AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Federal Register

11–28–07 Wednesday
Vol. 72 No. 228 Nov. 28, 2007

Pages 67227–67560

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WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

Printed on recycled paper.

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 92, 93, 94, and 98

[Docket No. APHIS–2006–0106]

RIN 0579–AC33

Importation of Live Swine, Swine Semen, Pork, and Pork Products From the Czech Republic, Latvia, Lithuania, and Poland

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations governing the importation of animals and animal products to add the Czech Republic, Latvia, Lithuania, and Poland to the region of the European Union that we recognize as low risk for classical swine fever (CSF). We are also adding the Czech Republic, Latvia, Lithuania, and Poland to the list of regions we consider free from swine vesicular disease (SVD) and adding Latvia and Lithuania to the list of regions considered free from foot-and-mouth disease (FMD) and rinderpest. These actions will relieve some restrictions on the importation into the United States of certain animals and animal products from those regions, while continuing to protect against the introduction of CSF, SVD, and FMD, and rinderpest into the United States.

DATES: *Effective Date:* December 13, 2007.

FOR FURTHER INFORMATION CONTACT: Dr. Kelly Rhodes, Regionalization and Evaluation Services, Import, Sanitary Trade Issues Team, National Center for Import and Export, VS, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture (USDA) regulates the importation of animals and animal products into the United States to guard against the introduction of animal diseases not currently present or prevalent in this country. The regulations in 9 CFR part 94 (referred to below as the regulations) prohibit or restrict the importation of specified animals and animal products to prevent the introduction into the United States of various animal diseases, including classical swine fever (CSF), swine vesicular disease (SVD), foot-and-mouth disease (FMD), and rinderpest. These are dangerous and destructive communicable diseases of swine and/or ruminants.

Sections 94.9 and 94.10 of the regulations list regions of the world that are declared free of or low-risk for CSF. The EU–15 [1] is currently the only region considered low-risk for CSF; §§ 94.24 and 98.38 specify restrictions necessary to mitigate the risk of introducing CSF into the United States via pork, pork products, live swine, and swine semen from the EU–15.

Section 94.12 of the regulations lists regions that are declared free of SVD. Section 94.13 of the regulations lists regions that have been determined to be free of SVD, but that are subject to certain restrictions because of their proximity to or trading relationships with SVD-affected regions.

Section 94.1 of the regulations lists regions of the world that are declared free of rinderpest or free of both rinderpest and FMD. Section 94.11 of the regulations lists regions that have been determined to be free of rinderpest and FMD, but that are subject to certain restrictions because of their proximity to or trading relationships with rinderpest- or FMD-affected regions.

On February 12, 2007, we published in the **Federal Register** (72 FR 6490–6499, Docket No. APHIS 2006–0106) a proposal [2] to amend the regulations governing the importation of animals and animal products to add the Czech Republic, Latvia, Lithuania, and Poland to the region of the EU that we recognize as low-risk for CSF. In addition, we proposed to add the Czech Republic, Latvia, Lithuania, and Poland to the list of regions we consider free from SVD and to add Latvia and Lithuania to the list of regions considered free from FMD and rinderpest. We also proposed to make other miscellaneous changes to the regulations. These actions were intended to relieve some restrictions on the importation into the United States of certain animals and animal products from those regions, while continuing to protect against the introduction of CSF, SVD, FMD, and rinderpest into the United States.

We solicited comments concerning our proposal for 60 days ending April 13, 2007. We received six comments by that date. They were from private citizens, a State animal health commission, industry groups, and Poland's Ministry of Agriculture and Rural Development.

Three of the commenters expressed support for the proposal; however, one of those commenters stated that APHIS should recognize all current and future EU Member States as low-risk for CSF and other animal diseases. While we recognize that countries have to meet certain animal health criteria to qualify for EU membership, we continue to believe it is appropriate and reasonable for us to first prepare a risk assessment and share it with the public before we recognize such countries as being of low risk for an animal disease.

One commenter expressed concern that, because CSF is present in the Czech Republic in wild boar, and surveillance for the disease is passive, swine imported into the United States from the Czech Republic present more than a negligible risk of introducing CSF.

As stated in the risk assessment, studies show that virus levels in wild boar in the Czech Republic are very low and declining. There have been no CSF outbreaks in domestic swine in the Czech Republic since 1997, which also indicates that the introduction of CSF from the wild boar population into the domestic swine population is a diminishing concern. In addition, the Czech Republic annually carries out both passive and active surveillance for

[1] A region consisting of the 15 Member States of the European Union (EU) that comprised the EU as of April 30, 2004 (the EU–15), that we recognized as a single region of low-risk for CSF in a final rule published in the **Federal Register** on May 19, 2006 (71 FR 29061–29072, Docket No. 02–046–2).

[2] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS–2006–0106.*

CSF in wild boar and domestic swine populations.

Another commenter stated that although we proposed to list Latvia and Lithuania as free of FMD and rinderpest, we would subject imports of ruminant and swine meat products from those countries to additional restrictions, which indicates a risk exists of introducing FMD and rinderpest into the United States. The commenter stated that the risk analyses concluded that FMD and rinderpest could be introduced into Latvia and Lithuania through wildlife, clothing, or vehicles moving across the border from neighboring countries and then subsequently exported to the United States via ruminant or swine meat products.

As noted by the commenter, we proposed to apply certain conditions on the importation of meat and other animal products derived from ruminants and swine from Latvia and Lithuania into the United States, due to the risk of introducing FMD into these countries from neighboring countries. The conditions, as detailed in the proposed rule, require that all meat and other animal products from ruminants or swine be certified as having been prepared in a slaughtering establishment that is approved by the USDA's Food Safety and Inspection Service to export to the United States, and that all live animals slaughtered in an approved slaughtering establishment be born and raised in a region that APHIS considers free of FMD and rinderpest. In addition, commingling of live animals, meat, or other animal products for export with such commodities from regions that APHIS does not consider free of these diseases is prohibited. These conditions already apply to other countries, including other EU Member States, with risk profiles for FMD and rinderpest that are similar to those of Latvia and Lithuania. We have determined that these conditions will mitigate the risk of introducing FMD and rinderpest into the United States from these countries.

One commenter also stated that, because some forms of SVD, CSF, and FMD are difficult to detect in live animals or in post-mortem examinations, veterinary inspection is ineffective in some instances.

We agree with the commenter that veterinary inspection is unlikely to detect incubating or subclinical infection. Therefore, we do not consider veterinary inspection to be the primary mitigating factor in preventing introduction of CSF, SVD, and FMD into EU Member States. However, veterinary inspection is highly likely to detect clinically diseased animals and, in conjunction with other mitigation measures, creates a substantial barrier to the introduction of FMD, CSF, or SVD into EU Member States.

Finally, one commenter expressed concern that, due to the less stringent sourcing requirements for swine and pork imports into the EU, infected animals could potentially come in contact with animals designated for export to the United States or could potentially be exported to the United States themselves.

While we agree with the commenter that the European Commission (EC) legislation imposes less stringent restrictions on sourcing of imported live ruminants and swine, as well as ruminant and swine products, than do APHIS requirements, the potential for the introduction of CSF, SVD, or FMD into EU Member States is mitigated by several factors put in place by the EC. These include, but are not limited to, stringent audits of animal health conditions and slaughter/processing establishments in the exporting region; comprehensive import certification requirements (including certification that the exporting region is free of CSF, SVD, and FMD); veterinary inspection at the point of entry; and isolation and veterinary spot checks at the point of destination within the EU.

Miscellaneous

We also proposed to revise the definition of *European Union* in § 92.1 to update its list of EU Member States. Our proposed definition listed 25 Member States of the EU. This was incorrect, as there are actually 27 Member States of the EU. Therefore, we have updated the definition of *European Union* to add Romania and Bulgaria to the list of EU Member States.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the change discussed in this document.

Effective Date

This is a substantive rule that relieves restrictions and, pursuant to the provisions of 5 U.S.C. 553, may be made effective less than 30 days after publication in the **Federal Register**. This rule adds the Czech Republic, Latvia, Lithuania, and Poland to the region of the EU that we recognize as low-risk for CSF. This rule also adds the Czech Republic, Latvia, Lithuania, and Poland to the list of regions we consider free from SVD and to add Latvia and Lithuania to the list of regions considered free from FMD and rinderpest and allows breeding swine, swine semen, and pork and pork products to be imported into the United States from these countries subject to certain conditions. We have determined that approximately 2 weeks are needed to ensure that APHIS and Department of Homeland Security, Bureau of Customs and Border Protection, personnel at ports of entry receive official notice of this change in the regulations. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this rule should be effective 15 days after publication in the **Federal Register**.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. The rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

We are amending the regulations governing the importation of animals and animal products to add the Czech Republic, Latvia, Lithuania, and Poland to the region of the European Union that we recognize as low-risk for CSF. We are also adding the Czech Republic, Latvia, Lithuania, and Poland to the list of regions we consider free from SVD and adding Latvia and Lithuania to the list of regions considered free from FMD and rinderpest.

The U.S. Swine Industry

The U.S. swine industry plays an important role in the U.S. economy. Cash receipts from marketing meat animals were about $15 billion in 2005 (the average between 2001 and 2005 was $12.4 billion).[3] Additionally, swine and related product exports generated over $2.1 billion in sales that year. Other agricultural and nonagricultural sectors are dependent on the swine industry for their economic activity. At present, international trade in U.S. livestock proceeds without CSF or SVD related restrictions. Maintaining such favorable conditions depends in part on continued aggressive efforts to prevent transmission of foreign diseases to U.S. swine.

As shown in table 1, U.S. pork production increased from 7,764,000 metric tons (MT) in 1996 to 9,392,000 MT in 2005, an annual growth rate of about 2.1 percent. Similarly, consumption increased from 7,619 MT to 8,671 MT. During the same period, U.S. exports increased from 440,000 MT to 1,207,000 MT, by far outpacing

[3] USDA/NASS, Meat Animal Production, Disposition, and Income: 2005 Summary, April 2006.

imports. Net exports increased from 159,000 MT to 743,000 MT.

TABLE 1.—U.S. PORK PRODUCTION, CONSUMPTION, PRICE, EXPORTS, AND IMPORTS, 1996–2005

Year	Production (1,000 MT)	Consumption (1,000 MT)	Price per MT	Exports (1,000 MT)	Imports (1,000 MT)	Net exports (1,000 MT)
1996	7,764	7,619	1,596	440	281	159
1997	7,835	7,631	1,562	473	288	185
1998	8,623	8,305	1,170	558	320	238
1999	8,758	8,594	1,178	582	375	207
2000	8,596	8,455	1,413	584	438	146
2001	8,691	8,389	1,473	707	431	276
2002	8,929	8,685	1,179	731	486	245
2003	9,056	8,816	1,298	779	538	241
2004	9,312	8,817	1,621	989	499	490
2005	9,392	8,671	1,562	1,207	464	743
5-year average (2001–2005)	9,076	8,676	1,427	883	484	399

[1] Sources: USDA/FAS, PS&D Online, 1996–2005, *http://www.fas.usda.gov/psdonline/psdquery.aspx*; prices, reported as $/100 pounds for yearly pork carcass cut-out values, are converted to dollars per metric ton, and are taken from Red Meat Yearbook (94006), *http://usda.manlib.cornell.edu/ers/94006/wholesaleprices.xls*; net exports are calculated as the difference between exports and imports for each year.

The Swine Industry in the Czech Republic, Latvia, Lithuania, and Poland

The four countries (the Czech Republic, Latvia, Lithuania, and Poland) together produced an average of 2.522 million MT of pig meat between 2001 and 2005. They are net importers of pork, which is the focus of this analysis. They had a 5-year (2001–2005) average level of pork exports of 130,030 MT and an average level of imports of 152,954 MT, yielding an average net export of a negative 22,823 MT. The Czech Republic and Poland accounted for 95 percent of production and export of the above total.

Potential Costs of Classical Swine Fever, Swine Vesicular Disease, and Foot and Mouth Disease

CSF, also known as hog cholera or swine plague, is a highly contagious and often fatal disease of pigs. Young animals are more severely affected than older animals. Mortality rates may reach up to 90 percent among young pigs. SVD is less severe and does not usually cause death. The overall cost of control and eradication depends on the mitigation methods used to control and eradicate the two diseases.

Potential costs include disease control measures such as imposing quarantine measures and movement controls, indemnity payments, vaccination costs, surveillance, and laboratory testing. CSF was eradicated from the United States in 1976 at a cost of about $550 million in 2006 dollars. Several EU countries experienced small- and large-scale CSF outbreaks between 1990 and 1997 and suffered heavy economic losses. One large outbreak cost producers $917.6 million, the national governments $296.9 million, and the EU $1,040.6 million in 2006 dollars. The cost of a small-scale outbreak was $14 million, and the cost of the medium-scale outbreak was $268.8 million.[4] The above costs are direct costs of disease outbreaks and do not include indirect costs such as losses caused by trade restrictions. Little information exists on the cost of control and eradication of SVD in a previously free region.

FMD is a contagious viral disease that affects cloven-hoofed animals. Cattle, pigs, sheep and goats are highly susceptible to FMD. Although the death rates are low, it has serious lasting negative effects on infected animals that survive the disease. It causes decreased milk production, decreased pregnancy rates, weight loss, and lameness. In addition to these losses, an FMD outbreak can lead to economic sanctions, including the loss of export markets. Any outbreak of FMD in the United States could result in a loss of billions of dollars for agriculture and related industries as indicated by the most recent FMD outbreak in the United Kingdom (UK). According to the World Organization for Animal Health (OIE), over 6 million cattle, sheep, swine, and goats were slaughtered to stop the spread of the disease and the epidemic is estimated to have cost the UK economy about $12.9 billion.[5]

Impact of Potential Pork Imports

In this section, we estimate the impact of pork imports from the Czech Republic, Latvia, Lithuania, and Poland on U.S. production, consumption, and prices using a net trade welfare model.[6] The baseline data used are as shown in the last row of table 1. The demand and supply elasticities used are −0.86 and 1, respectively.[7]

Based on the four countries' combined average annual global exports of 130,130 MT (2001–2005), we model three potential levels of pork exports to the United States from the Czech Republic, Latvia, Lithuania, and Poland: (1) An amount proportional to the percentage of the EU–15's pork exports sent to the United States (1.87 percent); (2) an amount proportional to the percentage of Denmark's[8] pork exports sent to the United States (3.99 percent); and (3) an amount equal to 10 percent of the global pork exports by the four countries. Amounts of pork shipped to the United States under the three

[4] Saatkamp, H.W., P.B.M. Berentsen *et al.* ''Economic aspects of the control of classical swine fever outbreaks in the European Union,'' Vet Microbiology 73 (2000): 221–237; Stegeman, A., A. Elbers *et al.,* ''The 1997–98 epidemic of classical swine fever in the Netherlands,'' Vet Microbiology, 73 (2000): 183–196.

[5] D. Thompson, P. Muriel, D. Russell, P. Osborne, A. Bromley, M. Rowland, S. Creigh-Tyte, and C. Brown, ''Economic losses of foot and mouth disease outbreak in the U.K,'' Rev. sci. tech. int. epiz., 21 (2002): 675–687.

[6] The data used were obtained from Foreign Agricultural Service (FAS), Production, Supply and Distribution database (*http://www.fas.usda.gov/psdonline/psdquery.aspx*; USDA/ERS, Red Meat Yearbook (94006) (*http://usda.mannlib.cornell.edu/usda/ers//wholesaleprices.xls*); The Global Trade Atlas: Global Trade Information Services, Inc., country Edition, June 2006; and UN/FAO, FAO stat data (*http://faostat.fao.org*).

[7] John Sullivan, John Wainio, Vernon Roningen, A Database for Trade Liberalization Studies, #AGES89–12, March 1989.

[8] Exports from Denmark to the United States are used as an upper range estimate of possible exports from these countries. Denmark's pork industry is export oriented, and it is the second largest supplier of pork products to the United States, after Canada. Using the proportion of its global pork exports that are shipped to the United States as an estimate of possible imports from the four countries likely overstates potential shipments to the United States from these countries.

scenarios would be 2,433 MT, 5,192 MT, and 13,013 MT.

TABLE 2.—THE IMPACT OF PORK IMPORTS FROM THE CZECH REPUBLIC, LATVIA, LITHUANIA, AND POLAND ON THE UNITED STATES ECONOMY

	Import scenario 1	Import scenario 2	Import scenario 3
Assumed pork imports, MT	[1] 2,433	[2] 5,192	[3] 13,013
Change in U.S. consumption, MT	1,160	2,475	6,202
Change in U.S. production, MT	−1,273	−2,717	−6,811
Change in wholesale price of pork, dollars per MT	−$0.22	−$0.47	−$1.19
Change in consumer welfare	$1,924,230	$4,106,610	$10,294,830
Change in producer welfare	−$1,817,020	−$3,877,160	−$9,715,120
Annual net benefit	$107,210	$229,450	$579,710

Note: Welfare and benefit are used interchangeably. The baseline data used is a 5-year annual average for production, consumption, price, exports and imports as reported in the last row of table 1. The demand and supply elasticities used are –0.86 and 1, respectively (John Sullivan, John Wainio, Vernon Roningen, A Database for Trade Liberalization Studies, #AGES89–12, March 1989).

[1] Calculated by multiplying the total global exports of the Czech Republic, Latvia, Lithuania, and Poland, 130,130 MT, by the proportion (1.87 percent) of EU–15's global export sent to the U.S. EU–15 countries including Denmark exported 50,742 MT to United States from their global exports of 2,719,698 MT.

[2] Calculated by multiplying total global exports of the Czech Republic, Latvia, Lithuania, and Poland by the proportion (3.99 percent) of Denmark exports sent to the United States, 43,037 MT out of 1,077,986 MT.

[3] Calculated by multiplying total global exports of the Czech Republic, Latvia, Lithuania, and Poland by 10 percent.

Table 2 presents the changes resulting from the assumed U.S. pork imports from the Czech Republic, Latvia, Lithuania, and Poland. These include annual changes in U.S. consumption, production, wholesale price, consumer welfare, producer welfare, and net welfare. Our medium level of pork imports of 5,192 MT (import scenario 2, assuming pork imports proportional to those received from Denmark) would result in a decline of $0.47 per metric ton in the wholesale price of pork and a fall in U.S. production of 2,717 MT. Consumption would increase by 2,475 MT. Producer welfare would decline by $3.9 million and consumer welfare would increase by $4.1 million, yielding an annual net benefit of about $230,000.

Import scenario 1 presents impacts assuming a more likely level of pork imports (proportional to those received from the EU–15). In this case, price would decrease by $0.22 per metric ton, production would decline by 1,273 MT, and consumption would increase by 1,160 MT. Consumer welfare would increase by $1.9 million and producer welfare would decline by $1.8 million. The annual net benefit would be about $107,000.

Finally, import scenario 3 presents a case of expanded trade, with pork imports by the United States assumed to equal 10 percent of global exports by the four countries. The wholesale price of pork would decline by $1.19 per metric ton, production would decline by 6,811 MT, and consumption would increase by 6,202 MT. Consumer welfare would increase by $10.3 million, while producer welfare would decline by $9.7 million. The annual net benefit would be about $580,000.

In all cases consumer welfare gains would outweigh producer welfare losses. The decline in producer welfare, even in the last scenario, would represent less than one tenth of 1 percent of cash receipts received from the sale of domestic hogs and pork products.[9] Thus, our analysis indicates that U.S. entities are unlikely to be significantly affected by this rule.

The Small Business Administration (SBA) has established guidelines for determining which types of firms are to be considered small under the Regulatory Flexibility Act. This rule could affect importers of live animals or animal products and swine operations with sales.

Meat processing entities (NAICS 311612) and meat and meat product merchant wholesalers (NAICS 424470) may be affected by this rule. Under SBA standards, meat processing establishments with no more than 500 employees and meat and meat product wholesalers with no more than 100 employees are considered small. In 2002, there were 1,335 companies in the United States that processed and sold meat. More than 97 percent of these establishments are considered to be small entities and had average sales of $15.4 million, while large meat processors had average sales of $188 million. In 2002, there were 2,535 meat and meat product wholesalers in the United States. Of these establishments, 2,456 (97 percent) employed not more than 100 employees and are, thus, considered small by SBA standards. Small wholesalers had average sales of $9.3 million, while large entities had average sales of $131 million.[10]

Other entities that could theoretically be affected include refrigerated long-distance trucking firms (NAICS 484230), freight forwarders (NAICS 488510), and deep sea freight transport companies (NAICS 483111). The SBA classifies trucking firms as small if their annual receipts are not more than $23.5 million; freight forwarding firms are small if their annual receipts are not more than $6.5 million, and deep sea freight transport firms are small if they have not more than 500 workers. According to the 2002 Economic Census, there were 3,429 trucking firms, 3,827 freight forwarders, and 195 deep sea freight transport companies. Over 99 percent of trucking firms, 96 percent freight forwarders, and 97 percent of deep sea freight transport firms are considered to be small. Thus, predominant numbers of meat processors, wholesale traders, and transport firms that could be affected by the rule are considered to be small by SBA standards. Average sales of even the smallest packers and wholesalers are large compared to the amount of pork expected to be imported from the four countries.

U.S. swine and pork producers (NAICS 112210) might be potentially affected by this rule. According to the 2002 Census of Agriculture, there were 82,028 hog and pig operations with

[9] $9.7 million divided by $12.4 billion equals 0.08 percent.

[10] U.S. Census Bureau, 2002 Economic Census: Manufacturing—Industries Series, Wholesale Trade—Subject Series and Transportation and Warehousing—Subject Series, issued August 2006; and SBA, Small Business Size Standards matched to North American Industry Classification System 2002, effective July 2006.

sales of 184,997,686 hogs and pigs valued at $12.4 billion. These facilities are considered to be small if their annual receipts are not more than $750,000. Over 83 percent of these operations (or 68,083) are considered to be small and had sales of fewer than 2,000 hogs and pigs. Small operations had a total inventory of 16,297,158 (8.81 percent) with an average inventory of 237 hogs, while large operations (or 13,945) had sales of 168,700,528 (91.19 percent) with an average inventory of 12,714 hogs. Based on inventory share, small operations had annual sales of $1.3 billion and an average income of about $19,400, while large operations had sales of $11 billion with an average income of about $834,000. As shown in table 3, the impact of potential pork imports on U.S. producers as a result of this rule would be small. The decrease in producer welfare per small entity is less than $133 or about 0.6 percent of average annual sales of small entities when we assume that 10 percent of combined global pork exports by the four countries would be sent to the United States.

TABLE 3.—THE ECONOMIC IMPACT OF POTENTIAL PORK IMPORTS FROM THE CZECH REPUBLIC, LATVIA, LITHUANIA, AND POLAND ON U.S. SMALL ENTITIES, ASSUMING 10 PERCENT OF COMBINED GLOBAL PORK EXPORTS BY THE FOUR COUNTRIES ARE SENT TO THE UNITED STATES, 2005 DOLLARS

Total decline in producer welfare [1]	$9,715,120
Decrease in welfare incurred by small entities [2]	$855,902
Average decrease per head of inventory, small entities [3]	$0.05
Average decrease per small entity [4]	$124
Average decrease as percentage of average sales, small entities [5]	0.6%

[1] From table 2. The change in producer welfare is negative indicating a decline.

[2] Change in producer welfare multiplied by 8.81 percent from the above text. We assume that the change in producer welfare would be proportional to inventory share.

[3] Decrease in producer welfare for small entities divided by 16,297,158 (see text above).

[4] Average decrease per head of inventory multiplied by 237 (see text above).

[5] Average decrease per small entity divided by $19,400 (see text above).

Because quantities of swine, swine semen, ruminants, and ruminant products imported from these countries, if such imports were to occur, are likely to be very small, effects of the rule with respect to these commodities are not included in the analysis.

The amounts of pork shipped to the United States under the three scenarios discussed above would be 2,433 MT, 5,192 MT, and 13,013 MT. Even when the largest import quantity is assumed, the welfare effect for U.S. small-entity producers would be equivalent to less than 1 percent of their average revenue.

Predominant numbers of producers, meat processors, and wholesale traders are considered to be small entities. Other small entities that could theoretically be affected by the rule include refrigerated long-distance trucking firms, freight forwarders, and deep sea freight transport companies. In all cases, any effects of this rule for these types of businesses are expected to be very minor.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

Environmental assessments and findings of no significant impact have been prepared for each country within this final rule. The environmental assessments provide the basis for the conclusion that the addition of the Czech Republic, Latvia, Lithuania, and Poland to the list of EU countries considered to be low-risk for CSF and to the list of regions recognized as free of SVD, but that are subject to certain import restrictions, and the addition of Latvia and Lithuania to the list of regions recognized as free of FMD and rinderpest, but that are subject to certain import restrictions, will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessments and findings of no significant impact were prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessments and findings of no significant impact may be viewed on the Regulations.gov Web site.[11] Copies of the environmental assessments and findings of no significant impact are also available for public inspection at USDA, room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

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

List of Subjects

9 CFR Part 92

Animal diseases, Imports, Livestock, Poultry and poultry products, Region, Reporting and recordkeeping requirements.

9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

9 CFR Part 94

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

9 CFR Part 98

Animal diseases, Imports.

■ Accordingly, we are amending 9 CFR parts 92, 93, 94, and 98 as follows:

PART 92—IMPORTATION OF ANIMALS AND ANIMAL PRODUCTS: PROCEDURES FOR REQUESTING RECOGNITION OF REGIONS

■ 1. The authority citation for part 92 continues to read as follows:

[11] Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2006-0106*. The environmental assessments and findings of no significant impact will appear in the resulting list of documents.

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 2. In § 92.1, the definition of *European Union* is revised to read as follows:

§ 92.1 Definitions.

* * * * *

European Union. The organization of Member States consisting of Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Republic of Ireland, Spain, Sweden, and the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland).

* * * * *

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, FISH, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 3. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 4. In § 93.500, the definition of *European Union-15 (EU–15)* is removed and a definition of *APHIS-defined EU CSF region* is added, in alphabetical order, to read as follows:

§ 93.500 Definitions.

* * * * *

APHIS-defined EU CSF region. The European Union Member States of Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Republic of Ireland, Spain, Sweden, and the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland).

* * * * *

§ 93.505 [Amended]

■ 5. In § 93.505, paragraph (a), the words ''region consisting of the EU–15 for the purposes of classical swine fever'' are removed and the words ''APHIS-defined EU CSF region'' are added in their place, and the note at the end of the paragraph is removed.

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), EXOTIC NEWCASTLE DISEASE, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

■ 6. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 7. In § 94.0, the definition of *European Union-15 (EU–15*) is removed and a definition of *APHIS-defined EU CSF region* is added, in alphabetical order, to read as follows:

§ 94.0 Definitions.

* * * * *

APHIS-defined EU CSF region. The European Union Member States of Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Republic of Ireland, Spain, Sweden, and the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland).

* * * * *

§ 94.1 [Amended]

■ 8. In § 94.1, paragraph (a)(2) is amended by adding the words ''Latvia, Lithuania,'' immediately after the word ''Japan,''.

§ 94.1a [Removed]

■ 9. Section 94.1a is removed.

§ 94.9 [Amended]

■ 10. In § 94.9, paragraphs (b) and (c), the words ''EU–15'' are removed and the words ''APHIS-defined EU CSF region'' added in their place.

§ 94.10 [Amended]

■ 11. In § 94.10, paragraphs (b) and (c), the words ''EU–15'' are removed and the words ''APHIS-defined EU CSF region '' added in their place.

§ 94.11 [Amended]

■ 12. In § 94.11, paragraph (a) is amended by adding the words ''Latvia, Lithuania,'' immediately after the word ''Japan,''.

■ 13. In § 94.12, paragraph (a) is revised to read as follows:

§ 94.12 Pork and pork products from regions where swine vesicular disease exists.

(a) Swine vesicular disease is considered to exist in all regions of the world except Australia, Austria, the Bahamas, Belgium, Bulgaria, Canada, Central American countries, Chile, the Czech Republic, Denmark, Dominican Republic, Fiji, Finland, France, Germany, Greece, Greenland, Haiti, Hungary, Iceland, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Republic of Ireland, Romania, Spain, Sweden, Switzerland, Trust Territories of the Pacific, the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland), Yugoslavia, and the Regions in Italy of Friuli, Liguria, Marche, and Valle d'Aosta.

* * * * *

■ 14. In § 94.13, in the introductory text of the section, the first sentence is revised to read as follows:

§ 94.13 Restrictions on importation of pork or pork products from specified regions.

Austria, the Bahamas, Belgium, Bulgaria, Chile, the Czech Republic, Denmark, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Republic of Ireland, Spain, Switzerland, the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland), Yugoslavia, and the Regions in Italy of Friuli, Liguria, Marche, and Valle d'Aosta are declared free of swine vesicular disease in § 94.12(a) of this part. * * *

* * * * *

§ 94.24 [Amended]

■ 15. Section 94.24 is amended as follows:

■ a. In the section heading, by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ b. In paragraph (a), introductory text, and paragraph (a)(1)(i), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ c. In paragraphs (a)(1)(ii) and (a)(1)(iii), by removing the words ''the EU–15'' and adding the words ''the APHIS-defined EU CSF region'' in their place and by removing the words ''an EU–15'' and adding the word ''the'' in their place.

■ d. In paragraph (a)(5), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ e. In paragraph (b), introductory text, and paragraph (b)(2)(i), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ f. In paragraph (b)(2)(ii) and (b)(2)(iii), by removing the words ''the EU–15''

and adding the words ''the APHIS-defined EU CSF region'' in their place and by removing the words ''an EU–15'' and adding the word ''the'' in their place.

■ g. In paragraph (b)(6), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

PART 98—IMPORTATION OF CERTAIN ANIMAL EMBRYOS AND ANIMAL SEMEN

■ 16. The authority citation for part 98 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 17. In § 98.30, the definition of *European Union-15 (EU–15)* is removed and a definition of *APHIS-defined EU CSF region* is added, in alphabetical order, to read as follows:

§ 98.30 Definitions.

* * * * *

APHIS-defined EU CSF region. The European Union Member States of Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Republic of Ireland, Spain, Sweden, and the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland).

* * * * *

§ 98.38 [Amended]

■ 18. Section 98.38 is amended as follows:

■ a. In the section heading, by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ b. In the introductory text of the section, paragraph (a), and paragraph (b)(1), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

■ c. In paragraph (b)(2), by removing the words ''the EU–15'' and adding the words ''the APHIS-defined EU CSF region'' in their place and by removing the words ''an EU–15'' and adding the word ''the'' in their place.

■ d. In paragraph (b)(3), by removing the words ''EU–15 established'' and adding the words ''APHIS-defined EU CSF region established'' in their place and by removing the words ''EU–15'' immediately before the word ''Member''.

■ e. In paragraph (f), by removing the words ''Office International des Epizooties'' and the parentheses surrounding the words ''World Organization for Animal Health''.

■ f. In paragraph (i), by removing the words ''EU–15'' and adding the words ''APHIS-defined EU CSF region'' in their place.

Done in Washington, DC, this 20th day of November 2007.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–23126 Filed 11–27–07; 8:45 am]

BILLING CODE 3410–34–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064–AD22

Rules of Practice and Procedure

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its procedural regulations implementing sections 8(g) and 8(b) of the Federal Deposit Insurance Act. The amendments are generally technical in nature, and are necessary to ensure that the rules are consistent with statutory changes effected by sections 708 and 702 of the Financial Services Regulatory Relief Act of 2006.

DATES: *Effective Date:* November 28, 2007.

FOR FURTHER INFORMATION CONTACT: Brett A. McCallister, Review Examiner, FDIC, 1101 Club Village Drive, Suite 101, Columbia, MO 65203; telephone: (816) 234–8099 x 4223; or electronic mail: *bmccallister@fdic.gov*; or Richard Bogue, Counsel, FDIC, 550 17th Street, NW., Washington, DC 20429; telephone: (202) 898–3726; facsimile: (202) 898–3658; or electronic mail: *rbogue@fdic.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On October 13, 2006, the President signed into law Public Law 109–351, the Financial Services Regulatory Relief Act of 2006 (FSRRA). Section 708 of the FSRRA modified section 8(g) of the Federal Deposit Insurance Act (FDI Act), in a number of ways.

On August 9, 1991, the FDIC issued a final rule entitled ''Rules of Practice and Procedure.'' 56 FR 37975, August 9, 1991. This rule contained a Subpart N, entitled ''Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged,'' which included sections 308.161–308.164. Section 708 of FSRRA made various modifications to section 8(g) of the FDI Act to clarify the extent of the suspension, removal and prohibition authority of the Federal banking agencies in cases of certain crimes by institution-affiliated parties (IAPs). Minor modifications were made to the predicate and findings requirements of section 8(g)(1), as well as conforming amendments to sections 8(g)(2) and (3). Significantly, section 8(g)(1) was modified to clarify that the appropriate Federal banking agency may suspend or prohibit individuals who are the subject of criminal proceedings involving certain crimes from participation in the affairs of any depository institution, not only the depository institution with which the IAP is or was associated.

In addition, because the previous suspension language of section 8(g) had required findings specific to the depositors of the depository institution or to the depository institution itself, it was unclear whether a covered individual could be suspended if the institution had ceased to exist. This problem was addressed by directing the required findings to ''any relevant depository institution,'' which is defined in a new subsection (E) to mean any depository institution of which the party is or was an IAP at the time the information, indictment, complaint, suspension notice or order of prohibition is issued.

Since much of the language of section 8(g) is repeated in the FDIC's implementing regulations at Part 308, Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony is Charged, 12 CFR 308.161–164, numerous conforming amendments of the regulations are required. Finally, a few changes are made in order to standardize references contained in the various sections and to make the hearing procedures easier to understand and to conform with current practice and procedure.

Section 702 of FSRRA enacted a new section 50 of the FDI Act, codified at 12 U.S.C. 1831aa, entitled ''Enforcement of Agreements.'' Subsection (a) of the new section 50 provides that:

''Notwithstanding clause (i) or (ii) of section 8(b)(6)(A) or section 38(e)(2)(E)(i), the appropriate Federal banking agency for a depository institution may enforce, under section 8, the terms of—

(1) Any condition imposed in writing by the agency on the depository institution or an institution-affiliated party in connection with any action on

any application, notice, or other request concerning the depository institution; or

(2) Any written agreement entered into between the agency and the depository institution or an institution-affiliated party.''

On August 9, 1991, the FDIC issued a final rule entitled ''Rules of Practice and Procedure.'' 56 FR 37975, August 9, 1991. This rule contained a Subpart G, entitled ''Rules and Procedures Applicable to Proceedings Relating to Cease-and-Desist Orders'' which included section 308.127, entitled ''Scope.'' Section 308.127(a) described the scope of rules applicable to cease-and-desist proceedings under section 8(b) of the FDI Act. Because the new section 50 modifies the requirements for pursuit of affirmative action under section 8(b)(6), it is appropriate that the procedural regulations respecting pursuit of cease-and-desist actions be amended to reflect the applicability of the new section 50. Accordingly, the final rule modifies the procedural regulations with the addition of a cross-reference to the new section 50.

II. The Final Rule

The following is a section-by-section discussion of the final rule revisions to the FDIC's regulations.

Section 308.161—Scope

The proposed rule: (1) Revises the scope of the prohibition from ''the bank'' to ''any depository institution;'' and (2) revises the description of the predicate offenses and the required findings to reflect statutory changes to section 8(g). The predicate offense description changed from ''is charged in any state or federal information, indictment, or complaint, with the commission of or participation in'' to ''is the subject of any state or federal information, indictment, or complaint, involving the commission of or participation in.'' The required findings changed from ''if continued service or participation by such party poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the depository institution'' to ''if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution.''

Section 308.162—Relevant Considerations

The proposed rule: (1) clarifies that the considerations apply to a notice of suspension or prohibition, or a removal or prohibition order; and (2) revises the required findings recited in subsection (a)(1)(iii) to reflect the statutory changes to section 8(g).

Section 308.163—Notice of Suspension, and Orders of Removal and Prohibition

The proposed rule: (1) Revises the title of the section to read ''Notice of suspension or prohibition, and orders of removal or prohibition;'' (2) revises the scope of the prohibition from ''the bank'' to ''any depository institution'' in subsections (a)(1) and (b)(1); revises the required findings in subsection (b)(1); (3) corrects the cross reference in subsection (b)(2) from 308.161(a)(ii) to 308.161(a)(2); and moves subsection (a)(2) respecting the filing and content of requests for hearing to a new subsection (c) to make clear that there is a right to a hearing regarding both notices of suspension and prohibition and orders of removal and prohibition.

Section 308.164—Hearings

The proposed rule: (1) Eliminates confusion by changing references to the party filing the request for hearing from the ''applicant'' to the ''institution-affiliated party;'' (2) eliminates confusion in subsection (c) caused by the apparent ability of the bank to waive a hearing even if the affected individual were to request a hearing; (3) in subsections (d) and (e) makes it clear that there is a right to a hearing regarding both notices of suspension and prohibition and orders of removal and prohibition.

Section 308.127—Scope Subpart G

The final rule: (1) Revises the heading for section 308.127(a) from ''*Cease-and-desist proceedings under section 8 of the FDIA* ''Cease-and-desist proceeding under sections 8 and 50 of the FDIA;'' and (2) at the end of section 308.127(a), replaces the period with a comma and adds ''and section 50 of the FDIA, 12 U.S.C. 1831aa.''

III. Exemption From Public Notice and Comment

The revisions to part 308 do not constitute a ''rule'' for which the FDIC is required to publish a general notice of proposed rulemaking under section 553(b) of Title 5 of the United States Code. This is because the final rule contains only clarifications and technical changes intended to bring the agency's rules of practice and procedure into conformity with statutory changes and current agency practices and procedures. Thus, the changes to be implemented will have no adverse effect on the public. In addition, the FSRRA changes to the FDI Act took effect on October 13, 2006. It is, therefore, desirable to implement the necessary technical and conforming regulatory amendments as soon as possible. Thus, the FDIC has determined for good cause that public notice and comment are unnecessary, and that the rule should be published in final form.

IV. Paperwork Reduction Act

The proposed rule will not create or modify any collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires an agency to publish an initial regulatory flexibility analysis, except to the extent provided in 5 U.S.C. 605(b), whenever the agency is required to publish a general notice of proposed rulemaking for a proposed rule. For the reasons discussed above, the FDIC is publishing this rule as a final rule, for which no publication of a general notice of proposed rulemaking is necessary. No regulatory flexibility analysis is required.

VI. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

VII. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (Title II, Pub. L. 104–121) provides generally for agencies to report rules to Congress and the General Accounting Office (GAO) for review. The reporting requirement is triggered when a federal agency issues a final rule. The FDIC will file the appropriate reports with Congress and the GAO as required by SBREFA. The Office of Management and Budget has determined that the proposed rule does not constitute a ''major rule'' as defined by SBREFA.

VIII. Effective Date

The Administrative Procedure Act (5 U.S.C. 551 *et seq.*) provides that regulations shall become effective thirty (30) days after their publication in the

Federal Register (5 U.S.C. 553). One exception to this requirement is for a finding of ''good cause'' (Id. At 553(d)). For the final rule, the Board finds ''good cause'' to make the amendments effective immediately upon publication in the **Federal Register** because the amendments are technical and conforming to pre-existing statutory and regulatory requirements.

Lists of Subjects in 12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties.

■ Accordingly, 12 CFR part 308 is amended as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 308 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1815(e), 1817, 1818, 1820, 1828, 1829, 1829b, 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, and 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Sec. 3100(s), Pub. L. 104–134, 110 Stat. 1321–358; and Pub. L. 109–351.

■ 2. Revise § 308.127(a) to read as follows:

§ 308.127 Scope.

(a) *Cease-and-desist proceedings under sections 8 and 50 of the FDIA.* The rules and procedures of this subpart, subpart B of the Local Rules and the Uniform Rules shall apply to proceedings to order an insured nonmember bank or an institution-affiliated party to cease and desist from practices and violations described in section 8(b) of the FDIA, 12 U.S.C. 1818(b), and section 50 of the FDIA, 12 U.S.C. 1831aa.

* * * * *

■ 3. Revise Subpart N to read as follows:

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

Sec.
308.161 Scope.
308.162 Relevant considerations.
308.163 Notice of suspension or prohibition, and orders of removal or prohibition.
308.164 Hearings.

Subpart N—Rules and Procedures Applicable to Proceedings Relating to Suspension, Removal, and Prohibition Where a Felony Is Charged

§ 308.161 Scope.

The rules and procedures set forth in this subpart shall apply to the following:

(a) Proceedings to suspend an institution-affiliated party of an insured state nonmember bank, or to prohibit such party from further participation in the conduct of the affairs of any depository institution, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12), where the individual is the subject of any state or federal information, indictment, or complaint, involving the commission of, or participation in:

(1) A crime involving dishonesty or breach of trust punishable by imprisonment exceeding one year under state or federal law; or

(2) A criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31.

(b) Proceedings to remove from office or to prohibit an institution-affiliated party from further participation in the conduct of the affairs of any depository institution without the consent of the Board of Directors or its designee where:

(1) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(1) of this section that is not subject to further appellate review, if continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12); or

(2) A judgment of conviction or an agreement to enter a pre-trial diversion or other similar program has been entered against such party in connection with a crime described in paragraph (a)(2) of this section.

§ 308.162 Relevant considerations.

(a)(1) In proceedings under § 308.161(a) and (b) for a notice of suspension or prohibition, or a removal or prohibition order, the following shall be considered:

(i) Whether the alleged offense is a crime which is punishable by imprisonment for a term exceeding one year under state or federal law and which involves dishonesty or breach of trust; and

(ii) Whether the alleged offense is a criminal violation of section 1956, 1957, or 1960 of Title 18 or section 5322 or 5324 of Title 31; and

(iii) Whether continued service or participation by the institution-affiliated party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as defined at section 1818(g)(1)(E) of Title 12).

(b) The question of whether an institution-affiliated party is guilty of the subject crime shall not be tried or considered in a proceeding under this subpart.

§ 308.163 Notice of suspension or prohibition, and orders of removal or prohibition.

(a) Notice of suspension or prohibition.

(1) The Board of Directors or its designee may suspend or prohibit from further participation in the conduct of the affairs of any depository institution an institution-affiliated party by written notice of suspension or prohibition upon a determination by the Board of Directors or its designee that the grounds for such suspension or prohibition exist. The written notice of suspension or prohibition shall be served upon the institution-affiliated party and any depository institution that the subject of the action is affiliated with at the time the notice is issued.

(2) The suspension or prohibition shall be effective immediately upon service on the institution-affiliated party, and shall remain in effect until final disposition of the information, indictment, complaint, or until it is terminated by the Board of Directors or its designee under the provisions of § 308.164 or otherwise.

(b) Order of removal or prohibition.

(1) The Board of Directors or its designee may issue an order removing or prohibiting from further participation in the conduct of the affairs of any depository institution an institution-affiliated party, when a final judgment of conviction not subject to further appellate review is entered against the institution-affiliated party for a crime referred to in § 308.161(a)(1) and continued service or participation by such party posed, poses, or may pose a threat to the interests of the depositors of, or threatened, threatens, or may threaten to impair public confidence in, any relevant depository institution (as

defined at section 1818(g)(1)(E) of Title 12).

(2) An order of removal or prohibition shall be entered if a judgment of conviction is entered against the institution-affiliated party for a crime described in § 308.161(a)(2).

(c) The notice of suspension or prohibition or the order of removal or prohibition shall:

(1) Inform the institution-affiliated party that a written request for a hearing, stating the relief desired and grounds therefore, and any supporting evidence, may be filed with the Executive Secretary within 30 days after receipt of the written notice or order; and

(2) Summarize or cite to the relevant considerations specified in § 308.162 of this subpart.

§ 308.164 Hearings.

(a) *Hearing dates*. The Executive Secretary shall order a hearing to be commenced within 30 days after receipt of a request for hearing filed pursuant to § 308.163. Upon the request of the institution-affiliated party, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Hearing procedure*. (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The institution-affiliated party may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as representatives of the FDIC enforcement staff.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the institution-affiliated party afforded the hearing.

(6) In the course of or in connection with any hearing under paragraph (b) of this section, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas duces tecum. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the institution-affiliated party afforded the hearing, or the members of the FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 10 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors. The Executive Secretary's certification shall close the record.

(c) *Written submissions in lieu of hearing*. The institution-affiliated party may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(d) *Failure to request or appear at hearing*. Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of hearing. If a hearing is waived, the order shall be final and unappealable, and shall remain in full force and effect pursuant to § 308.163.

(e) *Decision by Board of Directors or its designee*. Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the institution-affiliated party whether the notice of suspension or prohibition or the order of removal or prohibition will be continued, terminated, or otherwise modified. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the institution-affiliated party. The Board of Directors or its designee shall promptly rescind or modify a notice of suspension or prohibition or an order of removal or prohibition where the decision is favorable to the institution-affiliated party.

Dated this 5th day of November, 2007.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E7–22969 Filed 11–27–07; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–29259; Directorate Identifier 2007–NM–195–AD; Amendment 39–15274; AD 2007–24–08]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 767 Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) that applies to all Boeing Model 767 airplanes. That AD currently requires repetitive measurements of the rudder and elevator freeplay, repetitive lubrications of rudder and elevator components, and related investigative/corrective actions if necessary. This new AD instead requires revised repetitive measurements of the rudder freeplay and the elevator freeplay for each of the power control actuators (PCAs) that move the rudder and elevator, corrective and related investigative actions if necessary, and repetitive lubrications of the rudder and elevator components. For some airplanes, this AD also requires related concurrent actions. This AD results from reports of freeplay-induced vibration of the rudder and the elevator. The potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. We are issuing this AD to prevent excessive vibration of the airframe during flight, which could result in loss of control of the airplane.

DATES: This AD becomes effective November 28, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of November 28, 2007.

ADDRESSES: For service information identified in this AD, contact Boeing

Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT:

Tamara Anderson, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6421; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2006–11–12, amendment 39–14616 (71 FR 30272, May 26, 2006). The existing AD applies to all Boeing Model 767 airplanes. That NPRM was published in the **Federal Register** on September 20, 2007 (72 FR 53701). That NPRM proposed to require revised repetitive measurements of the rudder freeplay and the elevator freeplay for each of the power control actuators (PCAs) that move the rudder and elevator, corrective and related investigative actions if necessary, and repetitive lubrications of the rudder and elevator components. For some airplanes, the NPRM also proposed to require related concurrent actions.

Comments

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been received on the NPRM.

Supportive Comment

Boeing concurs with the contents of the proposed AD. British Airways (BA) also supports the need to do rudder and elevator freeplay checks and lubrications.

Request To Extend the Compliance Time of Freeplay Measurements

Air Canada, BA, All Nippon Airways (ANA), and Japan Air Lines (JAL) request that we extend the compliance time in paragraph (g)(1) of the proposed AD from 12 months after the effective date of the AD to 18 months after the effective date of the AD. JAL suggests that if 18 months after the effective date of the AD is not acceptable, 18 months after the release date of the referenced service bulletin would be an acceptable alternative. Air Canada notes that since Boeing was given enough time to revise a service bulletin, operators should be given enough time to plan the job without significant impact on operational schedules. BA notes they have been unable to accomplish the referenced service bulletins because of the unavailability of tooling, and advises that they would not be able to accomplish the AD within the proposed 12 months compliance time without significant out-of-service time. ANA and JAL state that scheduling their fleets to accomplish the AD within the proposed 12 months compliance time is not practical considering the large size of their Model 767 fleet, the C-check maintenance interval (almost 22 months and almost 18 months respectively), and the schedules of their maintenance facilities. ANA adds that manpower and parts provisioning also contribute to scheduling difficulties. ANA, BA, and JAL note that the service bulletin was approved with an 18-month compliance time.

We agree that a change to the compliance time in paragraph (g)(1) of this AD is necessary, since we intended to have the required compliance time coincide with the compliance time recommended in Boeing Special Attention Service Bulletins 767–27–0197 and 767–27–0198, both Revision 1, both dated July 19, 2007. However, we do not agree to change the compliance time to 18 months after the effective date of this AD. As explained in the proposed AD, we have determined that 18 months after the effective date of the AD would not address the unsafe condition soon enough to ensure an adequate level of safety for the fleet. We have revised paragraph (g)(1) to allow a compliance time of 14 months after the effective date of the AD. This compliance time has been coordinated with Boeing.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD with the change described previously. We also determined that this change will not increase the economic burden on any operator or increase the scope of the AD.

Costs of Compliance

There are about 979 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this AD. No parts are necessary to accomplish any action.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Freeplay measurement	30	$80	$2,400, per measurement cycle	423	$1,015,200, per measurement cycle.
Lubrication	27	80	$2,160, per lubrication cycle	423	$913,680, per lubrication cycle.

Authority for This Rulemaking

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

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

that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14616 (71 FR 30272, May 26, 2006) and by adding the following new airworthiness directive (AD):

2007–24–08 Boeing: Amendment 39–15274. Docket No. FAA–2007–29259; Directorate Identifier 2007–NM–195–AD.

Effective Date

(a) This AD becomes effective November 28, 2007.

Affected ADs

(b) This AD supersedes AD 2006–11–12.

Applicability

(c) This AD applies to all Boeing Model 767–200, –300, –300F, and –400ER series airplanes, certificated in any category.

Unsafe Condition

(d) This AD results from reports of freeplay-induced vibration of the rudder and the elevator. The potential for vibration of the control surface should be avoided because the point of transition from vibration to divergent flutter is unknown. We are issuing this AD to prevent excessive vibration of the airframe during flight, which could result in loss of control of the airplane.

Compliance

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

Service Bulletin References

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

(1) For Model 767–200, –300, and –300F series airplanes: Boeing Special Attention Service Bulletin 767–27–0197, Revision 1, dated July 19, 2007; and

(2) For Model 767–400ER series airplanes: Boeing Special Attention Service Bulletin 767–27–0198, Revision 1, dated July 19, 2007.

Repetitive Measurements

(g) At the latest of the compliance times specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, as applicable: Measure the rudder and elevator freeplay. Repeat the measurement thereafter at intervals not to exceed 12,000 flight hours or 36 months, whichever occurs first. Do all actions required by this paragraph in accordance with the service bulletin.

(1) Within 14 months after the effective date of this AD.

(2) Within 36 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness.

(3) For the elevator freeplay measurement: Within 12,000 flight hours or within 36 months after the last elevator freeplay inspection accomplished in accordance with Boeing Special Attention Service Bulletin 767–27–0197 or 767–27–0198, both dated October 27, 2005, as applicable, whichever occurs first.

Related Investigative and Corrective Actions

(h) If any measurement found during the measurement required by paragraph (g) of this AD exceeds any applicable limit specified in the service bulletin: Before further flight, do the applicable related investigative and corrective actions in accordance with the service bulletin.

Initial Lubrication

(i) At the latest of the compliance times specified in paragraphs (i)(1), (i)(2), and (i)(3) of this AD, as applicable: Lubricate the rudder and elevator components specified in the service bulletin. Do all actions required by this paragraph in accordance with the service bulletin.

(1) Within 9 months after the effective date of this AD, or within 9 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness; whichever occurs later.

(2) For airplanes on which BMS 3–33 grease is not already in use prior to the time the lubrication task is being accomplished: Within 3,000 flight hours or 9 months after the last lubrication accomplished in accordance with the service bulletin or Boeing Special Attention Service Bulletin 767–27–0197 or 767–27–0198, both dated October 27, 2005, whichever occurs first.

(3) For airplanes on which BMS 3–33 grease is already in use prior to the time the lubrication task is being accomplished: Within 6,000 flight hours or 18 months after the last lubrication accomplished in accordance with the service bulletin or Boeing Special Attention Service Bulletin 767–27–0197 or 767–27–0198, both dated October 27, 2005, whichever occurs first.

Repetitive Lubrication

(j) Repeat the lubrication required in paragraph (i) of this AD at the applicable interval specified in paragraph (j)(1) or (j)(2) of this AD.

(1) For airplanes on which BMS 3–33 grease is not already in use prior to the time the lubrication task is being accomplished: At intervals not to exceed 3,000 flight hours or 9 months, whichever occurs first.

(2) For airplanes on which BMS 3–33 grease is already in use prior to the time the lubrication task is being accomplished: At intervals not to exceed 6,000 flight hours or 18 months, whichever occurs first.

Repetitive Prior or Concurrent Inspection

(k) For airplanes specified in paragraphs (k)(1) and (k)(2) of this AD: Prior to or concurrently with the accomplishment of each elevator freeplay measurement specified in paragraph (g) of this AD, do all applicable actions required by AD 2001–04–09.

(1) Group 1, configuration 2, airplanes as identified in Boeing Special Attention Service Bulletin 767–27–0197, Revision 1, dated July 19, 2007.

(2) Group 1, configuration 1, airplanes as identified in Boeing Special Attention Service Bulletin 767–27–0198, Revision 1, dated July 19, 2007.

Alternative Methods of Compliance (AMOCs)

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

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) An AMOC that provides an acceptable level of safety may be used for any repair

required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) AMOCs approved previously in accordance with AD 2006–11–12 are approved as AMOCs for the corresponding provisions of this AD.

(5) AMOCs approved previously in accordance with AD 2001–04–09, are approved as AMOCs for the corresponding provisions of paragraph (k) of this AD.

Material Incorporated by Reference

(m) You must use Boeing Special Attention Service Bulletin 767–27–0197, Revision 1, dated July 19, 2007; or Boeing Special Attention Service Bulletin 767–27–0198, Revision 1, dated July 19, 2007; as applicable, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on November 16, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–22854 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28883; Directorate Identifier 2007–NM–106–AD; Amendment 39–15267; AD 2007–24–01]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Model 400A Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Hawker Beechcraft Model 400A series airplanes. This AD requires inspecting the galley cabinets to determine if a certain part number is installed or if a certain size of wire already exists, and doing related investigative/corrective actions if necessary. This AD results from reports of undersized, and consequently unprotected, wire in the galley cabinets. We are issuing this AD to prevent overheating of wire insulation and consequent fire or smoke in the airplane cabin.

DATES: This AD becomes effective January 2, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of January 2, 2008.

ADDRESSES: For service information identified in this AD, contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67206.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (telephone 800–647–5527) is the Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Philip Petty, Aerospace Engineer, Electrical Systems and Avionics, ACE–119W, FAA, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946–4139; fax (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Hawker Beechcraft Model 400A series airplanes. That NPRM was published in the **Federal Register** on August 9, 2007 (72 FR 44813). That NPRM proposed to require inspecting the galley cabinets to determine if a certain part number is installed or if a certain size of wire already exists, and doing related investigative/corrective actions if necessary.

Comments

We provided the public the opportunity to participate in the development of this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Change to Language in Final Rule

We have removed the words ''if necessary'' that were inadvertently added to paragraph (f) of the NPRM. The actions in paragraph (f) of this AD are required.

Conclusion

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

Costs of Compliance

There are about 285 airplanes of the affected design in the worldwide fleet. This AD affects about 214 airplanes of U.S. registry. The required inspection takes about 1 work hour per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of this AD for U.S. operators is $17,120, or $80 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States,

or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2007–24–01 Hawker Beechcraft Corporation: Amendment 39–15267. Docket No. FAA–2007–28883; Directorate Identifier 2007–NM–106–AD.

Effective Date

(a) This AD becomes effective January 2, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Hawker Beechcraft Model 400A series airplanes, certificated in any category; as identified in Raytheon Service Bulletin SB 25–3758, dated June 2006.

Unsafe Condition

(d) This AD results from reports of undersized, and consequently unprotected, wire in the galley cabinets. We are issuing this AD to prevent overheating of wire insulation and consequent fire or smoke in the airplane cabin.

Compliance

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

Inspection and Related Investigative/ Corrective Actions

(f) Within 200 flight hours or 12 months after the effective date of this AD, whichever occurs first, inspect the galley cabinets to determine if Precision Pattern galley cabinet, part number (P/N) 20917, 20918, or 20921 is installed, or if 8 American Wire Gauge (AWG) wire already exists; and, within 20 flight hours or 30 days after the inspection, whichever occurs later, do all applicable related investigative and corrective actions. The actions must be done in accordance with the Accomplishment Instructions of Raytheon Service Bulletin SB 25–3758, dated June 2006.

Note 1: Raytheon Service Bulletin SB 25–3758, dated June 2006, refers to Raytheon Kit 128–3068–0001, Revision 3, dated April 18, 2006, as an additional source of service information for replacing the undersized 10AWG wire with 8AWG wire in the gallery power circuit.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Wichita Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(h) You must use Raytheon Service Bulletin SB 25–3758, dated June 2006, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Hawker Beechcraft Corporation, 9709 East Central, Wichita, Kansas 67206, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on November 8, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–22545 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0193; Directorate Identifier 2007–NE–43–AD; Amendment 39–15273; AD 2007–24–07]

RIN 2120–AA64

Airworthiness Directives; General Electric Company (GE) CF6–80C2B1 Turbofan Engine

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for a GE CF6–80C2B1 turbofan engine, serial number (SN) 690203, with fan disk, part number (P/N) 1703M78P11, SN RPMDA662, installed. This AD requires stripping of thermal spray coating, inspection of dovetail slots, and reapplication of thermal spray coating on certain stage 1 fan disks. This AD results from a report that a repair shop did not meet the process requirements when applying copper-nickel-indium (Cu-Ni-In) thermal coating to certain stage 1 fan disks. We are issuing this AD to prevent possible uncontained release of multiple fan blades, resulting in damage to the airplane.

DATES: This AD becomes effective January 2, 2008. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of January 2, 2008.

We must receive any comments on this AD by January 28, 2008.

ADDRESSES: Use one of the following addresses to comment on this AD:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Docket Management Facility, Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422, for the service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: (781) 238–7176, fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION: GE reported that while recertifying a non-GE repair shop, they found the shop's process for coating dovetail slots with a Cu-Ni-In thermal coating did not meet the standard requirements of GE Substantiation Requirements Repair Document No. RSS–012–S2. Further investigation by GE identified twelve affected stage 1 fan disks. We discussed the issue with GE and the repair shop, and we agreed to allow the repair shop to strip, inspect, and recoat the 12 disks instead of issuing an AD to require the actions. The repair shop has stripped, inspected, and recoated 11 of the 12 disks. They have not been able to get the final stage 1 disk, P/N 1703M78P11, SN RPMDA662, to strip, inspect, and recoat that disk and it remains in service. This condition, if not corrected, could result in an uncontained release of multiple fan blades, and possible damage to the airplane

Relevant Service Information

We have reviewed and approved the technical contents of GE Service Bulletin (SB) No. CF6–80C2 S/B 72–1121, dated January 23, 2004, that references procedures for stripping, inspecting, and recoating the affected stage 1 fan disks.

Differences Between This AD and the Service Information

GE SB No. CF6–80C2 S/B 72–1121, dated January 23, 2004, recommends performing the actions within 3,500 cycles-since-last Cu-Ni-In thermal spray coating of the dovetail slots. This AD requires performing the actions within 3,500 cycles-since-last Cu-Ni-In thermal spray coating of the dovetail slots, but before March 31, 2008.

FAA's Determination and Requirements of This AD

Although no airplanes that are registered in the United States use these GE CF6–80–C2B1 turbofan engines, the possibility exists that the engines could be used on airplanes that are registered in the United States in the future. The unsafe condition described previously is likely to exist or develop on other GE CF6–80C2B1 turbofan engines of the same type design. We are issuing this AD to prevent possible uncontained release of multiple fan blades, resulting in damage to the airplane. You must use the service information described previously to perform the actions required by this AD.

FAA's Determination of the Effective Date

Since there are currently no domestic operators of this engine model, notice and opportunity for public comment before issuing this AD are unnecessary. A situation exists that allows the immediate adoption of this regulation.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. FAA–2007–0193; Directorate Identifier 2007–NE–43–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive:

2007–24–07 General Electric Company: Amendment 39–15273. Docket No. FAA–2007–0193; Directorate Identifier 2007–NE–43–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 2, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to GE CF6–80C2B1 turbofan engine, serial number 690203, with fan disk, part number (P/N) 1703M78P11, SN RPMDA662, installed. This engine is installed on, but not limited to, a Boeing 747–300 airplane.

Unsafe Condition

(d) This AD results from a report that a repair shop did not meet the process requirements when applying copper-nickel-indium (Cu-Ni-In) thermal coating to certain stage 1 fan disks. We are issuing this AD to prevent possible uncontained release of multiple fan blades, resulting in damage to the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within 3,500 cycles-since-last Cu-Ni-In thermal spray coating of the dovetail slots, but no later than March 31, 2008, unless the actions have already been done.

Stripping, Inspecting and Recoating the Stage 1 Fan Disk

(f) Strip the Cu-Ni-In thermal coating from the pressure faces and slot bottoms of the stage 1 fan disk, and perform a microstructure evaluation. Use 3.A.(2)(a) through 3.A.(2)(b) of GE Service Bulletin (SB) No. CF6–80C2 S/B 72–1121, dated January 23, 2004, to strip the thermal coating and perform the microstructure evaluation.

(g) Ultrasonic inspect, fluorescent penetrant inspect, and eddy current inspect stage 1 fan disk. Use 3.A.(2)(c) of GE SB No. CF6–80C2 S/B 72–1121, dated January 23, 2004, to inspect the disk.

(h) Apply Cu-Ni-In thermal coating to the pressure faces and slot bottoms of the stage 1 fan disks, using 3.A.(2)(d) of GE SB No. CF6–80C2 S/B 72–1121, dated January 23, 2004.

Alternative Methods of Compliance

(i) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(j) Contact James Lawrence, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone: (781) 238–7176, fax: (781) 238–7199, for more information about this AD.

Material Incorporated by Reference

(k) You must use GE Service Bulletin No. CF6–80C2 S/B 72–1121, dated January 23, 2004, to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of this service bulletin in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422, for a copy of this service information. You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Burlington, Massachusetts, on November 15, 2007.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E7–22922 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–26966; Directorate Identifier 99–NE–01–AD; Amendment 39–15271; AD 2007–24–05]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation AE 3007A and AE 3007C Series Turbofan Engines

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for Rolls-Royce Corporation (RRC) AE 3007A and AE 3007C series turbofan engines. That AD currently prohibits any flight following a ground engine start where the engine oil temperature is below 32 °F (0 °C), unless certain preflight operational procedures are followed. This AD also requires those actions and would also require a terminating action. This AD results from design improvements to components in the accessory gearbox air turbine starter mounting pad. We are issuing this AD to prevent an in-flight engine shutdown due to loss of engine oil from the engine accessory gearbox starter pad shaft seal drain and possible loss of the airplane.

DATES: This AD becomes effective January 2, 2008. The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of January 2, 2008.

ADDRESSES: You can get the service information identified in this AD from Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206; telephone (317) 230–3774; fax (317) 230–8084; e-mail: *indy.pubs.services@rolls-royce.com*.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

FOR FURTHER INFORMATION CONTACT: Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; telephone (847) 294–7836; fax (847) 294–7834.

SUPPLEMENTARY INFORMATION: The FAA proposed to amend 14 CFR part 39 by superseding AD 99–02–51, Amendment 39–11108 (64 FR 16339, April 5, 1999), with a proposed AD. The proposed AD applies to RRC AE 3007A and AE 3007C series turbofan engines. We published the proposed AD in the **Federal Register** on March 29, 2007 (72 FR 14724). That action proposed to:

- Prohibit before further flight, any flight following a ground engine start where the engine oil temperature is below 32 °F (0 °C), unless certain preflight operational procedures are followed to ensure that there is no excessive loss of oil from leakage at the air turbine starter shaft; and
- Require terminating action to the prohibition requirements of the existing AD, by removing from service certain seal P/Ns from the accessory gearbox air turbine starter mounting pad and installing an improved seal; and
- Require removing certain P/N drain caps, drain adapters, and orifice inserts, and installing an open adapter on the starter pad drain.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Comments

We provided the public the opportunity to participate in the

development of this AD. We have considered the comments received.

Request To Continue To Allow Existing Approved AMOCs

Four commenters, ExpressJet Inc., RRC, Embraer, and Cessna Aircraft Company state that alternative methods of compliance (AMOCs) currently approved for AD 99–02–51 should be allowed while this AD is not incorporated or until September 30, 2009. Paragraph (l) of the proposed rule states that AMOCs approved for AD 99–02–51 are not approved for the new rule. Until all engines are modified as required by paragraph (g) of the proposed rule, an aircraft may encounter 32 °F temperature or lower and it seems arbitrary to disallow the use of data that has already been approved and in use for over two years. Operators would have the burden of requesting the same AMOC for the superseding AD. Allowing the currently approved AMOCs would bridge the time gap to the Terminating Action compliance date.

We agree. We changed Alternative Methods of Compliance (AMOC), paragraph (l) from ''AMOCs approved for AD 99–02–51 are not approved as AMOCs for this AD.'' to ''AMOCs currently approved for AD 99–02–51 will remain in effect until the terminating action date for this AD, September 30, 2009. After that date, these AMOCs will expire and not be approved as AMOCs for this AD.'' This change will avoid confusion in the field and the AMOCs are still appropriate for the period before the mandatory terminating action date. These AMOCs will expire permanently on September 30, 2009, after which the only allowable configuration option is the new seal, a compatible starter and an open seal drain.

Request To Provide a More Accurate Description of the Original Problem

Two commenters, RRC and Embraer, ask us to include a more accurate description of the original problem. They state that the nomenclature ''Starter shaft seal'' may cause confusion with the seal of the pneumatic Air Turbine Starter (ATS). We agree. We changed Unsafe Condition, paragraph (d) from ''* * * due to loss of engine oil from the starter shaft seal'' to ''* * * due to loss of engine oil from the engine accessory gearbox starter pad shaft seal drain and possible loss of the airplane.''

Request To Clarify the Regulatory Text

Rolls-Royce Corporation asks us to make the following changes for clarity:

- Prohibited Flights, paragraph (f)(2): Change ''Oil consumption greater than 0.32 quart per hour (303 cc per hour) * * *'' to ''Oil consumption greater than 0.32 quart per hour, or 300 cc per hour, * * *'' Although it may not be a completely accurate quart-to-cc conversion, 300 cc is the value listed in all RRC manuals.
- Terminating Action, paragraph (g): Change ''* * * do the following, as applicable to your engine model and configuration.'' to ''* * * do the following, as applicable to your configuration.'' Engine model applicability is already established so it can be deleted here to make a simpler statement.
- Terminating Action, paragraph (g)(1): Change ''Remove seal part number (P/N) * * * '' to ''Remove seal and related component part numbers (P/Ns) * * *'' The P/Ns listed are not only currently approved seals but also adjacent hardware including a wave spring and spacer used in one of the approved configurations. This change accounts for all current hardware, not just the seals.
- Terminating Action, paragraph (g)(2): Change ''Install a new seal, P/N AS3209–026 * * *'' to ''Install a new O-ring, P/N AS3209–026 or M83248/1–026* * *'' RRC lists both of these P/Ns as acceptable alternatives in the engine parts list. Also, the correct nomenclature is O-ring, not seal.
- Prohibition of Seals, paragraph (i): Change ''Once the terminating action in this AD is performed on an engine, seal P/Ns * * *'' to ''Once the terminating action in this AD is performed on an engine, seal and related component P/Ns * * *'' This change accounts for all current hardware, not just the seals.

We agree with the suggestions and incorporated them into the applicable regulatory text of the AD.

Request to Not Implement the AD

Rolls-Royce North America, Inc., c/o American Eagle Airlines, asks us to not implement the AD, or at least extend the required completion date for the terminating action by at least 6–12 months. They believe that many AE3007A and AE3007C engines are not yet compliant with RRC Service Bulletin AE 3007A–72–321 and or SB AE 3007A–72–330. They state that it would be too much of a burden to modify all of the engines currently out in the field to be compliant with the proposed AD by September 30, 2009. A drastic maintenance campaign such as this would adversely affect the AE3007A and C fleet both in terms of costs and operations to drastic proportions.

We don't agree. We have determined that we can better assure long-term continued operational safety by design changes that remove the source of the problem, rather than by repetitive inspections or other special procedures. Based on the availability of the required parts and the support from the vast majority of operators and their ability to comply within the original specified date, we believe this is a reasonable time period and will maintain the final compliance date of September 30, 2009.

Conclusion

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

Costs of Compliance

We estimate that this AD will affect 1,868 RRC AE 3007A and AE 3007C series turbofan engines installed on aircraft of U.S. registry. We also estimate that it will take about 4 work-hours per engine to perform the proposed terminating action, and that the average labor rate is $80 per work-hour. Required parts will cost about $2,917 per engine. Based on these figures, if all engines incorporated the terminating action, we estimate the total cost of this AD to U.S. operators to be $6,046,100.

Authority for This Rulemaking

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

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

Regulatory Findings

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will

not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–11108 64 FR 16339 April 5, 1999, and by adding a new airworthiness directive, Amendment 39–15271, to read as follows:

2007–24–05 Rolls-Royce Corporation (Formerly Allison Engine Company, Inc.): Amendment 39–15271. Docket No. FAA–2007–26966; Directorate Identifier 99–NE–01–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 2, 2008.

Affected ADs

(b) This AD supersedes AD 99–02–51, Amendment 39–11108.

Applicability

(c) This AD applies to Rolls-Royce Corporation (RRC) (formerly Allison Engine Company, Inc.) AE 3007A and AE 3007C series turbofan engines. These engines are installed on, but not limited to, Cessna Aircraft Company 750 series, and Empresa Brasileira de Aeronautica S. A. (EMBRAER) EMB–135 and EMB–145 series airplanes.

Unsafe Condition

(d) This AD results from design improvements to components in the accessory gearbox air turbine starter mounting pad. We are issuing this AD to prevent an in-flight engine shutdown due to loss of engine oil from the starter shaft seal and possible loss of the airplane.

Compliance

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

Prohibited Flights

(f) All flights after ground engine starts at engine oil temperatures below 32 °F (0 °C), are prohibited except as follows:

(1) If the engine oil temperature has dropped below 32 °F (0 °C), before flight, perform a high-power leak check on each engine (at least three minutes at takeoff power).

(2) Oil consumption greater than 0.32 quart per hour, or 300 cc per hour, is not permitted. Instructions for performing the high-power leak check for the AE 3007A series engines can be found in the Rolls-Royce AE 3007A Series Maintenance Manual, TASK 72–00–00–700–801, SUBTASK 72–00–00–790–002. Leak check limits for the AE 3007A series engines can be found in the Rolls-Royce AE 3007A Series Maintenance Manual, TASK 71–00–00–200–801.

(3) Instructions for performing the high-power leak check for the AE 3007C series engines (including leak check limits) can be found in the Rolls-Royce AE 3007C Series Maintenance Manual, TASK 72–00–00–700–801, SUBTASK 72–00–00–790–002.

Terminating Action

(g) No later than September 30, 2009, as terminating action to the requirements in paragraph (f) through (f)(3) of this AD, do the following, as applicable to your engine configuration:

(1) Remove seal and related component, part numbers (P/Ns) 42520–71, 42520–196–X, 99004–1–6, 42520–75, or 42520–167, from the accessory gearbox (AGB) air turbine starter mounting pad.

(2) Install a new O-ring, P/N AS3209–026, M83248/1–026 or other serviceable part, to the shaft of the starter mounting pad.

(3) Install a new bearing locknut, P/N 42520–170, or other serviceable part, and an AGB air turbine starter mounting pad mechanical seal, P/N 42520–192, or other serviceable part.

(4) Use paragraphs 2. through 2.G. of the Accomplishment Instructions of RRC Service Bulletin (SB) No. AE 3007A–72–321/AE 3007C–72–250, Revision 2, dated November 12, 2007, to do the removals and installations.

(5) For AE 3007A series engines, remove the drain cap or starter drain adapter. Use paragraphs 2. through 2.C.(4)(c) of the Accomplishment Instructions of RRC SB No. AE 3007A–72–274, Revision 1, dated November 12, 2007 to do the removal.

(6) For AE 3007A series engines, install an open starter drain adapter. Use paragraphs 2. through 2.C.(2) of the Accomplishment Instructions of RRC SB No. AE 3007A–72–330, Revision 1, dated November 12, 2007 to do the installation.

(7) For AE 3007C series engines, install an open starter drain adapter. Use paragraphs 2. through 2.E.(2) of the Accomplishment Instructions of RRC SB No. AE 3007C–72–223, Revision 1, dated November 12, 2007 to do the installation.

Definition

(h) A serviceable part is any FAA-approved part not being removed from service, or not otherwise specifically addressed by this AD action.

Prohibition of Seals

(i) Do not install seal and related component P/Ns 42520–71, 42520–196–X, 99004–1–6, 42520–75, and 42520–167, on the air starter mounting pad after the terminating action in this AD is performed.

Previous Credit

(j) Previous credit is allowed for the terminating action in paragraphs (g)(1) through (g)(7) of this AD, that was done before the effective date of this AD using the Accomplishment Instructions of the SBs listed in the following Table 1:

TABLE 1.—SBS ALLOWING PREVIOUS CREDIT

For AE 3007A Series Engines:

(1) Engine—Accessory Drive Gearbox Assembly—New Starter Shaft Seal; RRC SB No. AE 3007A–72–321/AE 3007C–72–250, Revision 1, dated November 7, 2005; and

(2) Engine—Accessory Gearbox Starter Pad Drain—Remove The Drain Cap or Starter Drain Adapter; RRC SB No. AE 3007A–72–274, dated January 19, 2006; and

(3) Engine—Accessory Gearbox Starter Pad Drain—Install the Open Starter Drain Adapter (23083402 or 23077526); RRC SB No. AE 3007A–72–330, dated January 19, 2006.

For AE 3007C Series Engines:

(4) Engine—Accessory Drive Gearbox Assembly—New Starter Shaft Seal; RRC SB No. AE 3007A–72–321/AE 3007C–72–250, Revision 1, dated November 7, 2005; and

TABLE 1.—SBS ALLOWING PREVIOUS CREDIT—Continued

(5) Engine—Accessory Gearbox Starter Pad Drain—Install the Open Starter Drain Adapter (23077526 or 23083403); RRC SB No. AE 3007C–72–223, dated January 19, 2006.

Alternative Methods of Compliance (AMOC)

(k) The Manager, Chicago Aircraft Certification Office, has the authority to approve AMOCs for this AD if requested using the procedures found in 14 CFR 39.19.

(l) AMOCs currently approved for AD 99–02–51 will remain in effect until the terminating action date for this AD, September 30, 2009. After that date, these AMOCs will expire and will not be approved as AMOCs for this AD.

Related Information

(m) Contact Kyri Zaroyiannis, Aerospace Engineer, Chicago Aircraft Certification Office, Small Airplane Directorate, FAA, 2300 E. Devon Ave., Des Plaines, IL 60018; e-mail: *kyri.zaroyiannis@faa.gov;* telephone (847) 294–7836; fax (847) 294–7834, for more information about this AD.

Material Incorporated by Reference

(n) You must use the service information specified in Table 2 to perform the actions required by this AD. The Director of the Federal Register approved the incorporation by reference of the documents listed in Table 2 of this AD in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206; telephone (317) 230–3774; fax (317) 230–8084; e-mail: *indy.pubs.services@rolls-royce.com*, for a copy of this service information. You may review copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

TABLE 2.—INCORPORATION BY REFERENCE

Service Bulletin No.	Page	Revision	Date
AE 3007A–72–274 Total Pages—6	ALL	1	November 12, 2007.
AE 3007A–72–321, AE 3007C–72–250 Total Pages—13	ALL	2	November 12, 2007.
AE 3007A–72–330 Total Pages—6	ALL	1	November 12, 2007.
AE 3007C–72–223 Total Pages—7	ALL	1	November 12, 2007.

Issued in Burlington, Massachusetts, on November 14, 2007.

Peter A. White,

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

[FR Doc. E7–22810 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26102; Directorate Identifier 2006–NE–36–AD; Amendment 39–15272; AD 2007–24–06]

RIN 2120–AA64

Airworthiness Directives; Societe de Motorisations Aeronautiques (SMA) SR305–230 and SR305–230–1 Reciprocating Engines

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

ACTION: Final rule; request for comments.

SUMMARY: We are superseding an existing airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) provided by the European Aviation Safety Agency (EASA) to identify and correct an unsafe condition on SMA SR305–230 and SR305–230–1 reciprocating engines. The MCAI states the following:

Over a period of time, the alteration of one electronic control unit (ECU) electronic component can cause a rapid uncontrolled power increase. Several occurrences have already been reported during engine start or during engine warm-up. This condition, if not corrected, could result in the loss of control of the aircraft if the pilot fails to react appropriately by switching to the mechanical backup mode.

We are issuing this AD to prevent a rapid uncontrolled power increase and possible loss of control of the airplane.

DATES: This AD becomes effective December 13, 2007. The Director of the Federal Register approved the incorporation by reference of SMA Service Bulletin (SB) No. SB–01–76–005, dated December 15, 2006, as of December 13, 2007.

We must receive comments on this AD by December 28, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *Christopher.spinney@faa.gov;* telephone (781) 238–7175; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Discussion

On October 31, 2006, we issued AD 2006–23–08, Amendment 39–14820 (71 FR 65041, November 7, 2006). That AD required actions intended to address an unsafe condition on the products listed above. Since we issued AD 2006–23–08, SMA developed a terminating action for the unsafe condition. EASA, which is the Technical Agent for the Member States of the European Community, issued AD 2007–0033, dated February 13, 2007. That AD supersedes EASA EAD 2006–0312–E, which mandated a temporary corrective action to the rapid uncontrolled power increase. EASA AD 2007–0033 retains the requirements of EASA AD 2006–0312–E, and also requires replacing all affected ECUs with a new part number ECU as terminating action. EASA AD 2007–0033 states:

> Over a period of time, the alteration of one electronic control unit (ECU) electronic component can cause a rapid uncontrolled power increase. Several occurrences have already been reported during engine start or during engine warm-up. This condition, if not corrected, could result in the loss of control of the aircraft if the pilot fails to react appropriately by switching to the mechanical backup mode.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

SMA issued SB No. SB–01–76–005, dated December 15, 2006. The actions described in this service information are intended to correct the unsafe condition identified in EASA AD 2007–0033.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of France, and is approved for operation in the United States. Pursuant to our bilateral agreement with France, they have notified us of the unsafe condition described in the EASA AD and service information referenced above. We are issuing this AD because we evaluated all the information provided by EASA and SMA, and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design. This AD requires replacing all affected ECUs with a new part number ECU, as terminating action.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because of the short compliance provided to correct the unsafe condition. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2006–26102; Directorate Identifier 2006–NE–36–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–14820; (71 FR 65041, November 7, 2006) and adding the following new AD:

2007–24–06 Societe de Motorisations Aeronautiques (SMA): Amendment 39–15272; Docket No. FAA–2006–26102; Directorate Identifier 2006–NE–36–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective December 13, 2007.

Affected ADs

(b) This AD supersedes AD 2006–23–08, Amendment 39–14820.

Applicability

(c) This AD applies to SMA SR305–230 and SR305–230–1 engines equipped with an electronic control unit (ECU) having one of the following part numbers (P/Ns): SF01160009–0, SF01160011–0, SP01160013, SP01160051–0, SP01160051–1, SP01160051–2, SP01160051–3, SP01160051–4, SP01160051–5, SP01160089–0, SP01160089–1, SP01160089–2. These engines are installed on, but not limited to, Cessna 182 series airplanes with Supplemental Type Certificate SA03302AT applied.

Reason

(d) European Aviation Safety Agency (EASA) AD 2007–0033, dated February 13, 2007, states:

Over a period of time, the alteration of one electronic control unit (ECU) electronic component can cause a rapid uncontrolled power increase. Several occurrences have already been reported during engine start or during engine warm-up. This condition, if not corrected, could result in the loss of control of the aircraft if the pilot fails to react appropriately by switching to the mechanical backup mode.

We are issuing this AD to prevent a rapid uncontrolled power increase and possible loss of control of the airplane.

Actions and Compliance

(e) Unless already done, do the following actions:

(1) Before further flight, check if the ECU has a P/N listed in the Applicability section of this AD and a serial number (SN) of 131 or below, except SNs 70, 71, 83, and 88. If it does, then do not operate the engine.

(2) Remove and replace the ECU with an ECU P/N SP01160089–3, using SMA Service Bulletin (SB) No. SB–01–76–005, dated December 15, 2006.

(3) No later than 30 days after the effective date of this AD, replace all remaining affected P/N ECUs with an ECU P/N SP01160089–3, using SMA SB No. SB–01–76–005, dated December 15, 2006.

(4) After the effective date of this AD, do not install a spare ECU having a P/N listed in the Applicability section of this AD as a replacement part on any SMA SR305–230 or SR305–230–1 engine.

FAA AD Differences

(f) This AD differs from the Mandatory Continuing Airworthiness Information (MCAI) and/or service information as follows:

(1) EASA AD No. 2007–0033 requires compliance with the AD by March 31, 2007.

(2) This AD, written later, requires compliance within 30 days after the effective date of the AD.

Other FAA AD Provisions

(g) Alternative Methods of Compliance: The Manager, Engine Certification Office, FAA, has the authority to approve alternative methods of compliance for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) Refer to EASA AD 2007–0033, dated February 13, 2007, for related information.

(i) Contact Christopher Spinney, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *Christopher.spinney@faa.gov;* telephone (781) 238–7175; fax (781) 238–7199 for more information about this AD.

Material Incorporated by Reference

(j) You must use Societe de Motorisations Aeronautiques Service Bulletin No. SB–01–76–005, dated December 15, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Societe de Motorisations Aeronautiques, 10–12 Rue Didier Daurat, F–18021 Bourges, France—Telephone +33 (0) 2 4867 5600; Fax: +33 (0) 2 4850 0141; e-mail: *customer_services@smasr.com.*

(3) You may review service information copies at the FAA, New England Region, 12 New England Executive Park, Burlington, MA 01803; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Burlington, MA, on November 15, 2007.

Peter A. White,

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

[FR Doc. E7–22812 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28987; Directorate Identifier 2007–NM–127–AD; Amendment 39–15269; AD 2007–24–03]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135ER, –135KE, –135KL, and –135LR Airplanes and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

It has been found the development of cracks in the forward fuselage right hand (RH) side skin during full-scale fatigue tests. Those cracks may quickly reach their critical length, reducing the aircraft structural integrity, with possible rapid decompression of the aircraft.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 2, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 2, 2008.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on August 16, 2007 (72 FR 45963). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

It has been found the development of cracks in the forward fuselage right hand (RH) side skin during full-scale fatigue tests. Those cracks may quickly reach their critical length, reducing the aircraft structural integrity, with possible rapid decompression of the aircraft.

The corrective action includes rework of the aircraft structure on the forward fuselage LH (left-hand) and RH sides. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

EMBRAER has issued Service Bulletin 145–53–0067, Revision 02, dated August 28, 2007. We referred to EMBRAER Service Bulletin 145–53–0067, Revision 01, dated February 27, 2007, as the appropriate source of service information for doing the actions specified in the NPRM. The procedures in Revision 02 of the service bulletin are essentially the same as those procedures in Revision 01. Revision 02 revises the illustrations and makes editorial changes. We have revised paragraph (f)(1) and Table 1 of this AD to also refer to Revision 02 of the service bulletin.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

Request To Extend Grace Period

American Eagle Airlines requests that we extend the grace period specified in

the NPRM. The commenter states that the compliance time of ''prior to the accumulation of 22,000 total flight cycles or within 6 months after the effective date of this AD, whichever is later'' would impose an excessive strain on the operator due to labor requirements and time out of service. The commenter notes that a number of its aircraft are near the 22,000 total flight cycle threshold and suggests that we change the grace period to within 2,000 flight cycles after the effective date of this AD.

We do not agree with the commenter's request to extend the grace period. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of accomplishing the required modification within a period of time that corresponds to the normal scheduled maintenance for most affected operators. However, according to the provisions of paragraph (g) of the final rule, we may approve requests to adjust the compliance time if the request includes data that prove that the new compliance time would provide an acceptable level of safety. We have not changed this final rule in this regard.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the change described previously. We determined that this change will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 624 products of U.S. registry. We also estimate that it will take about 60 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts will cost about $1,210 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $3,750,240, or $6,010 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov*; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2007–24–03 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–15269. Docket No. FAA–2007–28987; Directorate Identifier 2007–NM–127–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 2, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all EMBRAER Model EMB–135ER, –135KE, –135KL, and –135LR airplanes; and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 53: Fuselage.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

It has been found the development of cracks in the forward fuselage right-hand (RH) side skin during full-scale fatigue tests. Those cracks may quickly reach their critical length, reducing the aircraft structural integrity, with possible rapid decompression of the aircraft.

The corrective action includes rework of the aircraft structure on the forward fuselage LH (left-hand) and RH sides.

Actions and Compliance

(f) Prior to the accumulation of 22,000 total flight cycles, or within 6 months after the effective date of this AD, whichever is later, unless already done, do the following actions:

(1) Add two reinforcements to the forward fuselage skin on the LH and RH sides between frames 9 to 10 and 10 to 11, and stringers 12 to 15. Install supports to the reinforcements and stringers as well as new fasteners to the reinforcements and supports, and reroute the electrical wiring on the affected area. Do all actions in accordance with EMBRAER Service Bulletin 145–53–0067, Revision 01, dated February 27, 2007; or Revision 02, dated August 28, 2007.

(2) Accomplishing the detailed instructions and procedures described in the EMBRAER Service Bulletin 145–53–0051, dated July 15, 2004; or EMBRAER Service Bulletin 145–53–0051, Revision 01, dated February 7, 2006; is considered acceptable for compliance with the actions specified in this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI Brazilian Airworthiness Directive 2007–05–01R1, effective July 4, 2007, and the service bulletins listed in Table 1 of this AD, for related information.

TABLE 1.—SERVICE BULLETINS

EMBRAER Service Bulletin	Revision level	Date
145–53–0051	Original	July 15, 2004.
145–53–0051	01	February 7, 2006.
145–53–0067	01	February 27, 2007.
145–53–0067	02	August 28, 2007.

Material Incorporated by Reference

(i) You must use the service information specified in Table 2 of this AD to do the actions required by this AD, unless the AD specifies otherwise.

TABLE 2.—MATERIAL INCORPORATED BY REFERENCE

EMBRAER Service Bulletin	Revision level	Date
145–53–0051	Original	July 15, 2004.
145–53–0051	01	February 7, 2006.
145–53–0067	01	February 27, 2007.
145–53–0067	02	August 28, 2007.

EMBRAER Service Bulletin 145–53–0051, Revision 01, dated February 7, 2006, has the following effective pages:

Page No.	Revision level shown on page	Date shown on page
1, 2	01	February 7, 2006.
3–129	Original	July 15, 2004.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on November 13, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–22635 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30581; Amdt. No. 3246]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes in the National Airspace System, such as the commissioning of new navigational facilities, adding of new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective November 28, 2007. The compliance date for each SIAP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of November 28, 2007.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability—All SIAPs are available online free of charge. Visit nfdc.faa.gov to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on November 16, 2007.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	Subject
11/13/07	NY	New York	La Guardia	7/4057	ILS or LOC Rwy 4, Amdt 35.

[FR Doc. E7–23077 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 546

Class II Classification Standards

AGENCY: National Indian Gaming Commission (NIGC), Interior.

ACTION: Notice of Extension of Comment Period.

SUMMARY: This notice extends the period for comments on the burden, estimates or any other aspects of the information collection requirements for the proposed Class II game classification standards (72 FR 60483) published in the **Federal Register** on October 24, 2007.

DATES: The comment period for comments submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, or the NIGC on the burden, estimates or any other aspects of the information collection requirements for the proposed Class II game classification standards is extended from November 23, 2007, to January 24, 2008.

FOR FURTHER INFORMATION CONTACT: Penny Coleman at 202/632–7003; fax 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: Congress established the National Indian Gaming Commission (NIGC or Commission) under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 *et seq.*) (IGRA) to regulate gaming on Indian lands. On October 24, 2007, the proposed Class II game classification standards (72 FR 60483) regulations were published in the **Federal Register**.

Dated: November 20, 2007.

Philip N. Hogen,

Chairman, National Indian Gaming Commission.

Cloyce V. Choney,

Vice Chairman, National Indian Gaming Commission.

Norman H. DesRosiers,

Commissioner, National Indian Gaming Commission.

[FR Doc. E7–23084 Filed 11–27–07; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 547

Technical Standards for Electronic, Computer, or Other Technologic Aids Used in the Play of Class II Games

AGENCY: National Indian Gaming Commission (NIGC), Interior.

ACTION: Notice of Extension of Comment Period.

SUMMARY: This notice extends the period for comments on the burden, estimates or any other aspects of the information collection requirements of the proposed Class II technical standards (72 FR 60508) published in the **Federal Register** on October 24, 2007.

DATES: The comment period for comments submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, or the NIGC on the burden, estimates or any other aspects of the information collection requirements for the proposed Class II technical standards regulations is extended from December 10, 2007, to January 24, 2008.

FOR FURTHER INFORMATION CONTACT: Michael Gross at 202/632–7003; fax 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: Congress established the National Indian Gaming Commission (NIGC or Commission) under the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 *et seq.*) (IGRA) to regulate gaming on Indian lands. On October 24, 2007, the proposed Class II technical standards (72 FR 60508) regulations were published in the **Federal Register**.

Dated: November 20, 2007.

Philip N. Hogen,

Chairman, National Indian Gaming Commission.

Cloyce V. Choney,

Vice Chairman, National Indian Gaming Commission.

Norman H. DesRosiers,

Commissioner, National Indian Gaming Commission.

[FR Doc. E7–23083 Filed 11–27–07; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2007–0093]

RIN 1625–AA87

Security Zone; Kahului Harbor, Maui, HI

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule; request for comments.

SUMMARY: The Coast Guard is creating a temporary security zone in the waters of Kahului Bay and Kahului Harbor, Maui, and on designated adjacent areas of land. This zone is intended to enable the Coast Guard and its law enforcement partners to better protect people, vessels, and facilities in and around Kahului Bay and Kahului Harbor during the transit of the Hawaii Superferry. This rule complements, but does not replace or supersede, existing regulations that establish a moving 100-yard security zone around large passenger vessels like the Superferry.

DATES: This rule is effective from 12:01 a.m. (HST) on December 1, 2007, through 11:59 p.m. (HST) on January 31, 2008. Comments and related material must reach the Coast Guard on or before December 19, 2007.

ADDRESSES: You may submit comments and related material, identified by Coast Guard docket number USCG–2007–0093, by any of the three methods listed below. To avoid duplication, please use only one of the following methods:

(1) *Mail:* Lieutenant Sean Fahey, U.S. Coast Guard District 14 (dl), Room 9–130, PJKK Federal Building, 300 Ala Moana Blvd., Honolulu, Hawaii 96850.

(2) *Electronically:* E-mail to Lieutenant Sean Fahey at *Sean.C.Fahey@uscg.mil* using the subject line ''Comment—Maui Security Zone.''

(3) *Fax:* (808) 541–2101.

(4) *Online: http://www.regulations.gov.*

All comments will be reviewed as they are received. We may change this rule based on your comments.

Documents indicated in this preamble as being available in the docket are part of docket USCG–2007–0093 and are available for inspection and copying at U.S. Coast Guard District 14 (dl), Room

9–130, between 7 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Sean Fahey, U.S. Coast Guard District 14 at (808) 541–2106.

SUPPLEMENTARY INFORMATION:

Regulatory Information

We did not publish a notice of proposed rulemaking (NPRM) for this temporary rule. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. It would be contrary to the public interest to delay implementing this temporary rule, as any delay might result in damage or injury to the public, the Hawaii Superferry (HSF) and its passengers and crew, other vessels, facilities, and law enforcement personnel. Though operation of the HSF from Oahu to Maui was temporarily enjoined by the state circuit court in Maui, that injunction was lifted on November 14, 2007, following action by the Hawaii State legislature, and service to Maui is advertised to resume on December 1, 2007. Given recent assessments by the Maui Police Department that waterborne obstruction tactics similar to those used in Kauai in August 2007 are likely to be employed in Maui as well when the HSF resumes service there, it is critical that this rule be in place so that local, State, and Federal public safety officials can adequately ensure maritime safety and security, and secure the observances of rights and obligations of the United States.

The main obstruction tactic employed by waterborne protesters in Kauai in August 2007 was to physically place themselves directly in the path of the HSF as it attempted to enter the harbor. Several obstructers ashore threw rocks and bottles at U.S. Coast Guard personnel. These actions are dangerous not only to the obstructers themselves—some of whom used or incited children and juveniles in support of their obstruction efforts—but also to the HSF, its passengers and crew, and law enforcement personnel working to ensure the vessel's safe passage.

Groups opposing the lawful operation of the HSF continue to vow to impede its transit utilizing these same dangerous tactics. These opposition groups have started several internet forums to encourage and coordinate support for their efforts. The danger such obstruction tactics pose is illustrated by an article posted on November 5, 2007, on Surferspath.com, a popular Web site for Hawaiian surfers. In this article, two prominent opposition members urge those who oppose the operation of the Superferry to take ''the last step of non-violent resistance,'' and prepare themselves for the possibility of ''physical injury or death'' that may result from obstructing the Superferry. These preparations include making the ''proper arrangements,'' preparing a ''last will and testament'' and engaging in a ''cleansing ceremony to prepare your body, mind, and spirit to greet the Spiritual Hierarchy that awaits your return.'' The letter goes on to say that, ''[t]here is also the possibility of accident in the turmoil of numerous boats, swimmers, and surfers in an ocean environment. In that sense you have to be prepared at the level of the Native American who decided when it was 'a good day to die.' ''

The Coast Guard cannot disregard such adamant safety and security threats. Consequently, this rule is necessary to prevent damage or injury to vessels, persons, and waterfront facilities, including the HSF, its passengers and crew, law enforcement personnel working to ensure the vessel's safe passage, and the obstructers themselves, arising from these dangerous and unlawful obstruction tactics. Any delay in implementing this temporary rule would be contrary to the public interest and would jeopardize the security and safety of the public, the HSF and its passengers and crew, other vessels, facilities, and law enforcement personnel.

For the same reasons, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Although the Coast Guard has good cause to issue this temporary rule without first publishing a proposed rule, you are invited to submit post-promulgation comments and related material regarding this rule on or before December 19, 2007. We may change this temporary interim rule based on the comments received. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided. We have an agreement with the Department of Transportation (DOT) for their Docket Management Facility to process online submissions to Coast Guard dockets. You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://DocketsInfo.dot.gov.*

Background and Purpose

The Hawaii Superferry (HSF) is a 349-foot large passenger vessel documented by the U.S. Coast Guard with an endorsement for coastwise trade, and certified for large passenger vessel service in the United States. The HSF, operating Hawaii's first inter-island vehicle-passenger service, is intended to provide service among the islands of Oahu, Maui, and Kauai. The sole port in Maui that can accommodate the HSF is Kahului Harbor. The sole port in Kauai that can accommodate the HSF is Nawiliwili Harbor.

The HSF inaugurated commercial service from Oahu to both Maui and Kauai on August 26, 2007. The voyage to and from Maui on that date occurred without incident. However, in Kauai, nearly 40 swimmers and obstructers on kayaks and surfboards blocked Nawiliwili Harbor's navigable channel entrance to prevent the lawful entry of the HSF into Kauai. Other demonstrators ashore threw rocks and bottles at Coast Guard personnel who were conveying detained obstructers to shore.

On the following day, August 27, 2007, the HSF again sailed to and from Maui without incident. Upon arrival in Kauai, however, approximately 70 persons entered the water again to physically block the channel entrance, thereby preventing the HSF from docking in Nawiliwili Harbor. Due to the difficulty in maneuvering in the small area of Nawiliwili Harbor, and in the interest of ensuring the safety of the protesters, the HSF's master chose not to enter the channel until the Coast Guard cleared the channel of obstructers. However, because the vessel remained outside the harbor, and because the obstructers did not approach within 100 yards of the vessel, the existing security zone for large passenger vessels (33 CFR 165.1410) did not provide the Coast Guard with the authority to control obstructer entry into Nawiliwili Harbor or clear the channel of obstructers before the HSF commenced its transit into the harbor. After waiting 3 hours, and with nearly 20 obstructers still in the water actively blocking the HSF, the HSF's master, after consulting with company officials, made the decision to return to Oahu without mooring in Kauai.

On August 28, HSF officials announced the ''indefinite'' suspension of commercial operations. Since that date, the HSF has only sailed in commercial service to either Kauai or Maui once; on September 8, 2007, to pick up and return cars to Oahu that were stranded on Maui after the

suspension of commercial service on August 28. This sailing was the product of a stipulated agreement in an ongoing lawsuit (discussed further below) involving HSF and environmental groups opposed to the HSF operating in and out of Kahului Harbor, Maui.

Shortly after the company announced its suspension of operations on August 28, the trial court judge in the ongoing state court proceeding referenced in the previous paragraph issued a temporary restraining order, which was followed by a preliminary injunction several weeks later, prohibiting HSF from utilizing the harbor improvements in Kahului Harbor, Maui. This injunction was the product of a Hawaii Supreme Court determination that the Hawaii Environmental Protection Act (HEPA) required the state to conduct an environmental assessment of the effects of the harbor improvements that were necessary to accommodate the HSF in Kahului Harbor. Following the Supreme Court decision, the trial court determined that HEPA required the environmental assessment to be conducted before the HSF could use those harbor improvements; and since that assessment had not occurred, the injunction was a necessary remedy. The injunction only pertained to Kahului Harbor; it did not apply in Nawiliwili Harbor, Kauai. However, the HSF voluntarily decided not to sail to Kauai while the court case was ongoing.

In response to this judicial action, the governor called the Hawaii legislature into special session to consider whether to grant legislative relief to HSF. The legislature passed a bill during this special session called Act 2, which the governor signed into law. Act 2 allowed the HSF to utilize the harbor improvements in Maui and Kauai while all necessary environmental assessments were being conducted. The trial judge in Maui determined that this legislation overcame the requirement in HEPA that caused him to enjoin HSF from utilizing of the harbor improvements in Maui, and in a ruling on November 14, 2007, he dissolved and vacated the injunction. This opened the door to HSF resuming commercial service to Maui.

Notwithstanding the fact that the HSF did not face waterborne obstructers in Kahului Harbor during any of its commercial voyages there, recent intelligence and assessments by the Maui Police Department indicate a substantial likelihood that certain elements in Maui, disaffected by the process that led to adoption of Act 2 and vacation of the injunction, plan to adopt the dangerous tactics used by the obstructers in Kauai in an effort to prevent the HSF from safely arriving in Maui. Individuals and groups have organized rallies and started several internet forums to encourage and coordinate support for their efforts. The dangerous and unlawful intent of these individuals and groups is clear, as is their resolve.

This temporary security zone is in response to the threat posed by would-be obstructers in and around Kahului Harbor to HSF and its crew and passengers, law enforcement officers working to ensure HSF's safe transit, and the obstructers themselves. By designating significant portions of the waters of Kahului Harbor and Kahului Bay, and specified areas of land adjacent to the water, as a security zone, activated for enforcement 60 minutes before the HSF's arrival into the zone through 10 minutes after its departure from the zone, this temporary security zone rule provides the Coast Guard and its law enforcement partners the authority to prevent persons and vessels from entering or remaining in the water with the intent of using themselves as human barriers to impede the HSF's safe passage.

Discussion of Rule

This rule creates a temporary security zone in most of the waters of Kahului Harbor, Maui; in waters of Kahului Bay, Maui; and on designated areas of land adjacent to Kahului Harbor. This temporary security zone is effective from 12:01 a.m. (HST) on December 1, 2007, through 11:59 p.m. (HST) on January 31, 2008. The security zone will be activated for enforcement 60 minutes before the HSF's arrival into the zone, and will remain activated for 10 minutes after the HSF's departure from the zone. The activation of the zone for enforcement will be announced by marine information broadcast and by a red flag, illuminated between sunset and sunrise, posted at the following locations: at Gate 1 at the main entrance to the harbor; on Pier No. 2; and at the harbor entrance on Wharf Street. During its period of activation and enforcement, entry into the land and water areas of the security zone is prohibited without the permission of the Captain of the Port, Honolulu, or his or her designated representative.

In preparing this temporary rule, the Coast Guard made sure to consider the rights of lawful protestors. To that end, the Coast Guard excluded from the security zone a defined region which creates a sizeable area of water in which demonstrators may lawfully assemble and convey their message in a safe manner to their intended audience. This area of the harbor not included in the security zone is completely accessible to anyone who desires to enter the water, and is fully visible to observers ashore, at the HSF mooring facility, aboard the HSF when transiting the harbor, and from the air.

The Coast Guard also took into account the lawful users of Kahului Harbor and Kahului Bay in its creation of this temporary rule. As previously noted, the rule will only be activated 1 hour before the HSF's arrival into port, and will be deactivated 10 minutes after the HSF departs the port. Kahului Harbor and Kahului Bay are fully available to all users during the period when the zone is not activated. Furthermore, the rule affords those desiring to use the harbor and surrounding waters and land areas with the opportunity to and a process for requesting permission of the Captain of the Port to enter the zone while it is activated in a manner that will not endanger any vessel, waterfront facility, the port, or any person.

The security zone incorporates the minimum land and water areas necessary to ensure the purposes underlying the rule's creation are served. Waters outside of the harbor are included in the zone to ensure that the HSF is able to line up, unimpeded, on the range that guides it safely into Kahului Harbor. The breakwaters on either side of the harbor entrance are included in the zone to ensure that would-be obstructers do not have a ready staging point for attempting to block the very narrow entrance to Kahului Harbor. Pier No. 2, to which the HSF ties up, is included in the security zone, is entirely fenced off, and not legally accessible except to authorized personnel. Other than the designated protest area, the waters of Kahului Harbor, including areas of the harbor not navigable by the HSF, are included in the zone to prevent would-be obstructers from interfering with law enforcement vessels in the harbor that are working to ensure the HSF's safe passage.

Under 33 CFR 165.33, entry by persons or vessels into the security zone during a period of zone activation is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives.

Operation of any type of vessel, including every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, within the security zone while the zone is activated is prohibited. If a vessel is found to be operating within the security zone without permission of the

Captain of the Port, Honolulu while the zone is activated, the vessel is subject to seizure and forfeiture.

All persons and vessels permitted in the security zone while the zone is activated must comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene patrol personnel. These personnel include commissioned, warrant, and petty officers of the Coast Guard and other persons permitted by law to enforce this regulation. Upon being hailed by an authorized vessel or law enforcement officer using siren, radio, flashing light, loudhailer, voice command, or other means, the operator of the vessel must proceed as directed.

If authorized passage through the security zone, a vessel 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. While underway with permission of the Captain of the Port or his or her designated representatives, under 33 CFR 165.1408, no person or vessel is allowed within 100 yards of the HSF when it is underway, moored, position-keeping, or at anchor, unless authorized by the Captain of the Port or his or her designated representatives.

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 the security zone during the enforcement period in order to ensure navigational safety. Any Coast Guard commissioned, warrant, or petty officer, and any other person permitted by law, may enforce the regulations in this section.

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.

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. This expectation is based on the short activation and enforcement duration of the security zone created by this temporary rule, as well as the limited geographic area affected by the security zone.

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 the affected area has small entities, including canoe and boating clubs and small commercial businesses that provide recreational services, we anticipate that there will be little or no impact to these small entities due to the narrowly tailored scope of this temporary rule, as well as the fact that such entities can request permission from the Captain of the Port to enter the security zone when it is activated.

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

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding this rule so that they may better evaluate its effects on them and participate in the rulemaking process. If this rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Lieutenant Sean Fahey, U.S. Coast Guard District 14, at (808) 541–2106. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information 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 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. While some obstructers, both on land on and shore, used small children in furtherance of their obstruction activities during the August 26 and 27 HSF arrivals into Kauai, and while online forums and other sources indicate that some organizers are actively recruiting adolescents and small children with the intent of putting them in harm's way should the HSF attempt to enter either Kauai or Maui, any heightened harm faced by children as a result of these tactics has no relation to the creation of this rule. Instead, those heightened risks are entirely the product of persons who recruit and employ adolescents and children to put themselves at risk of death or serious physical injury by attempting to physically obstruct the passage of a large passenger vessel in a small harbor.

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. An ''Environmental Analysis Checklist'' and ''Categorical Exclusion Determination'' are available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add a new § 165.T14–164 to read as follows:

§ 165.T14–164 Security Zone; Kahului Harbor, Maui, HI.

(a) *Location.* The following land areas, and water areas from the surface of the water to the ocean floor, are a security zone that is activated as described in paragraph (c) of this section, and enforced subject to the provisions of paragraph (d) of this section:

(1) All waters of Kahului Harbor, Maui, shoreward of the Kahului Harbor COLREGS DEMARCATION LINE (see 33 CFR 80.1460), except for a zone extending from the shoreline with the following three legs as boundaries:

(i) A leg extending in a straight line between Buoy ''10'' (LLNR 28375) and Buoy ''12'' (LLNR 28380);

(ii) A leg extending in a straight line between Buoy ''10'' (LLNR 28375) and the nearest shoreline point; and

(iii) A leg extending in a straight line between Buoy ''12'' (LLNR 28380) and the fence line at the southwestern base of Pier Two, at position (20°53.589′ N, 156°28.084′ W).

(2) Pier No. 2 in Kahului Harbor.

(3) The eastern breakwater at the entrance of Kahului Harbor, beginning at the east break wall (20°53.958′ N, 156°28.161′ W).

(4) The western breakwater at the entrance of Kahului Harbor, beginning at the berm on the west break wall (20°53.925′ N, 156°28.611′ W).

(5) All waters of Kahului Bay bounded on the south by the COLREGS. DEMARCATION LINE (see 33 CFR 80.1460); bounded on the north by line of latitude 20°56′ N; bounded on the west by a straight line drawn from the berm on the west break wall (20°53.925′ N, 156°28.611′ W) at a direction of 330° to the line of latitude 20°56′ N; and bounded on the east by a straight line drawn from the east break wall (20°53.958′ N, 156°28.161′ W) at a direction of 030° and ending at the line of latitude 20°56′ N.

(b) *Effective period.* This section is effective from 12:01 a.m. (HST) on December 1, 2007, through 11:59 p.m. (HST) on January 31, 2008. It will be activated for enforcement as described in paragraph (c) of this section.

(c) *Enforcement periods.* The zone described in paragraph (a) of this section will be activated for enforcement 60 minutes before the Hawaii Superferry's arrival into the zone and will remain activated until 10 minutes after the Hawaii Superferry's departure from the zone. The activation of the zone for enforcement will be announced by marine information broadcast and by a red flag, illuminated between sunset and sunrise, posted at the following locations: At Gate 1 at the main entrance to the harbor; on Pier No. 2; and at the harbor entrance on Wharf Street.

(d) *Regulations.* (1) Under 33 CFR 165.33, entry by persons or vessels into the security zone created by this section and activated as described in paragraph (c) of this section is prohibited unless authorized by the Coast Guard Captain of the Port, Honolulu or his or her designated representatives. Operation of any type of vessel, including every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, within the security zone is prohibited. If a vessel is found to be operating within the security zone without permission of the Captain of the Port, Honolulu, and refuses to leave, the vessel is subject to seizure and forfeiture.

(2) All persons and vessels permitted in the security zone must comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene-patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard and other persons permitted by law to enforce this regulation. Upon being hailed by an authorized vessel or law enforcement officer using siren, radio, flashing light, loudhailer, voice command, or other means, the operator of a vessel must proceed as directed.

(3) If authorized passage through the security zone, a vessel 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. While underway with permission of the Captain of the Port or

his or her designated representatives, no person or vessel is allowed within 100 yards of the Hawaii Superferry when it is underway, moored, position-keeping, or at anchor, unless authorized by the Captain of the Port or his or her designated representatives.

(4) Persons desiring to transit the security zone in this section may contact the Captain of the Port at telephone number (808) 927–0865 or on VHF channel 12 to seek permission to transit the area. 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. 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 the security zone in order to ensure navigational safety.

(e) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer, and any other Captain of the Port representative permitted by law, may enforce this temporary security zone.

Dated: November 21, 2007.

Sally Brice-O'Hara,

Rear Admiral, U.S. Coast Guard, Commander, Fourteenth Coast Guard District.

[FR Doc. 07–5872 Filed 11–26–07; 1:53 pm]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0105; FRL–8340–6]

Acetamiprid; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of acetamiprid in or on almond, hulls; fruit, stone, group 12, except plum, prune; nut, tree, group 14; pea and bean, succulent shelled, subgroup 6B; pistachio; plum, prune, dried; plum, prune, fresh; vegetable, cucurbit, group 9; and vegetable, legume, edible podded, subgroup 6A. Nippon Soda Co., Ltd. requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective November 28, 2007. Objections and requests for hearings must be received on or before January 28, 2008, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0105. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Susan Stanton, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5218; e-mail address: *stanton.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 are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111), e.g., agricultural workers; greenhouse, nursery, and floriculture workers; farmers.
- Animal production (NAICS code 112), e.g., cattle ranchers and farmers, dairy cattle farmers, livestock farmers.
- Food manufacturing (NAICS code 311), e.g., agricultural workers; farmers; greenhouse, nursery, and floriculture workers; ranchers; pesticide applicators.
- Pesticide manufacturing (NAICS code 32532), e.g., agricultural workers; commercial applicators; farmers; greenhouse, nursery, and floriculture workers; residential users.

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0105 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before January 28, 2008.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0105, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of September 15, 2004 (69 FR 55625) (FRL–7674–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 4F6833) by Nippon Soda Co., Ltd., c/o Nisso America Inc., 220 East 42nd Street, Suite 3002, New York, NY, 10017. The petition requested that 40 CFR 180.578 be amended by establishing tolerances for residues of the insecticide acetamiprid, N1-[(6-chloro-3-pyridyl)methyl]-N2-cyano-N1-methylacetamidine, in or on the cucurbit crop group at 0.5 parts per million (ppm); the stone fruit crop group, except plum, prune, fresh and dried at 1.2 ppm; plum, prune, fresh and dried at 0.3 ppm; the tree nut crop group, except almond hulls at 0.1 ppm; and almond hulls at 5.0 ppm. That notice included a summary of the petition prepared by Nippon Soda Co., Ltd., the registrant, which is available to the public in the docket ID Number EPA–HQ–OPP–2004–0223, *http://www.regulations.gov*. Comments were received on the notice of filing from a private citizen. EPA's response to these comments is discussed in Unit IV.C below.

In the **Federal Register** of September 22, 2006 (71 FR 55468) (FRL–8091–9), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 6F7051) by Nippon Soda Co., Ltd., c/o Nisso America Inc., 45 Broadway, Suite 2120, New York, NY, 10006. The petition requested that 40 CFR 180.578 be amended by establishing tolerances for residues of the insecticide acetamiprid, N1-[(6-chloro-3-pyridyl)methyl]-N2-cyano-N1-methylacetamidine, in or on bulb vegetables crop group 3 at 3 ppm; edible podded legume vegetables, crop subgroup 6a at 0.5 ppm; succulent shelled pea and beans, crop subgroup 6b, at 0.5 ppm; and berries, crop group 13 at 1 ppm. The notice also announced the filing of amended pesticide petition 4F6833, requesting a tolerance for residues of acetamiprid in or on pistachio at 0.1 ppm in addition to the tolerances described in the preceding paragraph. That notice referenced a summary of the petition prepared by Nippon Soda Co., Ltd., the registrant, which is available to the public in the docket ID Number EPA–HQ–OPP–2006–0733, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

EPA is deferring to a later date the decision regarding the proposed tolerances for residues of acetamiprid on bulb vegetables crop group 3 and berry crop group 13. Based upon review of the data supporting the petitions, EPA has modified the tolerance levels and/or commodity terms for several of the other proposed tolerances. The reasons for these changes are explained in Unit V.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....'' These provisions were added to FFDCA by the Food Quality Protection Act (FQPA) of 1996.

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerance for residues of acetamiprid on Almond, hulls at 5.0 ppm; Fruit, stone, group 12, except plum, prune at 1.20 ppm; Nut, tree, group 14 at 0.10 ppm; Pea and bean, succulent shelled, subgroup 6B at 0.40 ppm; Pistachio at 0.10 ppm; Plum, prune, dried at 0.40 ppm; Plum, prune, fresh at 0.20 ppm; Vegetable, cucurbit, group 9 at 0.50 ppm; and Vegetable, legume, edible podded, subgroup 6A at 0.60 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by acetamiprid as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document *Acetamiprid: Human Health Risk Assessment for Proposed Food Uses on Stone Fruits, Cucurbit Vegetables, Tree Nuts, Berries, Strawberries, Bulb Vegetables, Legumes (Peas and Beans) and for Residential/Commercial Insecticide/Termiticide Uses*. The referenced document is available in the docket established by this action, which is described under **ADDRESSES**, and is identified as document ID number EPA–HQ–OPP–2007–0105–0003 in that docket.

The toxicity database for acetamiprid is complete. The acute toxicity data indicate that acetamiprid is moderately toxic via the oral route and is minimally toxic via the dermal and inhalation routes. Acetamiprid is not an eye or skin irritant, and it is not a dermal sensitizer. Based on subchronic, chronic, developmental and reproductive studies in rats, rabbits, and dogs, acetamiprid does not appear to have specific target organ toxicity. Generalized nonspecific toxicity was observed as decreases in body weight, body weight gain, food consumption and food efficiency when determined. Generalized effects were also observed in the liver in the form of hepatocellular hypertrophy in both mice and rats and hepatocellular vacuolation in the rat. The hepatocellular hypertrophy in mice is considered to be adaptive; it is likely that the

vacuolization in rats is more related to liver activity in response to the presence of the chemical rather than frank toxicity. Neurotoxicity was observed in the form of decreased locomotor activity in the acute neurotoxicity study in rats and as decreased auditory startle response in the developmental neurotoxicity study in rats.

Developmental studies showed no evidence of either quantitative or qualitative susceptibility of the rat or rabbit fetuses from *in utero* exposure. However, both the developmental neurotoxicity (DNT) study and the multi-generation reproduction studies showed an increase in qualitative susceptibility of pups. Effects in pups in the reproduction study included delays in preputial separation, vaginal opening and pinna unfolding as well as reduced litter size, decreased early pup viability and weaning indices; offspring effects observed in the DNT study included decreased body weight and body weight gains, decreased early pup viability and decreased maximum auditory startle response in males. These effects were seen in the presence of less severe effects (decreased body weight and body weight gain) in the maternal animals.

Based on acceptable carcinogenicity studies in rats and mice, EPA has determined that acetamiprid is not likely to be carcinogenic to humans. This determination is based on the absence of a dose-response or statistical significance for the increased incidence in mammary adenocarcinomas observed in the rat carcinogenicity study, as well as the lack of evidence of carcinogenic effects in the mouse cancer study.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, the toxicological level of concern (LOC) is derived from the highest dose at which the NOAEL in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the LOAEL is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the LOC to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. Short-term, intermediate-term, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded.

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk and estimates risk in terms of the probability of occurrence of additional adverse cases. Generally, cancer risks are considered non-threshold. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for acetamiprid used for human risk assessment can be found at *http://www.regulations.gov* at pages 21–22 in the document *Acetamiprid: Human Health Risk Assessment for Proposed Food Uses on Stone Fruits, Cucurbit Vegetables, Tree Nuts, Berries, Strawberries, Bulb Vegetables, Legumes (Peas and Beans) and for Residential/Commercial Insecticide/Termiticide Uses* in docket ID number EPA–HQ–OPP–2007–0105.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to acetamiprid, EPA considered exposure under the petitioned-for tolerances as well as all existing acetamiprid tolerances in (40 CFR 180.578). EPA assessed dietary exposures from acetamiprid in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. In estimating acute dietary exposure to acetamiprid, EPA used food consumption information from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA relied upon anticipated residues derived from field trial data for certain commodities (apples; broccoli; cabbage, celery; grapefruit; grapes; lettuce; oranges; pears; peppers; spinach; tomatoes; stone fruits; and cucurbits) and assumed residues were present at tolerance levels in all other commodities. EPA also relied on percent crop treated (PCT) information for some of the currently registered commodities (apples, broccoli , celery, lettuce, pears, grapefruit, grapes, oranges, peppers, spinach and tomatoes) but assumed 100 PCT for all of the new commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed all foods for which there are tolerances or for which tolerances are being established contain tolerance-level residues. EPA relied on PCT information for two currently registered crops (apples and oranges) but assumed 100 PCT for all other commodities.

iii. *Cancer.* As noted above, EPA has determined that acetamiprid is not likely to be carcinogenic to humans. Therefore, an exposure assessment for use in a quantitative cancer risk assessment is unnecessary.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must pursuant to section 408(f)(1) of FFDCA require that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by section 408(b)(2)(E) of FFDCA and authorized under section 408(f)(1) of FFDCA. Data will be required to be submitted no later than 5 years from the date of issuance of this tolerance.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

a. The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain such pesticide residue.

b. The exposure estimate does not underestimate exposure for any significant subpopulation group.

c. Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area. In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows:

For the acute assessment, maximum PCT estimates were used for the following commodities: Apples (15%),

broccoli (5%), celery (15%), lettuce (10%), pears (25%), and grapefruit, grapes, oranges, peppers, spinach and tomatoes, each at 2.5%.

For the chronic assessment, average PCT estimates were used for the following commodities: Apples (10%) and oranges (1%).

EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available Federal, state, and private market survey data for that use, averaging by year, averaging across all years, and rounding up to the nearest multiple of 5% except for those situations in which the average PCT is less than one. In those cases <1% is used as the average and <2.5% is used as the maximum. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the single maximum value reported overall from available Federal, state, and private market survey data on the existing use, across all years, and rounded up to the nearest multiple of 5%. In most cases, EPA uses available data from USDA/National Agricultural Statistics Service (USDA/NASS), Proprietary Market Surveys, and the National Center for Food and Agriculture Policy (NCFAP) for the most recent six years.

The Agency believes that the three conditions listed in this unit have been met. With respect to Condition A, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions B and C, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available information on the regional consumption of food to which acetamiprid may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring data to complete a comprehensive dietary exposure analysis and risk assessment for acetamiprid in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the environmental fate characteristics of acetamiprid. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated environmental concentrations (EECs) of acetamiprid for acute exposures are estimated to be 20.1 parts per billion (ppb) for surface water and 1.6 ppb for ground water. The EECs for chronic exposures are estimated to be 4.9 ppb for surface water and 1.6 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 20.1 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 4.9 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Acetamiprid is currently registered for the following residential non-dietary sites: As a pre- and post-construction termiticide/insecticide for use in subterranean or hard-to-reach structure components and building perimeters; and as a crack, crevice or spot application using gel bait formulations for control of ants and cockroaches in residential settings. EPA assessed residential exposure using the following assumptions: The pre- and post-construction termiticide/insecticide uses of acetamiprid are limited to licensed Pest Control Operators (PCOs); therefore, homeowner handler exposures are not expected to occur. Nor are post-application exposures of adults or children expected as a result of these uses, since applications are limited to subterranean or hard-to-reach structure components and building perimeters. EPA has determined that short-term and intermediate-term dermal exposure of residential handlers may occur from use of the gel bait formulations in residential settings; however, due to the low vapor pressure of acetamiprid and its formulation as a gel, inhalation exposure of handlers is not expected. Post-application exposures of adults and children from this use are expected to be negligible for the following reasons: (i) Homeowners are unlikely to revisit the crack, crevice or spot where the gel bait has been applied, thereby minimizing potential exposure; (ii) inhalation exposure is expected to be minimal due to acetamiprid's low vapor pressure and its formulation as a gel; and (iii) the gel bait products contain a bittering agent which is used to prevent ingestion by children and animals, thereby further reducing potential for incidental oral exposures of children. For these reasons, EPA assessed only residential handler dermal exposures from the gel bait uses of acetamiprid.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Acetamiprid is a member of the neonicotinoid class of pesticides which also includes thiamethoxam, clothianidin, imidacloprid and several other active ingredients. Structural similarities or common effects do not constitute a common mechanism of toxicity. Evidence is needed to establish that the chemicals operate by the same, or essentially the same sequence of major biochemical events. Although the neonicotinoids bind selectively to insect nicotinic acetylcholine receptors (nAChR), the specific binding site(s)/receptor(s) are unknown at this time. Additionally, the commonality of the binding activity itself is uncertain, as preliminary evidence suggests that clothianidin operates by direct competitive inhibition, while thiamethoxam is a non-competitive inhibitor. Furthermore, even if future research shows that neonicotinoids share a common binding activity to a specific site on insect nicotinic acetylcholine receptors, there is not necessarily a relationship between this pesticidal action and a mechanism of toxicity in mammals. Structural variations between the insect and mammalian nAChRs produce quantitative differences in the binding affinity of the neonicotinoids towards these receptors, which, in turn, confers the notably greater selective toxicity of this class towards insects, including

aphids and leafhoppers, compared to mammals. Additionally, the most sensitive toxicological effect in mammals differs across the neonicotinoids (e.g., testicular tubular atrophy with thiamethoxam; mineralized particles in thyroid colloid with imidaclopid). Thus, there is currently no evidence to indicate that neonicotinoids share common mechanisms of toxicity, and EPA is not following a cumulative risk approach based on a common mechanism of toxicity for the neonicotinoids. In addition, acetamiprid does not appear to produce a toxic metabolite produced by other substances. Therefore, for the purposes of this tolerance action, EPA has not assumed that acetamiprid has a common mechanism of toxicity with other substances. For more information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional (''10X'') tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional FQPA safety factor value based on the use of traditional UFs and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. The pre- and postnatal toxicology database for acetamiprid includes rat and rabbit developmental toxicity studies, a 2–generation reproduction toxicity study in rats and a DNT study in rats. There was no evidence of quantitative or qualitative susceptibility of rat or rabbit fetuses following *in utero* exposure to acetamiprid in the developmental toxicity studies. However, both the DNT and multi-generation reproduction studies showed an increase in qualitative susceptibility of pups. Effects in pups in the reproduction study included delays in preputial separation, vaginal opening and pinna unfolding, as well as reduced litter size, decreased early pup viability and weaning indices; offspring effects observed in the DNT study included decreased body weight and body weight gains, decreased early pup viability and decreased maximum auditory startle response in males. These effects were seen in the presence of decreased body weight and body weight gain in the maternal animals, indicating increased qualitative susceptibility of fetuses and offspring to acetamiprid. Quantitative evidence of increased susceptibility was not observed in any study.

In considering the overall toxicity profile and the endpoints and doses selected for the acetamiprid risk assessment, EPA characterized the degree of concern for the effects observed in the acetamiprid DNT and the 2–generation reproduction study as low, noting that there is a clear NOAEL for the offspring effects in both studies, the toxicology database is complete, and regulatory doses were selected to be protective of potential offspring effects in both the DNT and the 2–generation study. No other residual uncertainties were identified. Based on the available data, EPA determined that changes in motor activity, auditory startle reflex, learning and memory assessments, and even changes in the brain morphometrics can occur as the result of a single exposure at a critical junction during pregnancy or from multiple exposures throughout pregnancy and lactation. Therefore, the NOAEL for offspring effects observed in the DNT was selected as the dose for acute dietary exposures (co-critical with the acute neurotoxicity study), as well as short-term and intermediate-term non-dietary risk assessment. Use of the DNT NOAEL is protective of effects seen in the 2-generation study (the NOAEL from the DNT is 10.0 mg/kg/day and the NOAEL from the 2–generation study is 17.9 mg/kg/day). The chronic dietary study in rats yielded a lower long-term NOAEL (7.1 mg/kg/day) and was, therefore, used for assessing chronic dietary risk. EPA believes that the endpoints and doses selected for acetamiprid are protective of adverse effects in both offspring and adults.

3. *Conclusion*. EPA has determined that reliable data show that it would be safe for infants and children to reduce the FQPA safety factor to 1X. That decision is based on the following findings:

i. The toxicity database for acetamiprid is complete.

ii. There is no evidence that acetamiprid results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies. Although there is qualitative evidence of increased susceptibility in the multi-generation reproduction study and in the DNT study, the risk assessment team did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment of acetamiprid. The degree of concern for pre- and/or postnatal toxicity is low.

iii. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on tolerance-level residues or anticipated residues derived from reliable field trial data. The PCT estimates used in the dietary assessment were derived from valid, reliable Federal and private market survey data and are unlikely to be exceeded. Conservative ground and surface water modeling estimates were used to assess exposures to acetamiprid from drinking water; and residential, non-dietary exposure of infants and children to acetamiprid is not expected to occur. EPA believes these assessments will not underestimate the exposure and risks posed by acetamiprid.

E. Aggregate Risks and Determination of Safety

Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the aPAD and cPAD. The aPAD and cPAD are calculated by dividing the LOC by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given aggregate exposure. Short-term, intermediate-term, and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to acetamiprid will occupy 35% of the aPAD for children 1 to 2 years old, the population group receiving the greatest exposure.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to acetamiprid from food and water will utilize 35% of the cPAD for children 1 to 2 years old, the population group with greatest exposure. Based on the use pattern, chronic residential exposure to residues of acetamiprid is not expected.

3. *Short-term risk*. Short-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Acetamiprid is currently registered for use that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and short-term exposures for acetamiprid. Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded that food, water, and residential exposures aggregated result in aggregate MOEs of 900 for adults 20 to 49 years old and 930 for adults 50 years and older who apply gel bait acetamiprid products for ant and cockroach control.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Acetamiprid is currently registered for use that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic food and water and intermediate-term exposures for acetamiprid. Since the short-term and intermediate-term dermal exposures and endpoints for acetamiprid are the same, intermediate-term aggregate MOEs for adult residential handlers are the same as the short-term aggregate MOEs reported above (900 to 930).

5. *Aggregate cancer risk for U.S. population*. EPA has classified acetamiprid as ''Not likely to be carcinogenic to humans. Acetamiprid is not expected to pose a cancer risk.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to acetamiprid residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate residue analytical methods are available for the enforcement of established and new tolerances for plant commodities (gas chromotography /electron capture detector and high performance liquid chromotography/ ultra violet detection (GC/ECD and HPLC/UV) and animal commodities (HPLC/UV)). These methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Codex, Canadian or Mexican maximum residue levels (MRLs) established on the commodities associated with these petitions.

C. Response to Comments

Comments were received from a private citizen objecting to establishing these tolerances or any exemptions for acetamiprid or approval of its sale. The commenter objected to acetamiprid residues in food as well as EPA's reliance on animal testing on the basis that animal tests are inhumane and not relevant to human toxicity. The Agency has received these same or similar comments from this commenter on numerous previous occasions. Refer to **Federal Register** 70 FR 37686 (June 30, 2005), 70 FR 1354 (January 7, 2005), and 69 FR 63096 (October 29, 2004) for the Agency's response to these objections.

V. Conclusion

Based upon review of the data supporting the petitions, EPA has modified the proposed tolerances as follows: (1) PP 4F6833: Modified the commodity terms for stone fruit, tree nuts and cucurbit vegetables to agree with recommended commodity terms in the Office of Pesticide Program's Food and Feed Commodity Vocabulary (Fruit, stone, group 12, except plum, prune; Nut, tree, group 14; and Vegetable, cucurbit, group 9); and modified the commodity terms and established separate tolerances for Plum, prune, dried at 0.40 ppm and Plum, prune, fresh at 0.20 ppm (fresh) based on the field trial results showing different residues in the dried and fresh forms. (2) PP 6F7051: Revised the commodity terms and tolerance levels for edible podded legumes and succulent shelled peas and beans to read ''Vegetable, legume, edible podded, subgroup 6A'' at 0.60 ppm and ''Pea and bean, succulent shelled, subgroup 6B'' at 0.40 ppm. EPA revised these tolerance levels based on analyses of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's Guidance for Setting Pesticide Tolerances Based on Field Trial Data Standard Operating Procedure (SOP).

EPA is deferring to a later date the decision regarding the proposed tolerances for residues of acetamiprid on bulb vegetables crop group 3 and berry crop group 13.

Therefore, tolerances are established for residues of acetamiprid, N1-[(6-chloro-3-pyridyl)methyl]-N2-cyano-N1-methylacetamidine, in or on Almond, hulls at 5.0 ppm; Fruit, stone, group 12, except plum, prune at 1.20 ppm; Nut, tree, group 14 at 0.10 ppm; Pea and bean, succulent shelled, subgroup 6B at 0.40 ppm; Pistachio at 0.10 ppm; Plum, prune, dried at 0.40 ppm; Plum, prune, fresh at 0.20 ppm; Vegetable, cucurbit, group 9 at 0.50 ppm; and Vegetable, legume, edible podded, subgroup 6A at 0.60 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, 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) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply

to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 14, 2007.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.578 is amended by alphabetically adding the following commodities to the table in paragraph (a)(1) to read as follows:

§ 180.578 Acetamiprid; tolerances for residues.

(a) *General.* * * *

(1) * * *

Commodity	Parts per million
Almond, hulls	5.0
* * *	* *
Fruit, stone, group 12, except plum, prune	1.20
* * *	* *
Nut, tree, group 14	0.10
Pea and bean, succulent shelled, subgroup 6B	0.40
Pistachio	0.10
Plum, prune, dried	0.40
Plum, prune, fresh	0.20
* * *	* *
Vegetable, cucurbit, group 9	0.50
* * *	* *
Vegetable, legume, edible podded, subgroup 6A	0.60
* * *	* *

[FR Doc. E7–23055 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

Proposed Rules

Federal Register

Vol. 72, No. 228

Wednesday, November 28, 2007

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–0254; Directorate Identifier 2007–NM–209–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Boeing Model 777 airplanes. This proposed AD would require installing software upgrades to the airplane information management system (AIMS) located in the flight compartment. This proposed AD results from an investigation that revealed that detrimental effects could occur on certain AIMS software during flight. We are proposing this AD to prevent an unannunciated loss of cabin pressure. If an undetected loss of pressure event were to cause an unsafe pressure in the cabin, the flight crew could become incapacitated.

DATES: We must receive comments on this proposed AD by January 14, 2008.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Jay Yi, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6494; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–0254; Directorate Identifier 2007–NM–209–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

An investigation of a service problem revealed that detrimental effects could occur during flight on certain Boeing Model 777 airplanes with certain airplane information management system (AIMS) software. The following airplane effects could potentially occur: A false measure of cabin pressure by the left air supply and cabin pressure controller (ASCPC) could result in an unannunciated loss of cabin pressure. If an undetected loss of pressure event were to cause an unsafe pressure in the cabin, the flightcrew could become incapacitated.

Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 777–31A0119, Revision 1, dated March 27, 2007; and Boeing Alert Service Bulletin 777–31A0120, Revision 1, dated March 23, 2007. Service Bulletin 777–31A0119 describes procedures for installing the AIMS–1 Blockpoint 2006 (BP06) operational software in the AIMS–1 hardware. Service Bulletin 777–31A0120 describes procedures for installing the AIMS–2 BP06 operational software in the AIMS–2 hardware.

Concurrent Service Bulletins

Boeing Alert Service Bulletin 777–31A0119 recommends prior or concurrent accomplishment of Boeing Special Attention Service Bulletin 777–31–0098, Revision 1, dated May 3, 2007. That service bulletin describes procedures for installing the AIMS–1 Blockpoint 2005A (BP05A) operational software. Boeing Alert Service Bulletin 777–31A0120 recommends prior or concurrent accomplishment of Boeing Special Attention Service Bulletin 777–31–0097, Revision 3, dated February 22, 2007. That service bulletin describes procedures for installing the AIMS–2 BP05A operational software.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. For this reason, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

There are about 142 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 2 airplanes of U.S. registry. The proposed actions would take between 1 and 4 work hours per airplane, at an average labor rate of $80 per work hour. Based

on these figures, the estimated cost of the proposed AD for U.S. operators is between $160 and $640, or between $80 and $320 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2007–0254; Directorate Identifier 2007–NM–209–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by January 14, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Boeing Model 777–200, –200LR, –300, –300ER series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 777–31A0119, Revision 1, dated March 27, 2007; and Boeing Alert Service Bulletin 777–31A0120, Revision 1, dated March 23, 2007.

Unsafe Condition

(d) This AD results from an investigation that revealed that detrimental effects could occur on certain airplane information management system (AIMS) software during flight. We are issuing this AD to prevent an unannunciated loss of cabin pressure. If an undetected loss of pressure event were to cause an unsafe pressure in the cabin, the flight crew could become incapacitated.

Compliance

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

Software Installation

(f) Within 15 months after the effective date of this AD, do the actions specified in paragraphs (f)(1) and (f)(2) of this AD, as applicable.

(1) Install the AIMS Blockpoint 2006 (BP06) operational software by doing all the actions in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777–31A0119, Revision 1, dated March 27, 2007; or Boeing Alert Service Bulletin 777–31A0120, Revision 1, dated March 23, 2007; as applicable.

(2) Prior to or concurrently with accomplishing the software installation, install the AIMS Blockpoint 2005A (BP05A) software in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–31–0098, Revision 1, dated May 3, 2007; or Boeing Special Attention Service Bulletin 777–31–0097, Revision 3, dated February 22, 2007; as applicable.

Credit for Actions Done Using Previous Service Information

(g) Actions accomplished before the effective date of this AD in accordance with Boeing Alert Service Bulletin 777–31A0119, or Boeing Alert Service Bulletin 777–31A0120, both dated October 16, 2006, are considered acceptable for compliance with the corresponding actions specified in this AD.

Alternative Methods of Compliance (AMOCs)

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

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Issued in Renton, Washington, on November 20, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–23117 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 347 and 352

[Docket No. 1978N–0038] (formerly 78N–0038)

RIN 0910–AF43

Sunscreen Drug Products for Over-The-Counter Human Use; Proposed Amendment of Final Monograph; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending to December 26, 2007, the comment period for the August 27, 2007, proposed rule to amend the final monograph for over-the-counter (OTC) sunscreen drug products (72 FR 49070). The comment period for the proposed rule was to end on November 26, 2007. The agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: Submit written or electronic comments by December 26, 2007.

ADDRESSES: You may submit comments, identified by Docket No. 1978N–0038

and RIN number 0910–AF43, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following ways:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

To ensure more timely processing of comments, FDA is no longer accepting comments submitted to the agency by e-mail. FDA encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal or the agency Web site, as described in the *Electronic Submissions* portion of this paragraph.

Instructions: All submissions received must include the agency name, docket number and regulatory information number (RIN) for this rulemaking. All comments received may be posted without change to *http://www.fda.gov/ohrms/dockets/default.htm*, including any personal information provided. For additional information on submitting comments, see the ''Request for Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/dockets/default.htm* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Matthew R. Holman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 5414, Silver Spring, MD 20993, 301–796–2090.

SUPPLEMENTARY INFORMATION:

I. Discussion

In the **Federal Register** of May 21, 1999 (64 FR 27666), FDA published the final monograph for OTC sunscreen drug products in part 352 (21 CFR part 352) with an effective date of May 21, 2001. Issues concerning active ingredients, labeling, and test methods for products intended to provide ultraviolet A (UVA) protection were deferred for future regulatory action because more time was required to review comments from interested parties. In the **Federal Register** of June 8, 2000 (65 FR 36319), FDA reopened the administrative record of the rulemaking for OTC sunscreen drug products to allow for specific comment on high sun protection factor (SPF) and UVA radiation testing and labeling issues. FDA also extended the effective date for the final monograph to December 31, 2002.

In the **Federal Register** of December 31, 2001 (66 FR 67485), FDA stayed the December 31, 2002, effective date of the final monograph for OTC sunscreen drug products in part 352 pending further notice from FDA in a future issue of the **Federal Register**. FDA took this action because we planned to amend part 352 to address formulation, labeling, and testing requirements for both ultraviolet B (UVB) and UVA radiation protection. The existing stay of the effective date for part 352 remains in effect at this time.

In the **Federal Register** of August 27, 2007 (72 FR 49070), FDA issued a proposed rule that would amend the final monograph for OTC sunscreen drug products to address both UVB and UVA testing and labeling requirements for sunscreen and sunscreen-skin protectant combination drug products. FDA requested comments on the proposed amendments. FDA also requested comments on issues related to OTC sunscreen drug products containing alpha hydroxy acids or titanium dioxide and zinc oxide formulated in particle sizes as small as a few nanometers. The comment period on the proposed rule was scheduled to end on November 26, 2007.

II. Extension of the Comment Period

The agency has received requests for an extension of the comment period for the proposed rule. Each request conveyed concern that the current 90-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the proposed rule.

FDA has considered the requests and is extending the comment period for the proposed rule for 30 days, until December 26, 2007. The agency believes that a 30-day extension allows adequate time for interested persons to submit comments without significantly delaying rulemaking on these important issues.

In response to several requests to extend the comment period, we are extending the comment period for 30 days, until December 26, 2007.

III. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments on this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that in January 2008, the FDA Web site is expected to transition to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. After the transition date, electronic submissions will be accepted by us through the FDMS only. When the exact date of the transition to FDMS is known, we will publish a **Federal Register** notice announcing that date.

IV. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) under Docket No. 1978N–0038 and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Comment No. EXT10.
2. Comment No. EXT11.
3. Comment No. EXT12.
4. Comment No. EXT13.
5. Comment No. EXT14.
6. Comment No. EXT15.
7. Comment No. EXT16.
8. Comment No. EXT17.
9. Comment No. EXT18.

Dated: November 21, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. 07–5853 Filed 11–26–07; 9:25 am]

BILLING CODE 4160–01–S

Notices

Federal Register

Vol. 72, No. 228

Wednesday, November 28, 2007

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.

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a meeting of the Advisory Committee on Actuarial Examinations (portions of which will be open to the public) in Washington, DC at the Office of Professional Responsibility on January 7 and January 8, 2008.

DATES: Monday, January 7, 2008, from 9 a.m. to 5 p.m., and Tuesday, January 8, 2008, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held in Room 6505, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, 202–622–8225.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet in Room 6505, 1111 Constitution Avenue, NW., Washington, DC on Monday, January 7, 2008, from 9 a.m. to 5 p.m., and Tuesday, January 8, 2008, from 8:30 a.m. to 5 p.m.

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in 29 U.S.C. 1242(a)(1)(B) and to review the November 2007 Pension (EA–2A) Joint Board Examination in order to make recommendations relative thereto, including the minimum acceptable pass score. Topics for inclusion on the syllabus for the Joint Board's examination program for the May 2008 Basic (EA–1) Examination and the May 2008 Pension (EA–2B) Examination will be discussed.

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the portions of the meeting dealing with the discussion of questions that may appear on the Joint Board's examinations and the review of the November 2007 Joint Board examination fall within the exceptions to the open meeting requirement set forth in 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such portions be closed to public participation.

The portion of the meeting dealing with the discussion of the other topics will commence at 1 p.m. on January 7 and will continue for as long as necessary to complete the discussion, but not beyond 3 p.m. Time permitting, after the close of this discussion by Committee members, interested persons may make statements germane to this subject. Persons wishing to make oral statements should notify the Executive Director in writing prior to the meeting in order to aid in scheduling the time available and should submit the written text, or at a minimum, an outline of comments they propose to make orally. Such comments will be limited to 10 minutes in length. All persons planning to attend the public session should notify the Executive Director in writing to obtain building entry. Notifications of intent to make an oral statement or to attend must be faxed, no later than December 31, 2007, to 202–622–8300, Attn: Executive Director. Any interested person also may file a written statement for consideration by the Joint Board and the Committee by sending it to the Internal Revenue Service, Joint Board for the Enrollment of Actuaries, Attn: Executive Director, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224.

Dated: November 14, 2007.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. E7–23102 Filed 11–27–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS–LS–07–0131; LS–07–16]

United States Standards for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived From Such Livestock

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and Request for Comments.

SUMMARY: The Agricultural Marketing Service (AMS) is seeking comments on a proposed voluntary standard for a naturally raised marketing claim. A number of livestock producers make claims associated with production practices in order to distinguish their products in the marketplace. There are a growing number of entities that wish to capture value added opportunities via alternative production methods to meet the demands of consumers seeking meat and meat products from naturally raised livestock. The livestock and meat supply chain along with consumers could benefit from a uniform standard for the marketing of this type of product. The standard for a naturally raised marketing claim, if adopted, will be part of the voluntary U.S. Standards for Livestock and Meat Marketing Claims. If this voluntary standard is established, livestock producers participating in this program would have their naturally raised claim verified through the Department of Agriculture (USDA). Verification of any claim would be accomplished through an audit of the production process in accordance with procedures that are contained in Part 62 of Title 7 of the Code of Federal Regulations (7 CFR part 62). Meat and meat products sold from approved programs can carry a claim verified by USDA.

DATES: Comments must be received on or before January 28, 2008 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments should be submitted through the Web site at *http://www.regulations.gov.* Send written comments to: Naturally Raised Marketing Claim, Room 2607–S, AMS, USDA, 1400 Independence Avenue,

SW., Washington, DC 20250–0254, or by facsimile to (202) 720–1112. All comments should reference the docket number. Comments received will be posted on the Web site at *http://www.regulations.gov* and will be made available for public inspection at the above physical address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Martin E. O'Connor, Chief, Standards, Analysis, and Technology Branch, Livestock and Seed Program, AMS, USDA, Room 2607–S, 1400 Independence Avenue, SW., Washington, DC 20250–0254; facsimile: (202) 720–1112; telephone: (202) 720–4486; or e-mail: *Martin.OConnor@usda.gov.* Additional information can also be found by accessing the Web site at *http://www.ams.usda.gov/lsg/stand/naturalclaim.htm.*

SUPPLEMENTARY INFORMATION: Section 203(c) of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1622), directs and authorizes the Secretary of Agriculture ''to develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices.'' USDA is committed to carrying out this authority in a manner that facilitates the marketing of agricultural products. One way of achieving this objective is through the development and maintenance of voluntary standards by AMS.

AMS is seeking comments on a proposed voluntary U.S. Standard for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived from such Livestock, in accordance with procedures that are contained in Part 36 of Title 7 of the Code of Federal Regulations (7 CFR part 36).

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA; 44 U.S.C. 3501, *et seq.*), the information collection and recordkeeping requirements for the services associated with a proposed naturally raised marketing claim is approved under Office of Management and Budget Control No. 0581–0124.

Background

Individuals and companies often highlight production and marketing practices in advertisements and promotions to distinguish their products in the marketplace. Since the late 1970s, livestock and meat producers (individuals and companies) have requested the voluntary services of AMS to verify or certify specific practices to increase the value of their products. The Livestock and Seed (LS) Program of AMS has provided certification through direct product examination for a number of production claims related to livestock and carcass characteristics. The validity of such claims is enhanced since the product is labeled as ''USDA Certified.'' The LS Program also offers verification services through Quality System Verification Programs (QSVP; *http://www.ams.usda.gov/lsg/arc/audit.htm)* to substantiate claims that cannot be determined by direct examination of livestock, their carcasses, component parts, or the finished product. The QSVP provides suppliers of agricultural products or services the opportunity to distinguish specific activities involved in the production and processing of their agricultural products and to assure customers of their ability to provide consistent quality products or services. This is accomplished by documenting the quality management system and having the manufacturing or service delivery processes verified through independent, third-party audits. One specific QSVP is the USDA Process Verified Program, which allows suppliers to make marketing claims—such as feeding practices or other raising and processing claims—and label and market their products as ''USDA Process Verified.''

As multiple marketers of specialized claims have begun to seek USDA certification or verification for the same or similar production practices, AMS has determined it would be beneficial to establish standards for common production and marketing claims that would collectively be a part of the voluntary U.S. Standards for Livestock and Meat Marketing Claims, which may be used in conjunction with a certified or verified program recognized by AMS. The livestock and meat marketing claim standards are instrumental in facilitating communication, establishing a common trade language, and enhancing understanding among producers, processors, and consumers. Past experience indicates that standards sort a highly diverse population into more homogeneous groups, and when standards are uniformly applied, they provide a valuable marketing tool. AMS develops and proposes standards for marketing and production claims based on experience with USDA Certified Programs and USDA QSVP, research into standard practices and procedures, and requests from the livestock and meat industries.

Naturally raised is an animal production method known in the industry. AMS is proposing that animals that have been naturally raised have been raised without growth promotants and antibiotics and have never been fed mammalian or avian by-products. Accordingly, AMS is seeking comments on a proposed voluntary naturally raised marketing claim standard. AMS has obtained input from a number of individual experts in government, industry, and academia while drafting the proposed standard and has conducted public listening sessions.

If adopted, product labels that include the voluntary naturally raised marketing claim must be submitted to the USDA's Food Safety and Inspection Service (FSIS), Labeling Program and Delivery Division (LPDD), for evaluation prior to use. FSIS, LPDD, under the authority of the Federal Meat Inspection Act (FMIA; 21 U.S.C. 601, 607) and the Poultry Products Inspection Act (PPIA; 21 U.S.C. 451, 457), regulates domestic and imported meat, poultry, and egg product labeling, standards, and ingredients. AMS has worked closely with FSIS, LPDD to develop and propose the voluntary naturally raised marketing claim standard. All products using the naturally raised marketing claim standard would have to be accompanied by a brief statement explaining the claim and attributes. The proposed standard for a naturally raised marketing claim, if adopted, would be part of the voluntary U.S. Standards for Livestock and Meat Marketing Claims which may be used in conjunction with a USDA QSVP, and naturally raised marketing claims may be verified, as provided in 7 CFR Part 62. However, since this would be a voluntary marketing claim, if adopted, FSIS would not establish a new provision limiting the use of the term naturally raised to labels in which participants meet this standard with a USDA QSVP. Any specific labeling issues or questions not related to AMS services would be directed to the FSIS, LPDD.

According to FreshLook Marketing Group retail data, the demand for natural and organic products has surged to double-digit growth in recent years (for more information on the National Organic Program visit *http://www.ams.usda.gov/nop/indexIE.htm).* To meet the growing consumer demand, U.S. meat and poultry companies have developed and marketed ''natural'' meat and meat products. An AMS naturally raised marketing claim standard, if adopted, would remain independent of the FSIS use of the term ''natural'' and

would separate claims about livestock production practices on product labeling.

The majority of claims currently citing naturally raised animal production methods are defined by the individual company selling the product. Depending upon the branded program making the claims, the production activities and associated requirements can vary since there is currently no standard to specify which attributes must be addressed and to what level, other than to be truthful and not misleading. This has led to confusion in the industry and the marketplace as to what requirements must be met in order to have a uniform, explicit claim that can be easily understood. This confusion has caused AMS to develop and propose a standard with explicit attributes that could easily be understood by the public as the basis for a naturally raised marketing claim as it relates to live animal production practices. AMS seeks comment from the public concerning its development and requirements.

Proposed Standard

To develop and propose a marketing claim standard for naturally raised, AMS conducted three listening sessions in December 2006 and January 2007 in Washington, DC, Denver, CO, and Seattle, WA, to seek oral and written comments regarding the use of a naturally raised marketing claim standard. Public input and comments related to a naturally raised marketing claim are posted on the Web site at *http://www.ams.usda.gov/lsg/stand/naturalclaim.htm.* AMS evaluated the public input and comments and is seeking further comments on a proposed naturally raised marketing claim standard.

AMS also reviewed consumer research along with the comments and identified, based upon this information, that production practices such as the prohibited use of antibiotics, growth promotants, and certain animal by-products are the main attributes consumers want for meat and meat products derived from livestock that are naturally raised. These are the attributes that AMS' proposed naturally raised standard contains. Again, the naturally raised labeling claim proposed in this notice remains independent of the FSIS policy on the use of the term ''natural'' on product labeling and will only pertain to live animal production practices.

Accordingly, AMS seeks comments on the following proposed voluntary U.S. Standard for Livestock and Meat Marketing Claims, in this notice.

Proposed U.S. Standards for Livestock and Meat Marketing Claims, Naturally Raised Claim for Livestock and the Meat and Meat Products Derived From Such Livestock

Background: This proposed claim applies to livestock used for meat and meat products that were raised entirely without growth promotants, antibiotics, and mammalian or avian by-products.

The administration of growth hormones, including natural hormones, synthetic hormones, estrus suppressants, beta agonists, or other synthetic growth promotants is prohibited from birth to slaughter. Collectively, they are referred to in the naturally raised marketing claim standard as growth promotants.

No antibiotics can be administered, whether through feed or water, or by injection, from birth to slaughter. This includes low-level (sub-therapeutic) or therapeutic level doses, sulfonamides, ionophores, coccidiostats, or any other synthetic antimicrobial. If an animal is in need of medical attention, proper treatment should, of course, be administered in an attempt to improve the health of the animal. In the case where antibiotics or the stated prohibited substances are administered, the treated animal must be identified and excluded from the program. Health products that can be used for disease prevention in a naturally raised program are vaccines, parasite control products, antibody preparations, and bloat prevention and treatment products (e.g., feed grade microbials and buffers that help facilitate the animals digestive process).

The feeding of mammalian or avian by-products is prohibited. Livestock cannot be fed rations that include components that are mammalian or avian derived.

Vitamin and mineral supplementation is permissible.

Verification of the proposed claim will be accomplished through an audit of the production process. The producer must be able to verify for AMS that the naturally raised marketing claim standard requirements are being met through a detailed documented quality management system.

Claim and Standard

Naturally Raised—Livestock used for the production of meat and meat products have been raised entirely without growth promotants, antibiotics, and have never been fed mammalian or avian by-products. This information shall be contained on any label claim that an animal has been naturally raised.

Authority: 7 U.S.C. 1621–1627.

Dated: November 21, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E7–23103 Filed 11–27–07; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Forest Service

Clearwater National Forest; Idaho; Travel Management Plan

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service gives notice of its intent to prepare a Travel Planning Environmental Impact Statement (EIS) for the Clearwater National Forest (CNF). The proposed action would designate a site-specific transportation system and prohibit indiscriminate cross-country traffic. The EIS will analyze the effects of the proposed action and alternatives. The Clearwater National Forest invites comments and suggestions on the issues to be addressed. The agency gives notice of the National Environmental Policy Act (NEPA) analysis and decision-making process on the proposal so interested and affected members of the public may participate and contribute to the final decision.

DATES: Comments concerning the scope of the analysis must be received by December 14, 2007. A 45-day public comment period will follow the release of the draft environmental impact statement that is expected in June 2008. The final environmental impact statement is expected in January 2009.

ADDRESSES: Send written or electronic comments to: Lochsa Ranger District, Kamiah Ranger Station; Attn: Lois Foster, Interdisciplinary Team Leader; Rt. 2 Box 191; Kamiah, ID 83536; FAX 208–935–4275; E-mail *comments-northern-clearwater@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Lois Foster, Interdisciplinary Team leader, (208) 935–4258.

SUPPLEMENTARY INFORMATION: Purpose and Need for Action is to (1) Implement national OHV Rule direction, (2) Limit indiscriminate cross-country motorized travel, (3) Designate selected roads and trails for motorized travel, (4) Designate appropriate acreas or routes for travel with over-snow vehicles, (5) Balance travel opportunities with maintenance and management capability including costs, (6) Provide for a better spectrum of motorized, non-motorized, and non-mechanized travel opportunities across

the CNF in recognition of the need to retain the charter of lands recommended for Wilderness designation and the CNF's ability to provide for non-motorized recreation opportunities that are not available on other land ownerships, (7) Manage impacts to Forest resources, (8) Improve clarity and consistency of existing travel restrictions, and (9) Amend the 1987 Forest Plan as necessary to accomplish the actions described above.

The need for revision of the Forest Plan is supported by nationwide awareness within the Forest Service of the negative effects of indiscriminate off-road travel by motorized users. These concerns led to publication of the Travel Management final rule on November 9, 2005 in the **Federal Register,** 36 CFR parts 212, 251, 261, 295 ''Travel Management:'' Designated Routes and Areas for Motor Vehicles Use (**Federal Register** 2005: 79 FR 68264). The rule requires each National Forest to designate those roads, trails, and areas that are open to motor vehicle use. The rule prohibits use of motor vehicles off the designated system, as well as use of motor vehicles on routes and in areas that are not consistent with the designation. The rule does not require that over-snow vehicles, such as snowmobiles, are limited to a designated system by exempting them under 121.51, but also states in 212.81 that ''use by over-snow vehicles * * * on National Forest System lands may allowed, restricted, or prohibit.'' The CNF chose to include over-snow vehicles in the analysis.

The Proposed Action would designate motorized road and trail routes for summer travel on the Clearwater National Forest. Existing Conditions include roads and trails identified as open to motorized travel in the 2005 Travel Guide, plus any error corrections or project-level NEPA decisions made since then. The Proposed Action would include any changes from existing conditions, such as road to trail conversions, designating some roads previously not thought to be travelable, and not designating some roads that were previously thought to be travelable.

The transportation system for snow-free travel would include:

- 1,623 miles of roads open yearlong to all highway-legal vehicles (an increase of 8 miles compared to existing conditions);
- 509 miles of road open yearlong to small vehicles such as ATV's and motorcycles, but not including UTV's (an increase of 9 miles);
- 633 miles of roads open seasonally to all highway-legal vehicles (a decrease of 13 miles);
- 151 miles of roads open seasonally to small vehicles (a decrease of 1 mile);
- 93 miles of trails open yearlong to small vehicles (a change of 0 miles);
- 226 miles of trails open yearlong to motorcycles (a decrease of 178 miles);
- 75 miles of trails open seasonally to small vehicles (an increase of 2 miles); and
- 93 miles of trails open seasonally to motorcycles (a change of 0 miles).

The proposed action would also modify the dates of seasonal restrictions for roads and trails to reduce the variety of restricted periods, and ultimately improve the clarity of the Motor Vehicle Use Map (MVUM). Motorized travel up to 300 fee off of designated routes to access established campsites would be permitted in most areas. In certain areas, off-route travel would be permitted only to access specifically designated campsites.

Existing restrictions for bicycles on all but one road would be eliminated. Bicycle restrictions on roads would drop from a total of 10 miles currently to only 1 mile, which would be entirely within the CNF seed orchard. Areas recommended for wilderness by the Forest Plan would become off limits to bicycles. System trails available to bicycles would drop from 811 miles to 730 miles (a reduction of 81 miles).

Over-snow vehicle use would be restricted in areas recommended for wilderness by the Forest Plan. Within the areas where over-snow vehicle use would generally be permitted, there would continue to be some specific routes where over-snow vehicles would be restricted. Over-snow vehicle use would be prohibited forest-wide from October 1 to November 4. The transportation system for over-snow vehicles would include:

- 364 miles of groomed snowmobile routes (no change from existing conditions);
- 1,322,943 acres generally open to over-snow vehicles except for certain restricted routes;
- 3,484 acres of roads where over-snow vehicles would be permitted from November 5 until snowmelt in the spring, compared to 3,174 acres available currently (an increase of 310 acres); and
- 503,057 acres closed to over-snow vehicles, compared to 302,856 acres available currently (a decrease of 200,201 acres).

The numbers above are only approximate at this time.

The existing Forest Plan will be amended. When the Forest Plan was completed in 1987, trail vehicles were few and travel planning was focused almost completely on roads and highway vehicles. Motorized use has increased dramatically since then, and modern vehicles such as snowmobiles, ATV's, and motorcycles have capabilities that could not have been envisioned in 1987. The Forest Plan also contains some conflicting information regarding the intent for management of certain areas. Changes may include:

- Better coordination between the level of motorized travel and the focus of certain management areas, primarily those in roadless areas;
- Additions or changes to Forest Plan standards to permit implementation of the national Travel Management rule; and
- Other goals, objectives, and standards affecting travel management.

Possible Alternatives the Forest Service will consider include a no-action alternative, which will serve as a baseline for comparison of alternatives. The proposed action will be considered along with additional alternatives that will be developed to meet the purpose and need for action, and to address significant issues identified during scoping.

The Responsible Official is Thomas K. Reilly, Clearwater Forest Supervisor, Clearwater National Forest, 12730 Highway 12, Orofino, ID 83544.

The Decision to be Made is whether to adopt the proposed action, in whole or in part, or another alternative; and what mitigation measures and management requirements will be implemented.

The Scoping Process for the EIS is being initiated with this notice. The scoping process will identify issues to be analyzed in detail and will lead to the development of alternatives to the proposal. The Forest Service is seeking information and comments from other Federal, State, and local agencies; Tribal governments; and organizations and individuals who may be interested in or affected by the proposed action. Comments received in response to this notice, including the names and addresses of those who comment, will be part of the project record and available for public review. Public meetings will be scheduled during the scoping period. Times, dates and locations for the public meetings will be published in the Lewiston, Idaho *Lewiston Morning Tribune.*

Early Notice of Importance of Public Participation in Subsequent Environmental Review: A draft environmental impact statement will be prepared for comment. The second major opportunity for public input will

be when the Draft EIS is published. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**. The Draft EIS is anticipated to be available for public review in June 2008. The comment period on the Draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the **Federal Register**.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that is it meaningful and alerts an agency to the reviewer's position and contentions (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 553 (1978)). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts (*City of Angoon* v. *Ho del*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980)). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the comment period for the Draft EIS so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in a final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

After the comment period for the Draft EIS ends, the Forest Service will analyze comments received and address them in the Final EIS. The Final EIS is scheduled to be released by January 2009. The Responsible Official (Forest Supervisor Thomas K. Reilly) will document the decision and rationale in a Record of Decision (ROD). The decision will be subject to review under Forest Service appeal regulations at 36 CFR Part 215.

Preliminary Issues identified by the Forest Service interdisciplinary team include: Changing motorized and non-motorized recreation opportunities, costs of road and trail management and maintenance, soil issues, effects on aquatic environments and species, effects on wildlife, the spread of noxious weeds, changes in motorized access to roads, trails and areas that are not designated as part of the travel planning analysis, and motorized access for people with disabilities.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 21)

Dated: November 7, 2007.

Thomas K. Reilly,

Clearwater Forest Supervisor.

[FR Doc. 07–5861 Filed 11–27–07; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–846]

Brake Rotors From the People's Republic of China: Final Results of the 2006 Semiannual New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On September 25, 2007, the Department of Commerce (the ''Department'') published the preliminary results of the semiannual new shipper review of the antidumping duty order on brake rotors from the People's Republic of China. *See Brake Rotors From the People's Republic of China: Preliminary Results of the 2006 Semiannual New Shipper Review*, 72 FR 54430 (September 25, 2007) (''*Preliminary Results*''). The merchandise covered by this review is brake rotors, exported and manufactured by Longkou Qizheng Auto Parts Co., Ltd. (''Qizheng''), as described in the ''Scope of the Order'' section of this notice. The period of review is April 1, 2006, through October 31, 2006. We invited parties to comment on our *Preliminary Results*. We received no comments, and no new evidence was placed on the record to cause us to question that determination. Therefore, the final results are unchanged from those presented in the Preliminary Results. The final weighted–average dumping margin for Qizheng is listed below in the section entitled ''Final Results of the Review.''

EFFECTIVE DATE: November 28, 2007.

FOR FURTHER INFORMATION CONTACT: Jennifer Moats or Blanche Ziv, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5047 or (202) 482–4207, respectively.

Scope of the Order

The products covered by this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake rotors limit their use to the following types of motor vehicles: automobiles, all–terrain vehicles, vans and recreational vehicles under ''one ton and a half,'' and light trucks designated as ''one ton and a half.''

Finished brake rotors are those that are ready for sale and installation without any further operations. Semi–finished rotors are those on which the surface is not entirely smooth, and have undergone some drilling. Unfinished rotors are those which have undergone some grinding or turning.

These brake rotors are for motor vehicles, and do not contain in the casting a logo of an original equipment manufacturer (''OEM'') which produces vehicles sold in the United States. (*e.g.*, General Motors, Ford, Chrysler, Honda, Toyota, Volvo). Brake rotors covered in this order are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake rotors that are made of gray cast iron, which contain a steel plate, but otherwise meet the above criteria. Excluded from the scope of this order are brake rotors made of gray cast iron, whether finished, semifinished, or unfinished, with a diameter less than 8 inches or greater than 16 inches (less than 20.32 centimeters or greater than 40.64 centimeters) and a weight less than 8 pounds or greater than 45 pounds (less than 3.63 kilograms or greater than 20.41 kilograms).[1]

[1] On January 17, 2007, the Department determined the brake rotors produced by Federal-Mogul and certified by the Ford Motor Company to be excluded from the scope of the order. *See* Memorandum from Blanche Ziv, Program Manager, AD/CVD Operations, Office 8, through Wendy J. Frankel, Office Director, AD/CVD Operations, Office 8, to Stephen J. Claeys, Deputy Assistant

Brake rotors were classifiable under subheading 8708.39.50.30 of the *Harmonized Tariff Schedule of the United States* (''HTSUS'') during the period of review.[2] Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Final Results of Review

We determine that the following percentage weighted–average margin exists for the period April 1, 2006, through October 31, 2006:

Exporter and Manufacturer	Margin
Longkou Qizheng Auto Parts Co., Ltd.	0.0 %

Liquidation

The Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. We will direct CBP to assess the appropriate assessment rate (0 percent) against the entered customs values for the subject merchandise on each of Qizheng's entries under the relevant order during the POR.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after date of publication, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (''the Act''): (1) for subject merchandise exported and produced by Qizheng, the cash deposit rate will be zero percent; (2) for subject merchandise exported but not produced by Qizheng, the cash deposit rate will be the PRC–wide rate; (3) the cash deposit rate for PRC exporters who received a separate rate in a prior segment of the proceeding will continue to be the rate assigned in that segment of the proceeding; (4) for all other PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC–wide rate of 43.32 percent; and (5) for all non–PRC exporters of subject merchandise, the cash deposit rate will be the rate applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until further notice.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entry during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

This new shipper review and this notice are published in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: November 21, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–23143 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–DS–S

Secretary for Import Administration, entitled, ''Scope Ruling of the Antidumping Duty Order on Brake Rotors from the People's Republic of China; Federal-Mogul Corporation,'' dated January 17, 2007.

[2] As of January 1, 2005, the HTSUS classification for brake rotors (discs) changed from 8708.39.50.10 to 8708.39.50.30. As of January 1, 2007, the HTSUS classification for brake rotors (discs) changed from 8708.39.50.30 to 8708.30.50.30. *See HTSUS (2007)*, available at <www.usitc.gov>.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–868]

Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 28, 2007.

SUMMARY: The Department of Commerce determines that imports of glycine from Japan are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The final weighted–average dumping margins are listed below in the section entitled ''Final Determination of Investigation.'' In addition, the Department of Commerce has determined that critical circumstances exist with respect to imports of glycine from Japan.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov or Richard Rimlinger, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0665 or (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 13, 2007, the Department of Commerce (the Department) published the preliminary determination of sales at less than fair value (LTFV) in the antidumping investigation of glycine from Japan. See *Notice of Preliminary Determination of Sales at Less Than Fair Value: Glycine from Japan*, 72 FR 52349 (September 13, 2007) (*Preliminary Determination*). We invited parties to comment on *Preliminary Determination*. We did not receive any case or rebuttal briefs from any interested parties. On October 25, 2007, the petitioner in this investigation, Geo Specialty Chemicals, Inc., submitted an allegation of critical circumstances with respect to imports of glycine from Japan.

Period of Investigation

The period of investigation is January 1, 2006, through December 31, 2006.

Scope of Investigation

The merchandise covered by this investigation is glycine, which in its solid (i.e., crystallized) form is a free–flowing crystalline material. Glycine is used as a sweetener/taste enhancer, buffering agent, reabsorbable amino acid, chemical intermediate, metal complexing agent, dietary supplement, and is used in certain pharmaceuticals. The scope of this investigation covers glycine in any form and purity level. Although glycine blended with other materials is not covered by the scope of this investigation, glycine to which relatively small quantities of other materials have been added is covered by the scope. Glycine's chemical composition is $C_2H_5NO_2$ and is normally classified under subheading

2922.49.4020 of the Harmonized Tariff Schedule of the United States (HTSUS).

The scope of this investigation also covers precursors of dried crystalline glycine including, but not limited to, glycine slurry (*i.e.*, glycine in a non–crystallized form) and sodium glycinate. Glycine slurry is classified under the same HTSUS subheading as crystallized glycine (2922.49.4020) and sodium glycinate is classified under subheading HTSUS 2922.49.8000.

While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Adverse Facts Available

For the final determination, we continue to find that, by failing to provide information we requested, Nu–Scaan Nutraceuticals Ltd. (Nu–Scaan) and Yuki Gosei Co., Ltd. (Yuki Gosei), the mandatory respondents in this investigation, along with other producers and/or exporters of glycine from Japan (Showa Denko K.K., Hayashi Pure Chemical Industries Co. Ltd., CBC Co., Ltd., Seino Logix Co. Ltd., Estee Lauder Group Companies K.K., and Chelest Corporation) did not act to the best of their ability. Thus, the Department continues to find that the use of adverse facts available is warranted for these companies under sections 776(a)(2) and (b) of the Act. See *Preliminary Determination*, 72 FR at 52350.

As we explained in *Preliminary Determination*, the rate of 280.57 percent we selected as the adverse facts–available rate is the highest margin alleged in the petition, as recalculated in the April 19, 2007, ''Office of AD/CVD Operations Initiation Checklist for the Antidumping Duty Petition on Glycine from Japan'' (the Initiation Checklist) on file in Import Administration's Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. See also *Petition for the Imposition of Antidumping Duties on Imports of Glycine from India, Japan, and the Republic of Korea* filed on March 30, 2007 (the Petition), and the April 3, 12, 13, 17, and 18, 2007, supplements to the Petition filed on behalf of Geo Specialty Chemicals, Inc. We included the range of margins we re–calculated in the Initiation Checklist in *Glycine from India, Japan, and the Republic of Korea: Initiation of Antidumping Duty Investigations*, 72 FR 20816 (April 26, 2007) (*Initiation Notice*). Further, as discussed in *Preliminary Determination*, we corroborated the adverse facts–available rate pursuant to section 776(c) of the Act.

All–Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted–averaged dumping margins established for all exporters and producers individually investigated are zero or *de minimis* or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all–others rate for exporters and producers not individually investigated. Our recent practice under these circumstances has been to assign, as the all–others rate, the simple average of the margins in the petition. See *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products From Argentina, Japan and Thailand*, 65 FR 5520, 5527–28 (February 4, 2000); see also *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Canada*, 64 FR 15457 (March 31, 1999), and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Italy*, 64 FR 15458, 15459 (March 31, 1999). Consistent with our practice we calculated a simple average of the rates in the Petition, as recalculated in the Initiation Checklist at Attachment VI and as listed in *Initiation Notice*, and assigned this rate to all other manufacturers/exporters. For details of these calculations, see the memorandum from Dmitry Vladimirov to the File entitled ''Antidumping Duty Investigation on Glycine from Japan - Analysis Memo for All–Others Rate,'' dated September 6, 2007.

Final Determination of Investigation

We determine that the following weighted–average dumping margins exist for the period January 1, 2006, through December 31, 2006:

Manufacturer or Exporter	Margin (percent)
Nu–Scaan Nutraceuticals Co., Ltd.	280.57
Yuki Gosei Co., Ltd.	280.57
Showa Denko K.K.	280.57
Hayashi Pure Chemical Industries Co., Ltd.	280.57
CBC Co., Ltd.	280.57
Seino Logix Co., Ltd.	280.57
Estee Lauder Group Companies K.K.	280.57
Chelest Corporation	280.57
All–Others	165.34

Final Critical–Circumstances Determination

On October 25, 2007, the petitioner in this investigation, Geo Specialty Chemicals, Inc., alleged that there is a reasonable basis to find that critical circumstances exist with respect to imports of glycine from Japan. In accordance with 19 CFR 351.206(e), because the petitioner submitted an allegation of critical circumstances at least 21 days before the scheduled date of the final determination, the Department must make a final finding on critical circumstances not later than the date of the final determination, pursuant to section 735(a)(3) of the Act.

Section 735(a)(3) of the Act provides that the Department will determine that critical circumstances exist if the following criteria are met: (A)(i) There is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales and (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been ''massive,'' the Department normally will examine (i) the volume and value of the imports, (ii) seasonal trends, and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that an increase in imports of 15 percent during the ''relatively short period'' of time may be considered ''massive.''

Section 351.206(i) of the regulations defines ''relatively short period'' as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later. The regulations also provide that, if the Department finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.

Because we are not aware of any antidumping duty order in any country on glycine from Japan, we do not find that there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise.

For this reason, the Department does not find a history of injurious dumping of glycine from Japan pursuant to section 735(a)(3)(A)(i) of the Act. Therefore, we must look to the second criterion for determining importer knowledge of dumping.

To determine whether the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value in accordance with section 735(a)(3)(A)(ii) of the Act, the Department normally considers margins of 25 percent or more for export–price sales or 15 percent or more for constructed export–price transactions sufficient to impute knowledge of dumping. See *Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances: Wax and Wax/Resin Thermal Transfer Ribbons From Japan*, 68 FR 71072, 71076 (December 22, 2003) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Wax and Wax/Resin Thermal Transfer Ribbons from Japan*, 69 FR 11834, 11835 (March 12, 2004)), and *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from Indonesia*, 71 FR 15162, 15166 (March 27, 2006) (*Lined Paper Products from Indonesia*) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Lined Paper Products from Indonesia*, 71 FR 47171, 47173 (August 16, 2006)). For the reasons explained above, we have assigned a margin of 280.57 percent to the mandatory respondents, Nu–Scaan and Yuki Gosei. Consequently, we have imputed knowledge of dumping to importers of subject merchandise from these companies because the assigned margins for these companies exceed the 15–percent threshold.

Similar to the Department's normal practice of conducting its critical–circumstances analysis of companies in the all–others group based on the experience of investigated companies, as discussed below and because we have assigned a margin of 280.57 percent to other Japanese exporters/producers of glycine (Showa Denko K.K., Hayashi Pure Chemical Industries Co. Ltd., CBC Co., Ltd., Seino Logix Co. Ltd., Estee Lauder Group Companies K.K., and Chelest Corporation), we have imputed knowledge of dumping to importers of subject merchandise from these companies.

In determining whether to find that an importer knew or should have known that there would be material injury by reason of dumped imports, the Department normally will look to the preliminary injury determination of the U.S. International Trade Commission (ITC). If the ITC finds a reasonable indication of present material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that there would be material injury by reason of dumped imports. See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan*, 64 FR 30574, 30578 (June 8, 1999). In this case, the ITC has found that a reasonable indication of present material injury due to dumping exists for Japan. See *Glycine From India, Japan, and Korea*, 72 FR 29352 (May 25, 2007) (Investigation Nos. 731–TA–1111–1113 (Preliminary)) (*ITC Prelim*). As a result, the Department has determined that importers knew or should have known that there would be material injury by reason of dumped imports of subject merchandise from Japan.

In determining whether there have been ''massive imports'' over a ''relatively short period,'' the Department normally compares the import volume and value of the subject merchandise for three months immediately preceding and following the filing of the petition. Imports normally will be considered massive when imports have increased by 15 percent or more during this ''relatively short period.'' Because we do not have verifiable data from any of the uncooperative Japanese respondents, we must base our ''massive imports'' determination as to these companies on the basis of facts otherwise available, pursuant to section 776(a) of the Act.[1] Because these companies failed to cooperate by not acting to the best of their ability to respond to our requests for information, we may make an adverse inference in selecting from the facts otherwise available pursuant to section 776(b) of the Act. Therefore, consistent with our practice, we have made an adverse inference, as facts available, that there were massive imports from these companies over a relatively short period. See *Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan*, 62 FR 51427 (October 1, 1997), and accompanying Issues and Decision memorandum at Comment 20.

Based on our determination that importers knew or should have known that producers/exporters Nu–Scaan, Yuki Gosei, Showa Denko K.K., Hayashi Pure Chemical Industries Co. Ltd., CBC Co., Ltd., Seino Logix Co. Ltd., Estee Lauder Group Companies K.K., and Chelest Corporation were selling glycine from Japan at less than fair value, that there would be material injury by reason of such dumped imports, and that there have been massive imports of glycine from these producers/exporters over a relatively short period, we determine affirmatively that critical circumstances exist for imports from Japan of glycine produced and/or exported by the companies in question.

It is the Department's normal practice to conduct its critical–circumstances analysis of companies in the all–others group based on the experience of investigated companies (see *Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey*, 62 FR 9737, 9741 (March 4, 1997) (the Department found that critical circumstances existed for the majority of the companies investigated and therefore concluded that critical circumstances also existed for companies covered by the all–others rate)). Notwithstanding that practice, however, the Department does not automatically extend an affirmative critical–circumstances determination to companies covered by the all–others rate. See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Japan*, 64 FR 30574, 30585 (June 8, 1999) (*Stainless Steel from Japan*). Instead, the Department considers the traditional critical–circumstances criteria with respect to the companies covered by the all–others rate. Consistent with *Stainless Steel from Japan*, in this case we have applied the traditional critical–circumstances criteria to the all–others category for the antidumping investigation of glycine from Japan.

First, in determining whether there is a reasonable basis to find that an importer knew or should have known that the exporter was selling glycine at less than fair value, we look to the all–others rate. The dumping margin for the all–others category in the instant case, 165.34 percent, exceeds the 15–percent threshold necessary to impute knowledge of dumping. Second, based on the ITC's preliminary material–injury determination, we also find that

[1] Because the non-cooperating respondents in question did not respond to our requests for information during the course of this investigation we did not request monthly shipment data from these companies.

importers knew or should have known that there would be material injury caused by the dumped merchandise.

Finally, with respect to massive imports, we are unable to base our determination on our findings for the mandatory respondents because our determinations for all companies in this investigation were based on adverse facts available. We have not inferred, as adverse facts available, that massive imports exist for companies under the all–others category because, unlike the uncooperative companies in question, the all–others companies have not failed to cooperate in this investigation. Therefore, an adverse inference with respect to a finding of a massive surge in imports by the all–others companies is not appropriate. Instead, consistent with the approach taken in *Notice of Final Determination of Sales at Less Than Fair Value: Hot–Rolled Flat–Rolled Carbon–Quality Steel Products from Japan*, 64 FR 24329 (May 6, 1999), and *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products From Argentina, Japan and Thailand*, 65 FR 5520, 5527 (February 4, 2000), we examined U.S. Customs and Border Protection data[2] on aggregate imports from Japan for the five months preceding and the five months following the filing of the petition in order to ascertain whether an increase in shipments of greater than 15 percent or more occurred within a relatively short period following the point in time at which importers had reason to know that a proceeding has commenced.[3] We determined that, with respect to HTSUS number 2922.49.4020, there have been massive imports of glycine from Japan over a relatively short period. For further discussion, see memorandum from Dmitry Vladimirov to Laurie Parkhill entitled ''Antidumping Duty Investigation on Glycine from Japan - Affirmative Final Determination of Critical Circumstances - All–Others Producers/Exporters,'' dated November 20, 2007.

Based on our determination that massive imports of glycine from the producers/exporters included in the all–others category have occurred and, consequently, that the third criterion necessary for determining affirmative critical circumstances has been met, we have determined affirmatively that critical circumstances exist for imports of glycine from Japan under HTSUS number 2922.49.4020 for producers/exporters in the all–others category.

Continuation of Suspension of Liquidation

Pursuant to section 735(c)(1)(B) of the Act and 19 CFR 351.211(b)(1), we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise from Japan entered, or withdrawn from warehouse, for consumption on or after September 13, 2007, the date of the publication of *Preliminary Determination*. Pursuant to section 735(c)(4) of the Act we will direct CBP to suspend liquidation of all entries, for all importers of subject merchandise that are entered, or withdrawn from warehouse, on or after 90 days before the date of publication of *Preliminary Determination*. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average margin, as indicated in the chart above, as follows: (1) the rates for companies identified in the chart above will be the rates we have determined in this final determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 165.34 percent. These suspension–of-liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our final determination. As our final determination is affirmative and in accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: November 20, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–23127 Filed 11–27–07; 8:45 am]

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[2] With respect to HTSUS 2922.49.8000 (covered by the scope of this investigation) the Department did not use information supplied by U.S. Customs and Border Protection because information publically available indicates that this is a basket category that includes non-subject merchandise. Thus, the Department cannot make an accurate analysis to determine whether there were massive imports of subject merchandise classified under this HTSUS number for the all-others category. See *Lined Paper Products from Indonesia*, 71 FR at 15167, *Stainless Steel from Japan*, 64 FR at 30585, *Preliminary Determinations of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and South Africa*, 65 FR 12509, 12511 (March 9, 2000) (where the Department determined that massive imports did not exist for imports from companies in the all-others category because it could not rely on the U.S. Customs data) (unchanged in *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan; and Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Japan and the Republic of South Africa*, 65 FR 25907, 25908 (May 4, 2000)).

[3] In its October 25, 2007, submission, the petitioner alleged an importer's prior knowledge of likelihood of the imminent filing of the petition at a time preceding the actual filing of the petition on March 30, 2007. Accordingly, in alleging a surge in imports of glycine from Japan, the petitioner relied on import data comprising the base and comparison periods, the selection of which was guided by the point in time of the alleged knowledge. We did not rely on import data comprising the base and comparison periods the petitioner used in our evaluation of the massive surge in imports. We find that the petitioner's claim of prior knowledge was not supported by evidence sufficient in demonstrating conclusively that importers had knowledge that a petition was likely to be filed. See, *e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa*, 67 FR 31243 (May 9, 2002), and the applicable April 26, 2002, critical- circumstances decision memorandum from Richard W. Moreland to Faryar Shirzad entitled ''Antidumping Duty Investigation on Certain Cold-Rolled Carbon Steel Flat Products From The Republic of South Africa - Preliminary Negative Determination of Critical Circumstances.'' A public version of this memorandum is on file at the Import Administration Central Records Unit in Room B-099 of the Department of Commerce main building.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–858]

Notice of Final Determination of Sales at Less Than Fair Value: Glycine from the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: November 28, 2007.

SUMMARY: The Department of Commerce determines that imports of glycine from the Republic of Korea are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The final weighted–average dumping margins are listed below in the section entitled ''Final Determination of Investigation.''

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov or Richard Rimlinger, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0665 or (202) 482–4477, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 13, 2007, the Department of Commerce (the Department) published the preliminary determination of sales at less than fair value (LTFV) in the antidumping investigation of glycine from the Republic of Korea. See *Notice of Preliminary Determination of Sales at Less Than Fair Value: Glycine from the Republic of Korea*, 72 FR 52345 (September 13, 2007) (*Preliminary Determination*). We invited parties to comment on *Preliminary Determination*. We did not receive any case or rebuttal briefs from any interested parties.

Period of Investigation

The period of investigation is January 1, 2006, through December 31, 2006.

Scope of Investigation

The merchandise covered by this investigation is glycine, which in its solid (*i.e.*, crystallized) form is a free–flowing crystalline material. Glycine is used as a sweetener/taste enhancer, buffering agent, reabsorbable amino acid, chemical intermediate, metal complexing agent, dietary supplement, and is used in certain pharmaceuticals. The scope of this investigation covers glycine in any form and purity level. Although glycine blended with other materials is not covered by the scope of this investigation, glycine to which relatively small quantities of other materials have been added is covered by the scope. Glycine's chemical composition is $C_2H_5NO_2$ and is normally classified under subheading 2922.49.4020 of the Harmonized Tariff Schedule of the United States (HTSUS).

The scope of this investigation also covers precursors of dried crystalline glycine including, but not limited to, glycine slurry (*i.e.*, glycine in a non–crystallized form) and sodium glycinate. Glycine slurry is classified under the same HTSUS subheading as crystallized glycine (2922.49.4020) and sodium glycinate is classified under subheading HTSUS 2922.49.8000.

While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Adverse Facts Available

For the final determination, we continue to find that, by failing to provide information we requested, a producer and/or exporter of glycine from the Republic of Korea, Korea Bio–Gen Co., Ltd., also a mandatory respondent in this investigation, did not act to the best of its ability in responding to our questionnaire. Thus, the Department continues to find that the use of adverse facts available is warranted for this company under sections 776 (a)(2) and (b) of the Act. See *Preliminary Determination*, 72 FR at 52346. As we explained in *Preliminary Determination*, the rate of 138.83 percent we selected as the adverse facts–available rate is the highest margin alleged in the petition, as recalculated in the April 19, 2007, ''Office of AD/CVD Operations Initiation Checklist for the Antidumping Duty Petition on Glycine from the Republic of Korea'' (the Initiation Checklist) on file in Import Administration's Central Records Unit, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230. See also *Petition for the Imposition of Antidumping Duties on Imports of Glycine from India, Japan, and the Republic of Korea* filed on March 30, 2007 (the Petition), and the April 3, 12, 13, 17, and 18, 2007, supplements to the Petition filed on behalf of Geo Specialty Chemicals, Inc. We included the range of margins we re–calculated in the Initiation Checklist in *Glycine from India, Japan, and the Republic of Korea: Initiation of Antidumping Duty Investigations*, 72 FR 20816 (April 26, 2007) (*Initiation Notice*). Further, as discussed in *Preliminary Determination*, we corroborated the adverse facts–available rate pursuant to section 776(c) of the Act.

All–Others Rate

Section 735(c)(5)(B) of the Act provides that, where the estimated weighted–average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* or are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated all–others rate for exporters and producers not individually investigated. Our recent practice under these circumstances has been to assign, as the all–others rate, the simple average of the margins in the petition. See *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold–Rolled Flat–Rolled Carbon–Quality Steel Products From Argentina, Japan and Thailand*, 65 FR 5520, 5527–28 (February 4, 2000); see also *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Canada*, 64 FR 15457 (March 31, 1999), and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coil from Italy*, 64 FR 15458, 15459 (March 31, 1999). Consistent with our practice we calculated a simple average of the rates in the Petition, as recalculated in the Initiation Checklist at Attachment VI and as listed in *Initiation Notice*, and assigned this rate to all other manufacturers/exporters. For details of these calculations, see the memorandum from Dmitry Vladimirov to the File entitled ''Antidumping Duty Investigation on Glycine from the Republic of Korea - Analysis Memo for All–Others Rate,'' dated September 6, 2007.

Final Determination of Investigation

We determine that the following weighted–average dumping margins exist for the period January 1, 2006, through December 31, 2006:

Manufacturer or Exporter	Margin (percent)
Korea Bio–Gen Co., Ltd.	138.83
All–Others	138.60

Continuation of Suspension of Liquidation

Pursuant to section 735(c)(1)(B) of the Act and 19 CFR 351.211(b)(1), we will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all entries of subject merchandise from the Republic of Korea entered, or withdrawn from warehouse,

for consumption on or after September 13, 2007, the date of the publication of *Preliminary Determination*. We will instruct CBP to require a cash deposit or the posting of a bond equal to the weighted–average margin, as indicated in the chart above, as follows: (1) the rate for the mandatory respondent will be the rate we have determined in this final determination; (2) if the exporter is not a firm identified in this investigation but the producer is, the rate will be the rate established for the producer of the subject merchandise; (3) the rate for all other producers or exporters will be 138.60 percent. These suspension–of-liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our final determination. As our final determination is affirmative and in accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports or sales (or the likelihood of sales) for importation of the subject merchandise. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding APO

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: November 20, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–23144 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–507–601]

Certain In–shell Roasted Pistachios from the Islamic Republic of Iran: Preliminary Results of Countervailing Duty New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting a new shipper review of the countervailing duty (CVD) order on certain in–shell roasted pistachios from the Islamic Republic of Iran (Iran) for the period January 1, 2006, through December 31, 2006. For information on the net subsidy rate for the reviewed company, please see the ''Preliminary Results of Review'' section of this notice. Interested parties are invited to comment on these preliminary results. (See the ''Public Comment'' section of this notice).

EFFECTIVE DATE: November 28, 2007.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, AD/CVD Operations, Office 3, Import Administration, U.S. Department of Commerce, Room 4014, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone (202) 482–4161.

SUPPLEMENTARY INFORMATION:

Background

On October 7, 1986, the Department published in the **Federal Register** the countervailing duty order on certain in–shell roasted pistachios from Iran. *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Roasted In–shell Pistachios from Iran*, 51 FR 35679 (October 7, 1986). On March 21, 2007, the Department received a timely request for a new shipper review from Kerman Corporation (Kerman) on behalf of Ahmadi's Agricultural Productions, Processing and Trade Complex (Ahmadi). *See* Letter from Ali R. Ahmadi, Kerman Corporation, dated March 21, 2007. On June 1, 2007, the Department published the notice of initiation of this new shipper review for the period of review (POR) of January 1, 2006, through December 31, 2006. *See Certain In–shell Roasted Pistachios from the Islamic Republic of Iran: Notice of Initiation of Countervailing Duty New Shipper Review*, 72 FR 30547 (June 1, 2007).

On June 6, 2007, we issued our initial questionnaire to the Government of Iran (GOI) and Ahmadi, to which Ahmadi and the GOI submitted responses on August 3 and September 14, 2007, respectively. On September 10, 2007, the Department issued a supplemental questionnaire to Ahmadi and Ahmadi submitted a response on October 1, 2007. On October 3, 2007, the Department issued a supplemental questionnaire to the GOI. The GOI did not respond to the supplemental questionnaire.

On October 4, 2007, the Western Pistachio Commission (petitioner) submitted additional subsidy allegations regarding certain programs provided by the GOI. On November 13, 2007, the Department issued supplemental questions to petitioners regarding their additional subsidy allegations. The supplemental information is due to the Department on November 27, 2007, and will be addressed in the final results of this proceeding.

On November 13, 2007, petitioner submitted comments regarding the Department's preliminary results. The Department intends to address these concerns as part of the *Public Comment* phase of this proceeding, as discussed below.

In accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(a), this new shipper review covers only merchandise produced and exported by Ahmadi, for which a review was specifically requested.

Scope of Order

The product covered by this order is all roasted in–shell pistachio nuts, whether roasted in Iran or elsewhere, from which the hulls have been removed, leaving the inner hard shells and edible meat, as currently classifiable in the Harmonized Tariff Schedules of the United States (HTSUS) under item number 0802.50.20.00. The HTSUS subheading is provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Analysis of Programs

I. *Programs Preliminarily Determined to Be Not Used*

Based on the information supplied by Kerman on behalf of Ahmadi, we preliminarily determine that the programs listed below were not used during the POR.

A. Provision of Fertilizer and Machinery
B. Provision of Credit
C. Tax Exemptions
D. Provision of Water and Irrigation Equipment
E. Technical Support
F. Duty Refunds on Imported Raw or Intermediate Materials Used in the Production of Export Goods
G. Program to Improve Quality of Exports of Dried Fruit
H. Iranian Export Guarantee Fund
I. GOI Grants and Loans to Pistachio Farmers
J. Crop Insurance for Pistachios

New Shipper Review Bona Fide Analysis

Consistent with the Department's practice, we investigated the bona fide nature of the sales made by Ahmadi for this new shipper review. The Department reviewed import data provided by U.S. Customs and Border Protection (CBP), and compared the quantity and value of the only shipment by Ahmadi to the United States to imports of subject merchandise by other companies. We also reviewed information on the record with regard to the commercial legitimacy of Ahmadi, Kerman, and the unaffiliated sale in the United States. We find that there is nothing on the record to question the *bona fides* of Ahmadi's sale. Therefore, for purposes of these preliminary results of review, we are treating Ahmadi's sale of subject merchandise to the United States as bona fide for this new shipper review. *See* Memo to the file from Eric B. Greynolds, Program Manager, Office 3, Operations, entitled, ''Preliminary Bona Fide Sales Analysis.''

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we have calculated an individual subsidy rate for Ahmadi, the only producer/exporter subject to this proceeding, for the POR, *i.e.*, calendar year 2006. We preliminarily determine that the total estimated net countervailable subsidy rate is 0.00 percent *ad valorem*.

We intend to issue the following cash deposit requirements, effective upon publication of the notice of final results of review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication: (1) for merchandise produced and exported by Ahmadi, the cash deposit rate will be 0.00 percent, (2) the rate calculated for merchandise exported by Ahmadi but not produced by Ahmadi, the cash deposit rate will be the all–others rate established in the original CVD investigation (*see* 51 FR 35679 (October 7, 1986)); (3) if the exporter is not a firm covered in this review, a prior review, or the original CVD investigation, but the producer is, the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; and (4) if neither the exporter nor producer is a firm covered in this review or the original investigation, the cash deposit rate for all other producers or exporters of the subject merchandise will continue to be 99.52 percent *ad valorem*. This rate is the all–others rate from the final determination in the original investigation.

If the final results of this review remain the same as these preliminary results, the Department intends to issue instructions to CBP 15 days after the date of publication of the final results of this review to liquidate without regard to countervailing duties all shipments of subject merchandise produced and exported by Ahmadi, entered, or withdrawn from warehouse, for consumption during the POR. Should the final results of this review remain the same as these preliminary results, the Department also will instruct CBP not to collect cash deposits of estimated countervailing duties on all shipments of the subject merchandise produced and exported by Ahmadi, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this new shipper review.

Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of the public announcement of this notice. Pursuant to 19 CFR 351.309, interested parties may submit written comments in response to these preliminary results. Unless otherwise indicated by the Department, case briefs must be submitted within 30 days after the publication of these preliminary results. Rebuttal briefs, which are limited to arguments raised in case briefs, must be submitted no later than five days after the time limit for filing case briefs, unless otherwise specified by the Department. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue, and (2) a brief summary of the argument. Parties submitting case and/or rebuttal briefs are requested to provide the Department copies of the public version on disk. Case and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f). Also, pursuant to 19 CFR 351.310, within 30 days of the date of publication of this notice, interested parties may request a public hearing on arguments to be raised in the case and rebuttal briefs. Unless the Secretary specifies otherwise, the hearing, if requested, will be held two days after the date for submission of rebuttal briefs.

Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under 19 CFR 351.309(c)(ii), are due. The Department will publish the final results of this administrative review, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This new shipper review and notice are issued and published in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act, and 19 CFR 351.214(h) and 351.221(b)(4).

Dated: November 20, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E7–23142 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No.: 071121731–7735–01]

Solicitation of Applications for the Minority Business Enterprise Center (MBEC) Program

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with 15 U.S.C. Section 1512 and Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate a Minority Business Enterprise Center (MBEC) in the locations and geographical service areas specified in this notice. The MBEC operates through the use of business consultants and provides a range of business consulting and technical assistance services directly to eligible minority-owned businesses. Responsibility for ensuring that applications in response to this competitive solicitation are complete

and received by MBDA on time is the sole responsibility of the applicant. Applications submitted must be to operate a MBEC and to provide business consultation services to eligible clients. Applications that do not meet these requirements will be rejected. This is not a grant program to help start or to further an individual business.

DATES: The closing date for receipt of applications is January 11, 2008 at 5 p.m. Eastern Standard Time (EST). Completed applications must be received by MBDA at the address below for paper submissions or at *http://www.Grants.gov* for electronic submissions. The due date and time is the same for electronic submissions as it is for paper submissions. The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered. Anticipated time for processing is seventy-five (75) days from the close of the competition period. MBDA anticipates that awards under this notice will be made with a start date of April 1, 2008.

Pre-Application Conference: In connection with this solicitation, a pre-application teleconference will be held on December 12, 2007 at 1 p.m. (EST). Participants must register at least 24 hours in advance of the teleconference and may participate in person or by telephone. Please visit the MBDA Internet Portal at *http://www.mbda.gov* (MBDA Portal) or contact an MBDA representative listed below for registration instructions.

ADDRESSES: (1a) *Paper Submission—If Mailed:* If the application is sent by postal mail or overnight delivery service by the applicant or its representative, one (1) signed original plus two (2) copies of the application must be submitted. Completed application packages must be mailed to: Office of Business Development—MBEC Program, Office of Executive Secretariat, HCHB, Room 5063, Minority Business Development Agency, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Applicants are advised that MBDA's receipt of mail sent via the United States Postal Service may be substantially delayed or suspended in delivery due to security measures. Applicants may therefore wish to use a guaranteed overnight delivery service. Department of Commerce delivery policies for overnight delivery services require all packages to be sent to the address above.

(1b) *Paper Submission—If Hand-Delivered:* If the application is hand-delivered by the applicant or by its representative, one (1) signed original plus two (2) copies of the application must be delivered to: U.S. Department of Commerce, Minority Business Development Agency, Office of Business Development—MBEC Program (extension 1940), HCHB—Room 1874, Entrance #10, 15th Street, NW., (between Pennsylvania and Constitution Avenues), Washington, DC. MBDA will not accept applications that are submitted by the deadline, but that are rejected due to the applicant's failure to adhere to Department of Commerce protocol for hand-deliveries.

(2) *Electronic Submission:* Applicants are encouraged to submit their proposal electronically at *http://www.Grants.gov.* Electronic submissions should be made in accordance with the instructions available at Grants.gov (see *http://www.grants.gov/forapplicants* for detailed information). MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as, in some cases, the process for completing an online application may require 3–5 working days.

FOR FURTHER INFORMATION CONTACT: For further information or for an application package, please visit MBDA's Minority Business Internet Portal at *http://www.mbda.gov.* Paper applications may also be obtained by contacting the MBDA Office of Business Development or the MBDA National Enterprise Center (NEC) in the region in which the MBEC will be located (see below Agency Contacts). In addition, Standard Forms (SF) may be obtained by accessing *http://www.whitehouse.gov/omb/grants* or *http://www.grants.gov.* and Department of Commerce (CD) forms may be accessed at *http://www.doc.gov/forms.*

Agency Contacts:

1. MBDA Office of Business Development, 1401 Constitution Avenue, NW., Room 5075, Washington, DC 20230. Contact: Efrain Gonzalez, Chief, 202–482–1940.

2. Dallas National Enterprise Center (DNEC), 1100 Commerce Street, Room 726, Dallas, Texas 75242. This region covers the states of Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. *Contact:* John F. Iglehart, Regional Director, 214–767–8001.

3. San Francisco National Enterprise Center (SFNEC), 221 Main Street, Room 1280, San Francisco, California 94105. This region covers the states of Alaska, America Samoa, Arizona, California, Hawaii, Idaho, Nevada, Oregon and Washington. *Contact:* Linda M. Marmolejo, Regional Director, 415–744–3001.

4. Atlanta National Enterprise Center (ANEC), 401 W. Peachtree Street, NW., Suite 1715, Atlanta, Georgia 30308. This region covers the states and territories of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee and the Virgin Islands. *Contact:* John F. Iglehart, Regional Director, 404–730–3300 or 214–767–8001.

SUPPLEMENTARY INFORMATION: *Background:* The MBEC Program is a key component of MBDA's overall minority business development assistance program and promotes the growth and competitiveness of eligible minority-owned businesses. MBEC operators leverage project staff and professional consultants to provide a wide-range of direct business assistance services to eligible minority-owned firms, including but not limited to initial consultations and assessments, business technical assistance, and access to federal and non-federal procurement and financing opportunities. MBDA currently funds a network of 31 MBEC projects located throughout the United States. Pursuant to this notice, competitive applications for new awards are being solicited for the MBEC projects identified below.

Locations and Geographical Service Areas: MBDA is soliciting competitive applications from organizations to operate a MBEC in the following locations and geographical service areas:

Name of MBEC	Location of MBEC	MBEC geographical service area**
Honolulu MBEC	Honolulu, HI	Honolulu MSA.**
Miami MBEC	Miami, FL	Miami/Ft. Lauderdale/Pompano Beach MSA.**
Oklahoma City MBEC	Oklahoma City, OK	State of Oklahoma.

** Metropolitan Statistical Area, please see OMB Bulletin No. 07–01, Update of Statistical Area Definitions and Guidance on Their Uses (December 18, 2006) at *http://www.whitehouse.gov/omb/bulletins.*

Electronic Access: A link to the full text of the Announcement of Federal Funding Opportunity (FFO) for this solicitation may be accessed at: *http://www.Grants.gov, http://www.mbda.gov,* or by contacting the appropriate MBDA representative identified above. The FFO contains a full and complete description of the requirements under the MBEC Program. In order to receive proper consideration, applicants must comply with all information and requirements contained in the FFO. Applicants will be able to access, download and submit electronic grant applications for the MBEC Program through *http://www.Grants.gov.* MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as in some cases the process for completing an online application may require additional time (e.g., 3–5 working days). The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered.

Funding Priorities: Preference may be given during the selection process to applications which address the following MBDA funding priorities:

(a) Proposals that include performance goals that exceed by 10% or more the minimum performance goal requirements in the FFO;

(b) Applicants who demonstrate an exceptional ability to identify and work towards the elimination of barriers which limit the access of minority businesses to markets and capital;

(c) Applicants who demonstrate an exceptional ability to identify and work with minority firms seeking to obtain large-scale contracts and/or insertion into supply chains with institutional customers;

(d) Proposals that take a regional approach in providing services to eligible clients; or

(e) Proposals from applicants with pre-existing or established operations in the identified geographic service area(s).

Funding Availability: MBDA anticipates that a total of approximately $574,679 will be available in FY 2008 and that a total of approximately $766,238 will be available in FY 2009 to fund financial assistance awards for the three MBEC projects referenced in this competitive solicitation. The total award period for awards made under this competitive solicitation is anticipated to be twenty-one (21) months and all awards are expected to be made with a start date of April 1, 2008. The anticipated amount of the financial assistance award for each MBEC project (including the minimum 20% non-federal cost share) is as follows:

Project name	April 1, 2008 through December 31, 2008			January 1, 2009 through December 31, 2009		
	Total cost ($)	Federal share ($)	Non-federal share ($) (20% min.)	Total cost ($)	Federal share ($)	Non-federal share ($) (20% min.)
Honolulu MBEC	$222,863	$178,238	$44,625	$297,150	$237,650	$59,500
Miami MBEC	307,941	246,441	61,500	410,588	328,588	82,000
Oklahoma City MBEC	187,500	150,000	37,500	250,000	200,000	50,000

Applicants must submit project plans and budgets for each of the two (2) funding periods covered by the award (April 1, 2008–December 31, 2008 and January 1, 2009–December 31, 2009, respectively). Projects will initially be funded for the first funding period and will not have to compete for funding for the second funding period. However, operators that fail to achieve a ''satisfactory'' or better performance rating for the first funding period may be denied funding for the second funding period. Recommendations for funding for the second funding period are generally evaluated by MBDA based on a ''Satisfactory'' or better mid-year funding performance rating (i.e., April 1, 2007–September 30, 2007) and/or a combination of a mid-year and year-to date (i.e., April 1–December 31, 2007) ''Satisfactory'' or better performance rating. In making such funding recommendations, MBDA and the Department of Commerce will consider the facts and circumstances of each case, such as but not limited to market conditions, most recent performance of the operator and other mitigating circumstances.

Applicants are hereby given notice that FY 2008 funds have not yet been appropriated for the MBEC program. Accordingly, MBDA issues this notice subject to the appropriations made available under the current continuing resolution, H.J. Res. 52, ''Making continuing appropriations for the fiscal year 2008, and for other purposes,'' Public Law 110–92, as amended by H.R. 3222, Public Law 110–116. In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other MBDA or Department of Commerce priorities.

Authority: 15 U.S.C. Section 1512 and Executive Order 11625.

Catalog of Federal Domestic Assistance (CFDA): 11.800, Minority Business Enterprise Centers.

Eligibility: For-profit entities (including but not limited to sole-proprietorships, partnerships, and corporations), non-profit organizations, state and local government entities, American Indian Tribes, and educational institutions are eligible to operate an MBEC.

Program Description: MBDA is soliciting competitive applications from organizations to operate a Minority Business Enterprise Centers (MBEC) (formerly known as Minority Business Development Centers). The MBEC will operate through the use of trained professional business consultants who will assist eligible minority entrepreneurs through direct client engagements. Entrepreneurs eligible for assistance under the MBEC Program are: African Americans, Puerto Ricans, Spanish-speaking Americans, Aleuts, Asian Pacific Americans, Native Americans (including Alaska Natives, Alaska Native Corporations and tribal entities), Eskimos, Asian Indians and Hasidic Jews. No service may be denied to any member of the eligible groups listed above.

The MBEC Program generally requires project staff to provide standardized business assistance services directly to ''eligible minority owned firms,'' with an emphasis on those firms with $500,000 or more in annual revenues and/or those eligible firms with ''rapid growth potential'' (''Strategic Growth Initiative'' or ''SGI'' firms); to develop and maintain a network of strategic

partnerships; to provide collaborative consulting services with MBDA and other MBDA funded programs and strategic partners; and to provide referral services (as necessary) for client transactions. MBEC operators will assist eligible minority-owned firms in accessing federal and non-federal contracting and financing opportunities that result in demonstrable client outcomes.

The MBEC Program incorporates an entrepreneurial approach to building market stability and improving the quality of client services. This entrepreneurial strategy expands the reach of the MBECs by requiring project operators to develop and build upon strategic alliances with public and private sector partners as a means of serving minority-owned firms within each MBEC's geographical service area. The MBEC Program is also designed to effectively leverage MBDA resources, including but not limited to: MBDA Office of Business Development and MBDA National Enterprise Centers; MBDA's Business Internet Portal; and MBDA's nationwide network of MBECs, Native American Business Enterprise Centers (NABECs) and Minority Business Opportunity Centers (MBOCs). MBEC operators are also required to attend a variety of MBDA training programs designed to increase operational efficiencies and the provision of value-added client services.

MBEC operators are generally required to provide the following four client services: (1) Client Assessment—this is a standardized service activity that includes identifying the client's immediate and long-term needs and establishes a projected growth track; (2) Strategic Business Consulting—this involves providing intensive business consulting services that can be delivered as personalized consulting or group consulting; (3) Access to Capital—this assistance is designed to secure the financial capital necessary for client growth, and (4) Access to Markets—this involves assisting clients to identify and access opportunities for increased sales and revenues.

Please refer to the FFO pertaining to this competitive solicitation for a full and complete description of the application and programmatic requirements under the MBEC Program.

Match Requirements: The MBEC Program requires a minimum non-federal cost share of 20%, which must be reflected in the proposed project budget. Non-federal cost share is the portion of the project cost not borne by the Federal Government. Applicants must satisfy the non-federal cost sharing requirements in one or more of the following four means or any combination thereof: (1) Client fees; (2) applicant cash contributions; (3) applicant in-kind (i.e., non-cash) contributions; or (4) third-party in-kind contributions. The MBEC is required to charge client fees for services rendered and such fees must be used by the operator towards meeting the non-federal cost share requirements under the award. Applicants will be awarded up to five bonus points to the extent that the proposed project budget includes a non-federal cost share contribution, measured as a percentage of the overall project budget, exceeding 20% (see Evaluation Criterion below).

Evaluation Criterion: Proposals will be evaluated and applicants will be selected based on the below evaluation criterion. The maximum total number of points that an application may receive is 105, including the bonus points for exceeding the minimum required non-federal cost sharing, except when oral presentations are made by applicants. If oral presentations are made (see below: Oral Presentation—Optional), the maximum total of points that can be earned is 115. The number of points assigned to each evaluation criterion will be determined on a competitive basis by the MBDA review panel based on the quality of the application with respect to each evaluation criterion.

1. Applicant Capability (40 points)

Proposals will be evaluated with respect to the applicant's experience and expertise in providing the work requirements listed. Specifically, proposals will be evaluated as follows:

(a) *Community*—Experience in and knowledge of the minority community, minority business sector, and strategies for enhancing its growth and expansion; particular emphasis shall be on expanding SGI firms. Consideration will be given as to whether the applicant has a physical presence in the geographic service area at the time of its application (4 points);

(b) *Business Consulting*—Experience in and knowledge of business consulting with respect to minority firms, with emphasis on SGI firms in the geographic service area (5 points);

(c) *Financing*—Experience in and knowledge of the preparation and formulation of successful financial transactions, with an emphasis on the geographic service area (5 points);

(d) *Procurements and Contracting*—Experience in and knowledge of the public and private sector contracting opportunities for minority businesses, as well as demonstrated expertise in assisting clients into supply chains (5 points);

(e) *Financing Networks*—Resources and professional relationships within the corporate, banking and investment community that may be beneficial to minority-owned firms (5 points);

(f) *Establishment of a Self-Sustainable Service Model*—Summary plan to establish a self-sustainable model for continued services to the MBE communities beyond the MBDA award period (3 points);

(g) *MBE Advocacy*—Experience and expertise in advocating on behalf of minority communities and minority businesses, both as to specific transactions in which a minority business seeks to engage and as to broad market advocacy for the benefit of the minority community at large (3 points); and

(h) *Key Staff*—Assessment of the qualifications, experience and proposed role of staff that will operate the MBEC. In particular, an assessment will be made to determine whether proposed key staff possesses the expertise in utilizing information systems and the ability to successfully deliver program services. At a minimum the applicant must identify a proposed project director. (10 points).

2. Resources (20 points)

The applicant's proposal will be evaluated as followed:

(a) *Resources*—Resources (not included as part of the non-federal cost share) that will be used in implementing the program, including but not limited to existing prior and/or current data lists that will serve in fostering immediate success for the MBEC (8 points);

(b) *Location*—Assessment of the applicant's strategic rationale for the proposed physical location of the MBEC. Applicant is encouraged to establish a location for the MBEC that is in a building which is separate and apart from any of the applicant's existing offices in the geographic service area (2 points);

(c) *Partners*—How the applicant plans to establish and maintain the network of strategic partners and the manner in which these partners will support the MBEC in meeting program performance goals (5 points); and

(d) *Equipment*—How the applicant plans to satisfy the MBEC information technology requirements, including computer hardware, software requirements and network map (5 points).

3. Techniques and Methodologies (20 points)

The applicant's proposal will be evaluated as follows:

(a) *Performance Measures*—For each funding period, the manner in which the applicant relates each performance measure to the financial information and market resources available in the geographic service area (including existing client list); how the applicant will create MBEC brand recognition (marketing plan); and how the applicant will satisfy program performance goals. In particular, emphasis may be placed on the manner in which the applicant matches MBEC performance goals with client service hours and how it accounts for existing market conditions in its strategy to achieve such goals (10 points);

(b) *Start-up Phase*—How the applicant will commence MBEC operations within the initial 30-day period. The MBEC shall have thirty (30) days to become fully operational after an award is made (3 points); and

(c) *Work Requirement Execution Plan*—The applicant will be evaluated on how effectively and efficiently staff time will be used to achieve the work requirements, particularly with respect to periods beyond the start-up phase (7 points).

4. Proposed Budget and Budget Narrative (20 points)

The applicant's proposal will be evaluated as follows:

(a) *Reasonableness, Allowability and Allocability of Proposed Program Costs.* All of the proposed program costs expenditures should be discussed and the budget line-item narrative must match the proposed budget. Fringe benefits and other percentage item calculations should match the proposed budget line-item and narrative (5 points);

(b) *Non-Federal Cost Share.* The required 20% non-Federal share must be adequately addressed and properly documented, including but not limited to how client fees (if proposed) will be used by the applicant in meeting the non-federal cost-share (5 points); and

(c) *Performance-Based Budgeting.* The extent to which the line-item budget and budget narrative relate to the accomplishment of the MBEC work requirements and performance measures (*i.e.*, performance-based budgeting) (10 points).

Bonus for Non-Federal Cost Sharing (maximum of 5 points): Proposals with non-federal cost sharing exceeding 20% of the total project costs will be awarded bonus points on the following scale: more than 20%–less than 25% = 1 point; 25% or more–less than 30% = 2 points; 30% or more–less than 35% = 3 points; 35% or more–less than 40% = 4 points; and 40% or more = 5 points. Non-federal cost sharing of at least 20% is required under the MBEC Program. Non-federal cost sharing is the portion of the total project cost not borne by the Federal Government and may be met by the applicant in any one or more of the following four means (or a combination thereof): (1) Client fees; (2) cash contributions; (3) non-cash applicant contributions; or, (4) third party in-kind contributions.

5. Oral Presentation—Optional (10 points)

Oral presentations are optional and held *only* when requested by MBDA. This action may be initiated for the top two (2) ranked applications for each project and will be applied on a consistent basis for each project competition. Oral presentations will be used to establish a final evaluation and ranking.

The applicant's presentation will be evaluated as to the extent to which the presentation demonstrates:

(a) How the applicant will effectively and efficiently assist MBDA in the accomplishment of its mission (2 points);

(b) Business operating priorities designed to manage a successful MBEC (2 points);

(c) A management philosophy that achieves an effective balance between micromanagement and complete autonomy for its Project Director (2 points);

(d) Robust search criteria for the identification of a Project Director (1 point);

(e) Effective employee recruitment and retention policies and procedures (1 point); and

(f) A competitive and innovative approach to exceeding performance requirements (2 points).

Review and Selection Process:

1. Initial Screening

Prior to the formal paneling process, each application will receive an initial screening to ensure that all required forms, signatures and documentation are present. An application will be considered non-responsive and will not be evaluated by the review panel if it is received after the closing date for receipt of applications, the applicant fails to submit an original, signed Form SF–424 by the application closing date (paper applications only), or the application does not provide for the operation of a MBEC. Other application deficiencies may be accounted for through point deductions during panel review.

2. Panel Review

Each application will receive an independent, objective review by a panel qualified to evaluate the applications submitted. The review panel will consist of at least 3 persons, all of whom will be full-time federal employees and at least one of whom will be an MBDA employee, who will review the applications for a specified project based on the above evaluation criterion. Each reviewer shall evaluate and provide a score for each proposal. Each project review panel (through the panel Chairperson) shall provide the MBDA National Director (Recommending Official) with a ranking of the applications based on the average of the reviewers' scores and shall also provide a recommendation regarding funding of the highest scoring application.

3. Oral Presentation—Upon MBDA Request

MBDA may invite the two (2) top-ranked applicants for each project competition to develop and provide an oral presentation. If an oral presentation is requested, the affected applicants will receive a formal communication (via standard mail, e-mail or fax) from MBDA indicating the time and date for the presentation. In-person presentations are not mandatory but are encouraged; telephonic presentations are acceptable. Applicants will be asked to submit a PowerPoint presentation (or equivalent) to MBDA that addresses the oral presentation criteria set forth above. The presentation must be submitted at least 24 hours before the scheduled date and time of the presentation. The presentation will be made to the MBDA National Director (or his/her designee) and up to three senior MBDA staff who did not serve on the original review panel. The oral panel members may ask follow-up questions after the presentation. MBDA will provide the teleconference dial-in number and pass code. Each applicant will present to MBDA staff only; competitors are not permitted to listen (and/or watch) other presentations.

All costs pertaining to this presentation shall be borne by the applicant. MBEC award funds may *not* be used as a reimbursement for this presentation. MBDA will not accept any requests or petitions for reimbursement.

The oral panel members shall score each presentation in accordance with the oral presentation criterion provided above. An average score shall be compiled and added to the score of the original panel review.

4. Final Recommendation

The MBDA National Director makes the final recommendation to the Grants Officer regarding the funding of applications under this competitive solicitation. MBDA expects to recommend for funding the highest ranking application for each project, as evaluated and recommended by the review panel and taking into account oral presentations (as applicable). However, the MBDA National Director may not make any selection, or he may select an application out of rank order for the following reasons:

(a) A determination that an application better addresses one or more of the funding priorities for this competition. The National Director (or his/her designee) reserves the right to conduct one or more site visits (subject to the availability of funding), in order to make a better assessment of an applicant's capability to achieve the funding priorities; or

(b) The availability of MBDA funding.

Prior to making a final recommendation to the Grants Officer, MBDA may request that the apparent winner of the competition provide written clarifications (as necessary) regarding its application.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Limitation of Liability: In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other MBDA or Department of Commerce priorities. All funding periods are subject to the availability of funds to support the continuation of the project and the Department of Commerce and MBDA priorities. Publication of this notice does not obligate the Department of Commerce or MBDA to award any specific cooperative agreement or to obligate all or any part of available funds.

Universal Identifier: Applicants should be aware that they will be required to provide a Dun and Bradstreet Data Universal Numbering system (DUNS) number during the application process. See the June 27, 2003 **Federal Register** notice (68 FR 38402) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or by accessing the Grants.gov Web site at *http://www.Grants.gov.*

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389) are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provisions of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Executive Order 12866: This notice has been determined to be not significant for purposes of E.O. 12866.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits, or contracts (5 U.S.C. 533(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 533 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: November 21, 2007.

Ronald N. Langston,

National Director, Minority Business Development Agency.

[FR Doc. E7–23129 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

[Docket No.: 071121729–7734–01]

Solicitation of Applications for the Native American Business Enterprise Center (NABEC) Program

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with 15 U.S.C. 1512 and Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications from organizations to operate a Native American Business Enterprise Center (NABEC) in the locations and geographical service areas specified in this notice. The NABEC operates through the use of business consultants and provides a range of business consulting and technical assistance services directly to Native American- and other eligible minority-owned businesses. Responsibility for ensuring that applications in response to this competitive solicitation are complete and received by MBDA on time is the sole responsibility of the applicant. Applications submitted must be to operate a NABEC and to provide business consultation services to eligible clients. Applications that do not meet these requirements will be rejected. This is not a grant program to help start or to further an individual business.

DATES: The closing date for receipt of applications is January 11, 2008 at 5 p.m. Eastern Standard Time (EST). Completed applications must be received by MBDA at the address below for paper submissions or at *http://www.Grants.gov* for electronic submissions. The due date and time is the same for electronic submissions as it is for paper submissions. The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered. Anticipated time for processing is seventy-five (75) days from the close of the competition period. MBDA anticipates that awards under this notice will be made with a start date of April 1, 2008.

Pre-Application Conference: In connection with this solicitation, a pre-application teleconference will be held on December 11, 2007 at 1:00 p.m. (EST). Participants must register at least 24 hours in advance of the teleconference and may participate in person or by telephone. Please visit the MBDA Internet Portal at *http://www.mbda.gov* (MBDA Portal) or contact an MBDA representative listed below for registration instructions.

ADDRESSES: (1a) *Paper Submission—If Mailed:* If the application is sent by postal mail or overnight delivery service by the applicant or its representative, one (1) signed original plus two (2) copies of the application must be submitted. Completed application packages must be mailed to: Office of Business Development—NABEC Program, Office of Executive Secretariat, HCHB, Room 5063, Minority Business

Development Agency, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230.

Applicants are advised that MBDA's receipt of mail sent via the United States Postal Service may be substantially delayed or suspended in delivery due to security measures. Applicants may therefore wish to use a guaranteed overnight delivery service. Department of Commerce delivery policies for overnight delivery services require all packages to be sent to the address above.

(1b) *Paper Submission—If Hand-Delivered:* If the application is hand-delivered by the applicant or by its representative, one (1) signed original plus two (2) copies of the application must be delivered to: U.S. Department of Commerce, Minority Business Development Agency, Office of Business Development—NABEC Program (extension 1940), HCHB—Room 1874, Entrance #10, 15th Street, NW. (between Pennsylvania and Constitution Avenues), Washington, DC. MBDA will not accept applications that are submitted by the deadline, but that are rejected due to the applicant's failure to adhere to Department of Commerce protocol for hand-deliveries.

(2) *Electronic Submission:* Applicants are encouraged to submit their proposal electronically at *http://www.Grants.gov.* Electronic submissions should be made in accordance with the instructions available at Grants.gov (see *http://www.grants.gov/forapplicants* for detailed information). MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as, in some cases, the process for completing an online application may require 3–5 working days.

FOR FURTHER INFORMATION CONTACT: For further information or for an application package, please visit MBDA's Minority Business Internet Portal at *http://www.mbda.gov.* Paper applications may also be obtained by contacting the MBDA Office of Business Development or the MBDA National Enterprise Center (NEC) in the region in which the NABEC will be located (see below Agency Contacts). In addition, Standard Forms (SF) may be obtained by accessing *http://www.whitehouse.gov/omb/grants* or *http://www.grants.gov* and Department of Commerce (CD) forms may be accessed at *http://www.doc.gov/forms.*

Agency Contacts:

1. MBDA Office of Business Development, 1401 Constitution Avenue, NW., Room 5075, Washington, DC 20230. Contact: Efrain Gonzalez, Chief, 202–482–1940.

2. MBDA Chicago National Enterprise Center (CNEC), 55 E. Monroe Street, Suite 2810, Chicago, Illinois 60603. This region covers the states of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, Ohio, and Wisconsin. *Contact:* Eric Dobyne, Regional Director, 312–353–0182.

3. Dallas National Enterprise Center (DNEC), 1100 Commerce Street, Room 726, Dallas, Texas 75242. This region covers the states of Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. *Contact:* John F. Iglehart, Regional Director, 214–767–8001.

4. San Francisco National Enterprise Center (SFNEC), 221 Main Street, Room 1280, San Francisco, California 94105. This region covers the states of Alaska, America Samoa, Arizona, California, Hawaii, Idaho, Nevada, Oregon and Washington. *Contact:* Linda M. Marmolejo, Regional Director, 415–744–3001.

SUPPLEMENTARY INFORMATION:

Background: The NABEC Program is a key component of MBDA's overall minority business development assistance program and promotes the growth and competitiveness of Native American and eligible minority-owned businesses. NABEC operators leverage project staff and professional consultants to provide a wide range of direct business assistance services to Native American, tribal entities and eligible minority-owned firms. NABEC services include, but are not limited to, initial consultations and assessments, business technical assistance, and access to Federal and non-Federal procurement and financing opportunities.

MBDA currently funds a network of eight NABEC projects located throughout the United States. Pursuant to this notice, competitive applications for new three-year awards are being solicited for the five NABEC projects set forth below. MBDA intends to hold a separate award competition during FY 2008 for the remaining three NABEC projects, due to their current award cycles which end on July 31, 2008 or August 31, 2008.

Geographical Service Areas: MBDA is soliciting competitive applications from organizations to operate a NABEC and to provide services in the following geographical service areas:

NABEC name	Geographical service area
Arizona NABEC	State of Arizona.
California NABEC	State of California.
Minnesota/Iowa NABEC	States of Minnesota & Iowa.
North/South Dakota NABEC	States of North Dakota & South Dakota.
Northwest NABEC	States of Washington, Oregon & Idaho.

The NABEC project must be physically located within the applicable geographical service area.

Electronic Access: A link to the full text of the Announcement of Federal Funding Opportunity (FFO) for this solicitation may be accessed at: *http://www.Grants.gov, http://www.mbda.gov,* or by contacting the appropriate MBDA representative identified above. The FFO contains a full and complete description of the requirements under the NABEC Program. In order to receive proper consideration, applicants must comply with all information and requirements contained in the FFO. Applicants will be able to access, download and submit electronic grant applications for the NABEC Program through *http://www.Grants.gov.* MBDA strongly recommends that applicants not wait until the application deadline date to begin the application process through Grants.gov as in some cases the process for completing an online application may require additional time (e.g., 3–5 working days). The date that applications will be deemed to have been submitted electronically shall be the date and time received at Grants.gov. Applicants should save and print the proof of submission they receive from Grants.gov. Applications received after the closing date and time will not be considered.

Funding Priorities: Preference may be given during the selection process to applications which address the following MBDA funding priorities:

(a) Proposals that include performance goals that exceed by 10% or more the minimum performance goal requirements in the FFO;

(b) Applicants who demonstrate an exceptional ability to identify and work

towards the elimination of barriers which limit the access of minority businesses to markets and capital;

(c) Applicants who demonstrate an exceptional ability to identify and work with Native American firms, tribal entities or minority firms seeking to obtain large-scale contracts and/or insertion into supply chains with institutional customers;

(d) Proposals that utilize fee for service models and those that use innovative approaches to charging and collecting fees from clients;

(e) Proposals that take a regional approach in providing services to eligible clients; or

(f) Proposals from applicants with pre-existing or established operations in the identified geographic service area(s).

Funding Availability: MBDA anticipates that a total of approximately $1,116,500 will be available in each of FYs 2008 through 2010 to fund financial assistance awards for the five NABEC projects referenced in this competitive solicitation. The total award period for awards made under this competitive solicitation is anticipated to be three years and all awards are expected to be made with a start date of April 1, 2008. The anticipated amount of the financial assistance award for each NABEC project (including the minimum 10% non-federal cost share) is as follows:

Project name	April 1, 2008 through March 31, 2009			April 1, 2009 through March 31, 2010			April 1, 2010 through March 31, 2011		
	Total Cost ($)	Federal share ($)	Non-federal share ($) (10% min.)	Total cost ($)	Federal share ($)	Non-federal share ($) (10% min.)	Total cost ($)	Federal share ($)	Non-federal share ($) (10% min.)
(1) Arizona NABEC ..	$225,500	$203,000	$22,500	$225,500	$203,000	$22,500	$225,500	$203,000	$22,500
(2) California NABEC	330,500	297,500	33,000	330,500	297,500	33,000	330,500	297,500	33,000
(3) Minnesota/Iowa NABEC	222,300	200,000	22,300	222,300	200,000	22,300	222,300	200,000	22,300
(4)North/South Dakota NABEC	225,500	203,000	22,500	225,500	203,000	22,500	225,500	203,000	22,500
(5) Northwest NABEC	236,700	213,000	23,700	236,700	213,000	23,700	236,700	213,000	23,700

Applicants must submit project plans and budgets for each of the three (3) program years. Projects will be funded for no more than one year at a time. Project proposals accepted for funding will not compete for funding in subsequent budget periods within the approved award period. However, operators that fail to achieve a ''satisfactory'' or better performance rating for the preceding program year may be denied second- or third-year funding (as the case may be). Recommendations for second- and third-year funding are generally evaluated by MBDA based on a mid-year performance rating and/or combination of mid-year and cumulative third quarter performance (e.g., April 1–January 31) performance rating. In making such funding recommendations, MBDA and the Department of Commerce will consider the facts and circumstances of each case, such as but not limited to market conditions, most recent performance of the operator and other mitigating circumstances.

Applicants are hereby given notice that FY 2008 funds have not yet been appropriated for the NABEC program. Accordingly, MBDA issues this notice subject to the appropriations made available under the current continuing resolution, H.J. Res. 52, ''Making continuing appropriations for the fiscal year 2008, and for other purposes,'' Public Law 110–92, as amended by H.R. 3222, Public Law 110–116. In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other MBDA or Department of Commerce priorities.

Authority: 15 U.S.C. Section 1512 and Executive Order 11625.

Catalog of Federal Domestic Assistance (CFDA): 11.801, Native American Business Enterprise Centers.

Eligibility: For-profit entities (including but not limited to sole-proprietorships, partnerships, and corporations), non-profit organizations, state and local government entities, American Indian Tribes, and educational institutions are eligible to operate a NABEC.

Program Description: MBDA is soliciting competitive applications from organizations to operate Native American Business Enterprise Centers (NABEC) (formerly known as Native American Business Development Centers). The NABEC will operate through the use of trained professional business consultants who will assist Native American and other minority entrepreneurs and tribal entities through direct client engagements. Entrepreneurs eligible for assistance under the NABEC Program are Native Americans (including Alaska Natives, Alaska Native Corporations and tribal entities), Eskimos, African Americans, Puerto Ricans, Spanish-speaking Americans, Aleuts, Asian Pacific Americans, Asian Indians and Hasidic Jews. References throughout this notice regarding a NABEC's provision of services and assistance to Native American clients also includes the eligible non-Native American clients listed in the preceding sentence. No service may be denied to any member of the eligible groups listed above.

The NABEC Program generally requires project staff to provide standardized business assistance services directly to eligible Native American clients, with an emphasis on those firms with $500,000 or more in annual revenues and/or those eligible firms with ''rapid growth potential'' (''Strategic Growth Initiative'' or ''SGI'' firms); to develop and maintain a network of strategic partnerships; to provide collaborative consulting services with MBDA and other MBDA funded programs and strategic partners; and to provide referral services (as necessary) for client transactions. NABEC operators will assist Native American clients in accessing federal and non-federal contracting and financing opportunities that result in demonstrable client outcomes. Specific work requirements and performance metrics are used by MBDA to evaluate each project and are a key component of the NABEC program.

The NABEC Program also incorporates an entrepreneurial approach to building market stability and improving quality of services delivered. This strategy expands the reach of the NABECs by requiring project operators to develop and build upon strategic alliances with public and private sector partners, as a means of

serving Native American and minority-owned firms within each NABEC's geographical service area. The NABEC Program is also designed to leverage MBDA resources including but not limited to: MBDA Office of Native American Business Development; MBDA Office of Business Development; MBDA National Enterprise Centers; MBDA Business Internet Portal; and MBDA's network of Minority Business Opportunity Centers (MBOCs), Minority Business Enterprise Centers (MBECs), and other NABECs. NABEC operators are required to attend a variety of MBDA training programs designed to increase operational efficiencies and the provision of value-added client services.

NABEC operators are generally required to provide the following four client services: (1) Client Assessment—this is a standardized service activity that includes identifying the client's immediate and long-term needs and establishes a projected growth track; (2) Strategic Business Consulting—this involves providing intensive business consulting services that can be delivered as personalized consulting or group consulting; (3) Access to Capital—this assistance is designed to secure the financial capital necessary for client growth, and (4) Access to Markets—this involves assisting clients to identify and access opportunities for increased sales and revenues.

Please refer to the FFO pertaining to this competitive solicitation for a full and complete description of the application and programmatic requirements under the NABEC Program.

Match Requirements: The NABEC Program requires a minimum non-federal cost share of 10%, which must be reflected in the proposed project budget. Non-federal cost share is the portion of the project cost not borne by the Federal Government. Applicants must satisfy the non-federal cost sharing requirements in one or more of the following four means or any combination thereof: (1) Client fees; (2) applicant cash contributions; (3) applicant in-kind (i.e., non-cash) contributions; or (4) third-party in-kind contributions. The NABEC may but is not required to charge client fees for services rendered, although MBDA encourages the applicant to implement a fee-for-service program. Client fees (if imposed) must be used towards meeting non-federal cost share requirements and must be used in furtherance of the program objectives. Applicants will be awarded up to five bonus points to the extent that the proposed project budget includes a non-federal cost share contribution, measured as a percentage of the overall project budget, exceeding 10% (see Evaluation Criterion below).

Evaluation Criterion: Proposals will be evaluated and applicants will be selected based on the below evaluation criterion. The maximum total number of points that an application may receive is 105, including the bonus points for exceeding the minimum required non-federal cost sharing, except when oral presentations are made by applicants. If oral presentations are made (see below: Oral Presentation—Optional), the maximum total of points that can be earned is 115. The number of points assigned to each evaluation criterion will be determined on a competitive basis by the MBDA review panel based on the quality of the application with respect to each evaluation criterion.

1. Applicant Capability (40 points)

Proposals will be evaluated with respect to the applicant's experience and expertise in providing the work requirements listed. Specifically, proposals will be evaluated as follows:

(a) Community—Experience in and knowledge of the Native American community, Native American tribal entities and minority business sector, and strategies for enhancing its growth and expansion; particular emphasis shall be on expanding SGI firms and tribal entities. Consideration will be given as to whether the applicant has a physical presence in the geographic service area at the time of its application (4 points);

(b) Business Consulting—Experience in and knowledge of business consulting with respect to Native American and minority firms and tribal entities, with emphasis on SGI firms in the geographic service area (5 points);

(c) *Financing*—Experience in and knowledge of the preparation and formulation of successful financial transactions, with an emphasis on the geographic service area (5 points);

(d) *Procurements and Contracting*—Experience in and knowledge of the public and private sector contracting opportunities for Native American entities and minority businesses, as well as demonstrated expertise in assisting clients into supply chains (5 points);

(e) *Financing Networks*—Resources and professional relationships within the corporate, banking and investment community that may be beneficial to Native American entities and minority-owned firms (5 points);

(f) *Establishment of a Self-Sustainable Service Model*—Summary plan to establish a self-sustainable model for continued services to the Native American and MBE communities beyond the three-year MBDA award period (3 points);

(g) *MBE Advocacy*—Experience and expertise in advocating on behalf of Native American communities, Native American tribal entities and minority businesses, both as to specific transactions in which a minority business seeks to engage and as to broad market advocacy for the benefit of the minority community at large (3 points); and

(h) *Key Staff*—Assessment of the qualifications, experience and proposed role of staff that will operate the NABEC. In particular, an assessment will be made to determine whether proposed key staff possesses the expertise in utilizing information systems and the ability to successfully deliver program services. At a minimum the applicant must identify a proposed project director (10 points).

2. Resources (20 points)

The applicant's proposal will be evaluated as followed:

(a) *Resources*—Resources (not included as part of the non-federal cost share) that will be used in implementing the program, including but not limited to existing prior and/or current data lists that will serve in fostering immediate success for the NABEC (8 points);

(b) *Location*—Assessment of the applicant's strategic rationale for the proposed physical location of the NABEC. Applicant is encouraged to establish a location for the NABEC that is in a building which is separate and apart from any of the applicant's existing offices in the geographic service area (2 points);

(c) *Partners*—How the applicant plans to establish and maintain the network of strategic partners and the manner in which these partners will support the NABEC in meeting program performance goals (5 points); and

(d) *Equipment*—How the applicant plans to satisfy the NABEC information technology requirements, including computer hardware, software requirements and network map (5 points).

3. Techniques and Methodologies (20 points)

The applicant's proposal will be evaluated as follows:

(a) *Performance Measures*—For each program year, the manner in which the applicant relates each performance measure to the financial information and market resources available in the geographic service area (including existing client list); how the applicant will create NABEC brand recognition (marketing plan); and how the applicant

will satisfy program performance goals. In particular, emphasis may be placed on the manner in which the applicant matches NABEC performance goals with client service hours and how it accounts for existing market conditions in its strategy to achieve such goals (10 points);

(b) *Start-up Phase*—How the applicant will commence NABEC operations within the initial 30-day period. The NABEC shall have thirty (30) days to become fully operational after an award is made (3 points); and

(c) *Work Requirement Execution Plan*—The applicant will be evaluated on how effectively and efficiently staff time will be used to achieve the work requirements, particularly with respect to periods beyond the start-up phase (7 points).

4. Proposed Budget and Budget Narrative (20 points)

The applicant's proposal will be evaluated as follows:

(a) *Reasonableness, Allowability and Allocability of Proposed Program Costs.* All of the proposed program costs expenditures should be discussed and the budget line-item narrative must match the proposed budget. Fringe benefits and other percentage item calculations should match the proposed budget line-item and narrative (5 points);

(b) *Non-Federal Cost Share.* The required 10% non-Federal share must be adequately addressed and properly documented, including but not limited to how client fees (if proposed) will be used by the applicant in meeting the non-federal cost-share (5 points); and

(c) *Performance-Based Budgeting.* The extent to which the line-item budget and budget narrative relate to the accomplishment of the NABEC work requirements and performance measures (i.e., performance-based budgeting) (10 points).

Bonus for Non-Federal Cost Sharing (maximum of 5 points): Proposals with non-federal cost sharing exceeding 10% of the total project costs will be awarded bonus points on the following scale: more than 10%–less than 15% = 1 point; 15% or more–less than 20% = 2 points; 20% or more–less than 25% = 3 points; 25% or more–less than 30% = 4 points; and 30% or more = 5 points. Non-federal cost sharing of at least 10% is required under the NABEC Program. Non-federal cost sharing is the portion of the total project cost not borne by the Federal Government and may be met by the applicant in any one or more of the following four means (or a combination thereof): (1) Client fees (encouraged but not mandatory); (2) cash contributions; (3) non-cash applicant contributions; or (4) third party in-kind contributions.

5. Oral Presentation—Optional (10 points)

Oral presentations are optional and held only when requested by MBDA. This action may be initiated for the top two (2) ranked applications for each project and will be applied on a consistent basis for each project competition. Oral presentations will be used to establish a final evaluation and ranking.

The applicant's presentation will be evaluated as to the extent to which the presentation demonstrates:

(a) How the applicant will effectively and efficiently assist MBDA in the accomplishment of its mission (2 points);

(b) Business operating priorities designed to manage a successful NABEC (2 points);

(c) A management philosophy that achieves an effective balance between micromanagement and complete autonomy for its Project Director (2 points);

(d) Robust search criteria for the identification of a Project Director (1 point);

(e) Effective employee recruitment and retention policies and procedures (1 point); and

(f) A competitive and innovative approach to exceeding performance requirements (2 points).

Review and Selection Process:

1. Initial Screening

Prior to the formal paneling process, each application will receive an initial screening to ensure that all required forms, signatures and documentation are present. An application will be considered non-responsive and will not be evaluated by the review panel if it is received after the closing date for receipt of applications, the applicant fails to submit an original, signed Form SF–424 by the application closing date (paper applications only), or the application does not provide for the operation of a NABEC. Other application deficiencies may be accounted for through point deductions during panel review.

2. Panel Review

Each application will receive an independent, objective review by a panel qualified to evaluate the applications submitted. The review panel will consist of at least 3 persons, all of whom will be full-time federal employees and at least one of whom will be an MBDA employee, who will review the applications for a specified project based on the above evaluation criterion. Each reviewer shall evaluate and provide a score for each proposal. Each project review panel (through the panel Chairperson) shall provide the MBDA National Director (Recommending Official) with a ranking of the applications based on the average of the reviewers' scores and shall also provide a recommendation regarding funding of the highest scoring application.

3. Oral Presentation—Upon MBDA Request

MBDA may invite the two (2) top-ranked applicants for each project competition to develop and provide an oral presentation. If an oral presentation is requested, the affected applicants will receive a formal communication (via standard mail, e-mail or fax) from MBDA indicating the time and date for the presentation. In-person presentations are not mandatory but are encouraged; telephonic presentations are acceptable. Applicants will be asked to submit a PowerPoint presentation (or equivalent) to MBDA that addresses the oral presentation criteria set forth above. The presentation must be submitted at least 24 hours before the scheduled date and time of the presentation. The presentation will be made to the MBDA National Director (or his/her designee) and up to three senior MBDA staff who did not serve on the original review panel. The oral panel members may ask follow-up questions after the presentation. MBDA will provide the teleconference dial-in number and pass code. Each applicant will present to MBDA staff only; competitors are not permitted to listen (and/or watch) other presentations.

All costs pertaining to this presentation shall be borne by the applicant. NABEC award funds may not be used as a reimbursement for this presentation. MBDA will not accept any requests or petitions for reimbursement.

The oral panel members shall score each presentation in accordance with the oral presentation criterion provided above. An average score shall be compiled and added to the score of the original panel review.

4. Final Recommendation

The MBDA National Director makes the final recommendation to the Grants Officer regarding the funding of applications under this competitive solicitation. MBDA expects to recommend for funding the highest ranking application for each project, as evaluated and recommended by the review panel and taking into account oral presentations (as applicable).

However, the MBDA National Director may not make any selection, or he may select an application out of rank order for the following reasons:

(a) A determination that an application better addresses one or more of the funding priorities for this competition. The National Director (or his/her designee) reserves the right to conduct one or more site visits (subject to the availability of funding), in order to make a better assessment of an applicant's capability to achieve the funding priorities; or

(b) The availability of MBDA funding.

Prior to making a final recommendation to the Grants Officer, MBDA may request that the apparent winner of the competition provide written clarifications (as necessary) regarding its application.

Intergovernmental Review: Applications under this program are not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Limitation of Liability: In no event will MBDA or the Department of Commerce be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other MBDA or Department of Commerce priorities. All funding periods are subject to the availability of funds to support the continuation of the project and the Department of Commerce and MBDA priorities. Publication of this notice does not obligate the Department of Commerce or MBDA to award any specific cooperative agreement or to obligate all or any part of available funds.

Universal Identifier: Applicants should be aware that they will be required to provide a Dun and Bradstreet Data Universal Numbering System (DUNS) number during the application process. See the June 27, 2003 **Federal Register** notice (68 FR 38402) for additional information. Organizations can receive a DUNS number at no cost by calling the dedicated toll-free DUNS Number request line at 1–866–705–5711 or by accessing the Grants.gov Web site at *http://www.Grants.gov*.

Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements: The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of December 30, 2004 (69 FR 78389) are applicable to this solicitation.

Paperwork Reduction Act: This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424, 424A, 424B, SF–LLL, and CD–346 have been approved by OMB under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, and 0605–0001. Notwithstanding any other provisions of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Executive Order 12866: This notice has been determined to be not significant for purposes of E.O. 12866.

Administrative Procedure Act/ Regulatory Flexibility Act: Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits, or contracts (5 U.S.C. 533(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 533 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: November 21, 2007.

Ronald N. Langston,

National Director, Minority Business Development Agency.

[FR Doc. E7–23128 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–21–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE09

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program; Notice of Observer Program Public Workshop

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

ACTION: Notification of public workshop.

SUMMARY: NMFS will present a public workshop on the implementation of new Alaska groundfish observer sampling protocols for fishery participants and other interested parties. At the workshop, NMFS will provide an overview of the changes to observer sampling protocols, discuss alterations made in the observer electronic data submission and communications system, and answer questions. NMFS is conducting this public workshop to provide assistance to fishery participants in understanding the sampling protocols which will be used by groundfish observers in 2008 and beyond.

DATES: The workshop will be held on Tuesday, December 11, 2007, from 10 a.m. to 1 p.m. Pacific standard time.

ADDRESSES: The workshop will be held at the Nordic Heritage Museum, 3014 NW 67th Street, Seattle, WA 98117.

FOR FURTHER INFORMATION CONTACT: Jennifer Ferdinand, 206–526–4076 or *Jennifer.Ferdinand@noaa.gov*.

SUPPLEMENTARY INFORMATION: Groundfish fisheries in waters of the Gulf of Alaska (GOA) and Bering Sea and Aleutian Islands management area (BSAI) are managed under quotas set annually for groundfish species and for several other species that the groundfish fishery is prohibited from retaining. These quotas may be apportioned among areas, seasons, gear types, processor and catcher vessel sectors, cooperatives, and individual fishermen. Both retained and discarded catch are credited against these annual quotas, which generally are based on stock assessments generated principally by NMFS and on recommendations from the North Pacific Fishery Management Council. NMFS' Alaska Region is responsible for monitoring the progress of fisheries toward attainment of these quotas and allocations, and for closing the fisheries when quotas are reached. Stock assessments, quota monitoring, and management require collection of data from the fishery to account for all groundfish and prohibited species catch, including the portion of the catch that is discarded. North Pacific groundfish observers aboard vessels and at shoreside or floating stationary processors collect the data necessary for these purposes.

The Alaska Fisheries Science Center's groundfish observer program has embarked on an ambitious set of observer data collection changes for implementation in the 2008 fishing year. The new sampling procedures eliminate much of the need for observers to summarize and calculate information at sea and take steps to ensure all data points are recorded at the level from which they are observed.

NMFS is conducting a public workshop to provide assistance to fishery participants in reviewing the new observer sampling protocols and the changes that were necessary to the observer electronic data submission and communications system. Additionally, NMFS will answer questions from workshop participants. For further information on the groundfish observer

program, please visit the NMFS Alaska Fisheries Science Center website at *http://www.afsc.noaa.gov/FMA/.htm*.

Special Accommodations

This workshop is physically accessible to people with disabilities. Requests for special accommodations should be directed to Jennifer Ferdinand (see **FOR FURTHER INFORMATION CONTACT**) before December 6, 2007.

Dated: November 21, 2007.

Emily H. Menashes

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

[FR Doc. E7–23141 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: United States Patent and Trademark Office (USPTO), Department of Commerce.

Title: Electronic Response to Office Action and Preliminary Amendment Forms.

Form Number(s): PTO–1771, PTO–1882, PTO–1930, PTO–1957 and PTO–1966.

Agency Approval Number: 0651–0050.

Type of Request: Revision of a currently approved collection.

Burden: 27,240 hours annually, including 495 hours per year for Post Publication Amendments and 1,092 hours per year for the Response to Suspension Inquiry or Letter of Suspension.

Number of Respondents: 158,300 responses per year, including 1,800 responses per year for Post Publication Amendments and 5,600 responses per year for the Response to Suspension Inquiry or Letter of Suspension.

Avg. Hours Per Response: The USPTO estimates that the public will require approximately 10 to 18 minutes (0.17 to 0.30 hours) to prepare and submit the information in this collection. Completion times may vary, depending upon the nature and amount of information requested in a particular Office Action.

Needs and Uses: This collection of information is required by the Trademark Act, 15 U.S.C. 1051 *et seq.*, which provides for the Federal registration of trademarks, service marks, collective trademarks and service marks, collective membership marks, and certification marks. Individuals and businesses that use or intend to use such marks in commerce may file an application to register their marks with the United States Patent and Trademark Office (USPTO). In some cases, the USPTO may issue an Office Action to an applicant in order to request additional information that is required before a mark can be registered. Applicants may also supplement their applications by providing additional information voluntarily.

The USPTO is proposing to add two forms to this information collection, Post Publication Amendment (PTO–1711) and Response to Suspension Inquiry or Letter of Suspension (PTO–1822). Applicants may file a Post Publication Amendment in order to submit a proposed amendment to an application that has already been approved for publication by the examining attorney. If an applicant receives a Suspension Inquiry or Letter of Suspension from the USPTO, the applicant may use the proposed response form to file a reply. Applicants may submit the two proposed new forms to the USPTO electronically through the USPTO Web site or submit the required information for the amendment or response to the USPTO on paper.

Affected Public: Individuals or households, businesses or other for-profits, and not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by any of the following methods:

E-mail: Susan.Fawcett@uspto.gov. Include ''0651–0050 copy request'' in the subject line of the message.

Fax: 571–273–0112, marked to the attention of Susan Fawcett.

Mail: Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Written comments and recommendations for the proposed information collection should be sent on or before December 28, 2007 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503.

Dated: November 21, 2007.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division.

[FR Doc. E7–23115 Filed 11–27–07; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2007–OS–0089]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 28, 2007.

Title, Form, and OMB Number: Defense Logistics Agency Survey of Supply Vendors; OMB Control Number 0704–0429.

Type of Request: Extension.

Number of Respondents: 200.

Responses per Respondent: 1.

Annual Responses: 200.

Average Burden per Response: 1 hour.

Annual Burden Hours: 200.

Needs and Uses: The Defense Logistics Agency (DLA) is transforming its distribution business practices. It is developing an automated system that will give it visibility on the location and movement of material originating at Government and contractor locations alike, and the ability to use that information for Corporate-wide planing and management. DLA needs to understand corresponding business practices of segments of the contractor community. The survey information will be used by DLA to help determine the extent to which shipments from contractor locations can be integrated into DLA's distribution practices.

Affected Public: Business or other for-profit.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room

10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 20, 2007.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–5863 Filed 11–27–07; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket No. DoD–2007–OS–0074]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 28, 2007.

Title, Form, and OMB Number: Customer Satisfaction Surveys—Generic Clearance; OMB Control Number 0730–0003.

Type of Request: Extension.

Number of Respondents: 166,000.

Responses per Respondent: 1.

Annual Responses: 166,000.

Average Burden per Response: 2 minutes.

Annual Burden Hours: 6,000.

Needs and Uses: This information collection requirement is necessary to determine the kind and quality of services DFAS customers want and expect, as well as their satisfaction with the DFAS existing services.

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions; Federal Government; and state, local, or tribal governments.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 20, 2007.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–5864 Filed 11–27–07; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket No. USAF–2007–0026]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 28, 2007.

Title, Form and OMB Number: Presentation Comment Card and Air Force Week Event Comment Card; ROTC Form 155–R; OMB Control Number 0701–TBD.

Type of Request: New.

Number of Respondents: 2,000.

Responses per Respondent: 1.

Annual Responses: 2,000.

Average Burden per Response: 6 minutes.

Annual Burden Hours: 200.

Needs and Uses: The information collection requirement is necessary to obtain audience feedback data in order to improve future Air Force presentations and future Air Force Week on-base public events. The data that is collected will be used to improve these communication products. The respondents will be attendees at these events and participation will be anonymous and voluntary.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings and WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 20, 2007.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–5865 Filed 11–27–07; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for Utah Test and Training Range Military Operations Area

AGENCY: Department of the Air Force, Air Combat Command, DOD.

ACTION: Notice of Intent.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321, et seq.), the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR Parts 1500–1508), and Air Force policy and procedures (32 CFR Part 989), the U.S. Air Force is issuing this notice to advise the public of its intent to prepare an Environmental Impact Statement (EIS) to assess the potential environmental impacts of creating a new military operations area (MOA) west of the Utah Test and Training Range (UTTR).

The Air Force proposal would expand the current UTTR airspace in Nevada in order to provide training opportunities not consistently available in existing UTTR airspace. This expansion is needed due to the scheduling limitations caused by other activities including large footprint weapons system tests. The MOA would underlay an established Air Traffic Control Assigned Airspace (ATCAA) unit and would not extend below 14,000 feet mean sea level. The Air Force proposal includes use of chaff and flares in the MOA and authorization of supersonic flight in the ATCAA.

Dates and Addresses: The Air Force will host a series of scoping meetings to receive public input on environmental concerns that should be addressed in the EIS. The schedule and location of the public scoping open house meetings are below. All meetings will last from 6 p.m. to 8 p.m.

Tuesday, 18 December 2007: Ely, Nevada, Bristlecone Pine Convention Center, 150 Sixth Street, Ely, NV 89301. Wednesday, 19 December 2007: Elko, Nevada, Elko Convention Center 700 Moren Way, Elko, NV 89801. Thursday, 20 December 2007: West Wendover, Nevada, West Wendover Branch Library, 590 Camper Dr., West Wendover, NV 89883.

Comments will be accepted at any time during the environmental impact analysis process. However, to ensure the Air Force has sufficient time to consider public input in the preparation of the Draft EIS, comments should be submitted to the address below by January 7, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Sheryl Parker, HQ ACC/A7PP, 129 Andrews St., Suite 102, Langley AFB, VA 23665–2769, telephone 757–764–9334.

Bao-Anh Trinh,

DAF, Air Force Federal Register Liaison Officer.

[FR Doc. E7–23137 Filed 11–27–07; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket No. USA–2007–0021]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

DATES: Consideration will be given to all comments received by December 28, 2007.

Title, Form, and OMB Number: Army ROTC Referral Information; ROTC Form 155–R; OMB Control Number 0702–0111.

Type of Request: Extension.

Number of Respondents: 16,300.

Responses per Respondent: 1.

Annual Responses: 16,300.

Average Burden per Response: 15 minutes.

Annual Burden Hours: 4,075.

Needs and Uses: The purpose of the information is to provide prospect referral data to a Professor of Military Science to contact individuals who have expressed an interest in Army ROTC. The Army ROTC Program produces approximately 75 percent of the newly commissioned officers for the U.S. Army. The Army must have the ability to attract quality men and women who will pursue college degrees.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Hillary Jaffe.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jaffe at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 1777 North Kent Street, RPN, Suite 11000, Arlington, VA 22209–2133.

Dated: November 20, 2007.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–5862 Filed 11–27–07; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER07–1317–000, ER07–1317–001, ER07–1318–000, ER07–1318–001]

Citizens Electric Company of Lewisburg, PA, Wellsboro Electric Company; Notice of Issuance of Order

November 20, 2007.

Citizens Electric Company of Lewisburg, PA (Citizens) and Wellsboro Electric Company (Wellsboro) filed an application for market-based rate authority, with an accompanying rate tariff. The proposed market-based rate tariff provides for the sale of energy and capacity at market-based rates. Citizens and Wellsboro also requested waivers of various Commission regulations. In particular, Citizens and Wellsboro requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Citizens and Wellsboro.

On November 16, 2007, pursuant to delegated authority, the Director, Division of Tariffs and Market Development—West, granted the requests for blanket approval under part 34 (Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Citizens and Wellsboro, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing protests is December 17, 2007.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Citizens and Wellsboro are authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Citizens and Wellsboro, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Citizen's and Wellsboro's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov,* using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23069 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–20–000]

Ozark Gas Transmission, LLC; Notice of Request Under Blanket Authorization

November 20, 2007.

Take notice that on November 9, 2007, Ozark Gas Transmission, LLC (Ozark), 1437 S. Boulder, Suite 1500, Tulsa, Oklahoma 74119, filed in Docket No. CP08–20–000 a prior notice request pursuant to sections 157.205(b), 157.208(c), and 157.210 of the Commission's regulations under the Natural Gas Act (NGA). The Commission issued Ozark's blanket certificate in Docket No. CP98–265–000 on July 1, 1998.[1] Ozark seeks authorization to install and operate a compressor station, to be known as the Standing Rock Compressor, on Ozark's 16-inch mainline in Izard County, Arkansas, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Specifically, Ozark proposes to design and construct a 6,500 horsepower booster compressor station consisting of two 3,250 horsepower Aerial JGD–4 electric drive compressors and ancillary equipment. Installation of the Standing Rock Compressor Station will increase Ozark's current firm certificated capacity from 400,000 Mcf/d to 500,000 Mcf/d, at an estimated cost of $18,848,718.

Any questions regarding this application should be directed to David A. Harrell, Sr., Director of Regulatory Affairs, Ozark Gas Transmission, LLC, 1437 S. Boulder, Suite 1500, Tulsa, Oklahoma 74119, or by phone (918) 398–2123, fax (918) 398–2165 or e-mail *dharrell@ozarkgastransmission.com.*

Any person or the Commission's Staff may, within 60 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and, pursuant to section 157.205 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the ''e-Filing'' link.

Comment Date: *January 22, 2008.*

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23072 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

[1] 84 FERC ¶ 61,002 (1998).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–102–005]

Southern Company Services, Inc.; Notice of Filing

November 20, 2007.

Take notice that on November 16, 2007, Southern Company Services, acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company, filed a notice of completion and a conformed version of the Separation of Functions and Communications Protocol, in compliance with the Commission's Orders issued October 5, 2006, *Southern Company Services, Inc.,* 117 FERC ¶ 61,021 (2006) and *Southern Company Services, Inc.,* 119 FERC ¶ 61,065 (2007).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy

of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 7, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23066 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL05–25–005, EL05–26–005, EL05–27–005]

Southern Company Services, Inc.; Notice of Filing

November 20, 2007.

Take notice that on November 15, 2007, Southern Company Services, acting as agent for Alabama Power Company and Georgia Power Company, filed a compliance filing pursuant to the Commission Order issued October 31, 2007, *Tenaska Alabama II Partners, et al.,* v. *Alabama Power Company, et al.,* 121 FERC ¶ 61,124 (2007).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 6, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23067 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL08–10–000]

Wisconsin Electric Power Company; Notice of Filing

November 20, 2007.

Take notice that on November 13, 2007, Wisconsin Electric Power Company filed a petition of declaratory order, requesting that the Federal Energy Regulatory Commission issue an order interpreting a 1998 provision of the WEPCO's market-based rate tariff limiting sales to those with ''delivery points'' outside of the Wisconsin-Upper Michigan Systems region.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on December 13, 2007.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23068 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER08–1–000, ER08–1–001]

Yuma Power Limited Liability Company; Notice of Issuance of Order

November 20, 2007.

Yuma Power Limited Liability Company (Yuma Power) filed an application for market-based rate authority, with an accompanying rate schedule. The proposed market-based rate schedule provides for the sale of energy, capacity and ancillary services at market-based rates. Yuma Power also requested waivers of various Commission regulations. In particular, Yuma Power requested that the Commission grant blanket approval under 18 CFR part 34 of all future issuances of securities and assumptions of liability by Yuma Power.

On November 20, 2007, pursuant to delegated authority, the Director, Division of Tariffs and Market Development-West, granted the requests for blanket approval under part 34

(Director's Order). The Director's Order also stated that the Commission would publish a separate notice in the **Federal Register** establishing a period of time for the filing of protests. Accordingly, any person desiring to be heard concerning the blanket approvals of issuances of securities or assumptions of liability by Yuma Power, should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. 18 CFR 385.211, 385.214 (2004).

Notice is hereby given that the deadline for filing protests is December 20, 2007.

Absent a request to be heard in opposition to such blanket approvals by the deadline above, Yuma Power is authorized to issue securities and assume obligations or liabilities as a guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of Yuma Power, compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approvals of Yuma Power's issuance of securities or assumptions of liability.

Copies of the full text of the Director's Order are available from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426. The Order may also be viewed on the Commission's Web site at *http://www.ferc.gov*, using the eLibrary link. Enter the docket number excluding the last three digits in the docket number filed to access the document. Comments, protests, and interventions may be filed electronically via the internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23070 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filings

November 21, 2007.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP96–312–173.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Co submits their Second Revised Sheet 30G of FERC Gas Tariff, Fifth Revised Volume 1.

Filed Date: 11/16/2007.

Accession Number: 20071119–0032.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 28, 2007.

Docket Numbers: RP08–68–000.

Applicants: Williston Basin Interstate Pipeline Co.

Description: Williston Basin Interstate Pipeline Co submits their Sixth Revised Sheet 231, *et al.* to FERC Gas Tariff, Second Revised Volume 1.

Filed Date: 11/16/2007.

Accession Number: 20071119–0031.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 28, 2007.

Docket Numbers: RP08–69–000.

Applicants: Questar Overthrust Pipeline Company.

Description: Questar Overthrust Pipeline Company submits their Second Revised Sheet 11, *et al.* to FERC Gas Tariff, Second Revised Volume 1–A.

Filed Date: 11/16/2007.

Accession Number: 20071119–0030.

Comment Date: 5 p.m. Eastern Time on Wednesday, November 28, 2007.

Docket Numbers: RP08–71–000.

Applicants: Questar Overthrust Pipeline Company.

Description: Questar Overthrust Pipeline Co submits First Revised Sheet 1, 4, 12, 21 and 30, *et al.* to FERC Gas Tariff, Second Revised Volume 1–A.

Filed Date: 11/19/2007.

Accession Number: 20071120–0110.

Comment Date: 5 p.m. Eastern Time on Monday, December 3, 2007.

Docket Numbers: RP08–72–000.

Applicants: Chandeleur Pipe Line Company.

Description: Chandeleur Pipe Line Company submits Third Revised Sheet 64 to FERC Gas Tariff, Second Revised Volume 1, to be effective 12/1/07.

Filed Date: 11/19/2007.

Accession Number: 20071120–0129.

Comment Date: 5 p.m. Eastern Time on Monday, December 3, 2007.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Acting Deputy Secretary.

[FR Doc. E7–23124 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the Record Communications; Public Notice

November 20, 2007.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR. 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Exempt:

Docket No.	Date Received	Presenter or requester
1. CP06–54–000, *et al.*	10–29–07	Hon. Rosa DeLauro.
2. CP07–8–000	10–29–07	Hon. Thomas E. Petri.
3. Project No. 2100–000	10–29–07	Hon. Barbara Boxer.
4. Project No. 2100–000	11–5–07	Hon. Sam Aanestad.

Kimberly D. Bose,

Secretary.

[FR Doc. E7–23071 Filed 11–27–07; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OAR–2003–0225; FRL–8498–9]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Populations, Usage and Emissions of Diesel Nonroad Equipment (Renewal); EPA ICR No. 2156.02, OMB Control No. 2060–0553

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA)(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. The ICR, which is abstracted below, describes the nature of the information collection and its estimated burden and cost.

DATES: Additional comments may be submitted on or before December 28, 2007.

ADDRESSES: Submit your comments, referencing Docket ID No. EPA-HQ-OAR–2003–0225, to (1) EPA online using www.regulations.gov (our preferred method), by e-mail to *a-and-r-Docket@epa.gov* or by mail to: EPA Docket Center, Environmental Protection Agency, Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, and (2) OMB by mail to: 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: James Warila, Office of Transportation and Air Quality, Assessment and Standards Division, (ASD), Environmental Protection Agency, 2000 Traverwood Drive, Ann Arbor, Michigan 48105; telephone number: 734–214–4951; fax number: 734–214–4821; email address: *warila.james@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 August 9, 2007 (72 FR 44843), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received one comment during the comment period, which is addressed in the ICR. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under Docket ID No. EPA-HQ-OAR–2003–0225, which is available for online viewing at www.regulations.gov, or in person viewing at the Air and Radiation Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket is 202–566–1742.

Use EPA's electronic docket and comment system at

www.regulations.gov, to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *www.regulations.gov* as EPA receives them and without change, unless the comment contains copyrighted material, confidential business information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *www.regulations.gov.*

Title: Populations, Usage and Emissions of Diesel Nonroad Equipment (Renewal).

ICR numbers: EPA ICR No. 2156.02, OMB Control No. 2060–0553.

ICR Status: This ICR is scheduled to expire on November 30, 2007. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. 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 title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In response to recommendations from the National Research Council of the National Academy of Sciences, EPA is continuing a systematic data collection designed to improve the methods and tools used by the Agency to estimate emissions from nonroad equipment. Data to be collected include populations, usage rates (activity) and ''in-use'' or ''real-world'' emission rates.

The collection is a survey, to be conducted by the Office of Transportation and Air Quality (OTAQ) in the Office of Air and Radiation (OAR). Development of rapid in-use instrumentation promises to substantially reduce the cost of emissions measurement for nonroad equipment. This study will combine rapid in-use measurement capability with statistical survey design to improve the representation of nonroad engine populations. The goal is to continue a pilot survey designed to develop methods and protocols needed to collect data on populations, activity and in-use emissions of diesel nonroad equipment. Response to the survey is voluntary.

The target population includes nonroad equipment used by commercial establishments in the construction and manufacturing sectors. The study area for this collection will include areas in EPA Regions 5 and 7. To estimate the prevalence of equipment ownership in the target sectors, establishments will be requested to respond to brief interviews regarding their equipment ownership and use. The total sample size for instrumented measurement is 100 equipment pieces, with 50 pieces targeted for emissions and usage measurement, respectively.

Emissions and usage will be measured using portable on-board electronic instrumentation. Emissions instrumentation will measure carbon dioxide (CO_2) and several air pollutants on an instantaneous basis during normal operation over a period of one to three days. Air pollutants to be measured include carbon monoxide (CO), total hydrocarbons (THC), oxides of nitrogen (NO_x) and particulate matter (PM). The usage instrument will measure engine on/off over a period of approximately one month.

Data will be collected during normal operation at the respondents' facilities or work sites. Following quality-assurance and analysis, the data will be stored in OTAQ's Mobile Source Observation Database. The information collection will involve 517 respondents per year, requiring 99 hours per year to complete at an annual total cost to those respondents of $6,716. For the agency, the collection will require 4,455 hours per year at an annual total cost to the agency of $322,415.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 0.19 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 which have subsequently changed; 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: Construction and Manufacturing Establishments.

Estimated Number of Respondents: 517.

Frequency of Response: One-time event.

Estimated Total Annual Hour Burden: 99.

Estimated Total Annual Cost: $6,716, includes $0.0 annualized capital or O&M costs.

Changes in the Estimates: There is a decrease of 961 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens. This decrease is due to the fact that EPA proposes to contact fewer respondents than in the previous approved ICR, and that burden estimates for individual respondents have been adjusted downward, based on experience in the previous approval period.

Dated: November 20, 2007.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E7–23114 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2007–1053; FRL–8499–7]

Board of Scientific Counselors, National Exposure Research Laboratory (NERL) Standing Subcommittee Meeting—2007

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a meeting of the Board of Scientific Counselors (BOSC) National Exposure Research Laboratory (NERL) Standing Subcommittee.

DATES: The meeting will be held on Tuesday, December 11, 2007 from 8 a.m. to 5 p.m., and will continue on Wednesday, December 12, 2007 from 8 a.m. to 2. All times noted are eastern time. The meeting may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the conference call will

be accepted up to 1 business day before the meeting.

ADDRESSES: The meeting will be held at the U.S. Environmental Protection Agency Main Campus, National Computing Center, 109 TW Alexander Drive, Room N110, Research Triangle Park, North Carolina 27709. Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2007–1053, by one of the following methods:

• *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

• *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2007–1053.

• *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2007–1053.

• *Mail:* Send comments by mail to: Board of Scientific Counselors, National Environmental Research Laboratory (NERL) Standing Subcommittee—2007 Docket, Mailcode: 28221T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2007–1053.

• *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room B102, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2007–1053. Note: this is not a mailing address. Such deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2007–1053. 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. 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 Board of Scientific Counselors, National Exposure Research Laboratory (NERL) Standing Subcommittee—2007 Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer via mail at: Susan Peterson, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–1077; via fax at: (202) 565–2911; or via e-mail at: *peterson.susan@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Susan Peterson, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to: an introduction to NERL, the organizational structure and research programs within NERL, exposure issues related to the mission and principles of NERL, and a discussion of the charge to the NERL Standing Subcommittee. The meeting is open to the public.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Susan Peterson at (202) 564–1077 or *peterson.susan@epa.gov.* To request accommodation of a disability, please contact Susan Peterson, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: November 20, 2007.

Jeff Morris,

Acting Director, Office of Science Policy.

[FR Doc. E7–23136 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0968; FRL–8339–9]

Chlormequat Chloride Reregistration Eligibility Decision for Low Risk Pesticide; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide, chlormequat chloride, and opens a public comment period on the RED, related risk assessments, and other support documents. Chlormequat chloride is a plant growth regulator registered for use on ornamental plants grown in greenhouses, nurseries and shadehouses. Chlormequat chloride has no food or feed uses, or U.S. tolerances associated with its use.

EPA has reviewed the low risk pesticide, chlormequat chloride, through a modified, streamlined version of the public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

DATES: Comments must be received on or before January 28, 2008.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0968, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P),

Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–0968. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Joy Schnackenbeck, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8072; fax number: (703) 308–8005; e-mail address: *schnackenbeck.joy@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action is the Agency Taking?

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. Using a modified, streamlined version of its public participation process, EPA has completed a RED for the pesticide, chlormequat chloride under section 4(g)(2)(A) of FIFRA. Chlormequat chloride is a plant growth regulator registered for use on ornamental plants grown in greenhouses, nurseries and shadehouses. Chlormequat chloride has no food or feed uses, or U.S. tolerances associated with its use. EPA has determined that the data base to support reregistration is substantially complete and that products containing chlormequat chloride are eligible for reregistration provided the risks are mitigated either in the manner described in the RED or by another means that achieves equivalent risk reduction. Upon submission of any required product-specific data under section 4(g)(2)(B) of FIFRA and any necessary changes to the registration and labeling (either to address concerns identified in the RED or as a result of product-specific data), EPA will make a

final reregistration decision under section 4(g)(2)(C) of FIFRA for products containing chlormequat chloride.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004, (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to its uses, risks, and other factors, chlormequat chloride was reviewed through a modified process. Once EPA assesses uses and risks for such low risk pesticides, the Agency may go directly to a decision and prepare a document summarizing its findings such as the chlormequat chloride RED.

The reregistration program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. The Agency is issuing the chlormequat chloride RED for public comment. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the RED. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the Agency Docket for chlormequat chloride. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and will provide a Response to Comments Memorandum in the Docket and regulations.gov. If any comment significantly affects the document, EPA also will publish an amendment to the RED in the **Federal Register**. In the absence of substantive comments requiring changes, the chlormequat chloride RED will be implemented as it is now presented.

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration, before calling in product-specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 17, 2007.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E7–23053 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0431; FRL–8339–6]

Mefluidide Reregistration Eligibility Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's Reregistration Eligibility Decision (RED) for the pesticide mefluidide. The Agency's risk assessments and other related documents also are available in the mefluidide docket. Mefluidide is a plant growth regulator that is applied postemergence when needed. EPA has reviewed mefluidide through the public participation process that the Agency uses to involve the public in developing pesticide reregistration and tolerance reassessment decisions. Through these programs, EPA is ensuring that all pesticides meet current health and safety standards.

FOR FURTHER INFORMATION CONTACT: Wilhelmena Livingston, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8025; fax number: (703) 308–8005; e-mail address: *livingston.wilhelmena@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0431. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr.*

II. Background

A. What Action is the Agency Taking?

Under section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is reevaluating existing pesticides to ensure that they meet current scientific and regulatory standards. EPA has completed a RED for the pesticide, mefluidide under section 4(g)(2)(A) of FIFRA. Mefluidide is a plant growth regulator that is applied postemergence when needed. It is used to suppress seed heads and fruiting, as well as retarding growth to reduce mowing and trimming. It is registered for use on turf on rights-of-ways, airports, public and industrial sites, as well as on ornamental plants and shrubs. Mefluidide can also be used on residential lawns. EPA has determined that the database to support reregistration is substantially complete and that products containing mefluidide are eligible for reregistration, provided the risks are mitigated in the manner described in the RED. Upon submission of any required product specific data under section 4(g)(2)(B) of FIFRA and any necessary changes to the registration and labeling (either to address concerns identified in the RED or as a result of product specific data), EPA will make a final reregistration decision under section 4(g)(2)(C) of

FIFRA for products containing mefluidide.

EPA is applying the principles of public participation to all pesticides undergoing reregistration and tolerance reassessment. The Agency's Pesticide Tolerance Reassessment and Reregistration; Public Participation Process, published in the **Federal Register** on May 14, 2004, (69 FR 26819) (FRL–7357–9) explains that in conducting these programs, EPA is tailoring its public participation process to be commensurate with the level of risk, extent of use, complexity of issues, and degree of public concern associated with each pesticide. Due to its uses, risks, and other factors, mefluidide was reviewed through the modified 4–Phase public participation process. Through this process, EPA worked extensively with stakeholders and the public to reach the regulatory decision for mefluidide.

The reregistration program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. A comment period is not needed because all issues related to this pesticide were resolved through consultations with stakeholders. The Agency therefore is issuing the mefluidide RED without a comment period.

B. What is the Agency's Authority for Taking this Action?

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 19, 2007.

Steven Bradbury,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E7–23094 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0573; FRL–8141–1]

Notice of Filing of Pesticide Petition for Amendment of Residues of Quaternary Ammonium Compounds, n-Alkyl (C12-C18) Dimethyl Benzyl Ammonium Chlorides on Food Contact Surfaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the amendment of regulations 40 CFR 180.940(a) for residues of antimicrobial pesticide formulation containing n-Alkyl(C_{12}-C_{18}) dimethyl benzyl ammonium chlorides applied to food contact surfaces in public eating places, dairy processing equipment, and food processing equipment and utensils.

DATES: Comments must be received on or before December 28, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2006–0573 and pesticide petition number (PP), by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2006–0573. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The Federal regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Velma Noble, Product Manager (31). Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–6233, e-mail: *noble.velma@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is printing a summary of each pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or amendment of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that this pesticide petition contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition included in this notice, prepared by the petitioner along with a description of the analytical method available for the detection and measurement of the pesticide chemical residues is available on EPA's Electronic Docket at *http://www.regulations.gov/*. To locate this information on the home page of EPA's Electronic Docket, select ''Quick Search'' and type the OPP docket ID number. Once the search has located the docket, clicking on the ''Docket ID'' will bring up a list of all documents in the docket for the pesticide including the petition summary.

Amendment to Existing Tolerance Exemption

PP 6F7071. Edwards-Councilor Co., Inc 1427 Baker Road Airport Industrial Park Virginia Beach, VA 23455, proposes to amend the tolerance(s) in 40 CFR 180.190(a) for residues of the antimicrobial pesticide formulations containing n-Alkyl (C_{12}-C_{18}) dimethyl benzyl ammonium chlorides that may be applied to food contact surfaces in public eating places, dairy processing equipment, and food processing equipment and utensils. When ready for use, end-use concentration of total quaternary chemicals, n-Alkyl (C_{12}-C_{18}) dimethyl benzyl ammonium chlorides, in solution is not to exceed 400 parts per million (ppm). Analytical method is not necessary since these quaternary ammonium compounds are exempt from the requirement of a tolerance.

List of Subjects

Environmental protection, Food Contact Sanitizers, ADBAC, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 16, 2007.

Frank Sanders,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. E7–23056 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–1024; FRL–8141–2]

Notice of Filing of a Pesticide Petition for Amendment of Residues of Quaternary Ammonium Compounds, Didecyl Dimethyl Ammonium Carbonate and Didecyl Dimethyl Ammonium Bicarbonate on Food Contact Surfaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the amendment of regulations 40 CFR 180.940(a) for residues of antimicrobial pesticide formulation didecyl dimethyl ammonium carbonate and didecyl dimethyl ammonium bicarbonate applied to food contact surfaces in public eating places, dairy processing equipment, and food processing equipment and utensils.

DATES: Comments must be received on or before December 28, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2006–1024 and the pesticide petition number (PP), by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The

Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2006–1024. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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 regulations.gov or e-mail. The regulations.gov website 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Antimicrobials Division (7510P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308–6233; e-mail address: *noble.velma@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is printing notice of the filing of a pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition included in this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

New Tolerance Exemption

PP 6F7131. Lonza, Inc., 90 Boroline Allendale, NJ 07401, proposes to establish a tolerance in 40 CFR 180.190(a) for residues of the antimicrobial pesticide formulations containing didecyl dimethyl ammonium carbonate and didecyl dimethyl ammonium bicarbonate that may be applied to food contact surfaces in public eating places, dairy processing equipment, and food processing

equipment and utensils. When ready for use, end-use concentration of didecyl dimethyl ammonium carbonate and didecyl dimethyl ammonium bicarbonate in solution is not to exceed 240 parts per million (ppm). Analytical method is not necessary since these quaternary ammonium compounds are exempt from the requirement of a tolerance.

List of Subjects

Environmental protection, Agricultural commodities, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 16, 2007.

Frank Sanders,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. E7–23054 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPP–2007–0671; FRL–8153–9]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period July 1, 2007 to September 30, 2007 to control unforeseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption or denial for the name of a contact person. The following information applies to all contact persons: Team Leader, Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9366.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions discussed above. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0671. Publicly available docket materials are available either electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Background

EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A ''specific exemption'' authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.

2. ''Quarantine'' and ''public health'' exemptions are a particular form of specific exemption issued for quarantine or public health purposes. These are rarely requested.

3. A ''crisis exemption'' is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in ''a reasonable certainty of no harm'' to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the ''reasonable certainty of no harm standard'' of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U.S. States and Territories

Arkansas

Arkansas State Plant Board

Crisis: On September 24, 2007, for the use of profenofos on rice grown in greenhouses for research only (non-food) to control rice panicle mite (*Steneotarsonemus Spinki Smiley*). This program ended on October 9, 2007. Contact: Libby Pemberton.

California

Environmental Protection Agency, Department of Pesticide Regulation

Specific Exemption: EPA authorized the use of myclobutanil on artichokes to control powdery mildew; August 18, 2007 to May 31, 2008. Contact: Stacey Groce.

Public Health Exemption: EPA authorized the use of d-Phenothrin and

piperonyl butoxide in the air column over agricultural lands to control mosquito vectors of Eastern Equine Encephalitis virus and West Nile Virus at risk for mosquito-borne disease transmission; August 3, 2007 to November 1, 2007. Contact: Princess Campbell.

Connecticut

Department of Environmental Conservation

Crisis: On September 19, 2007, for the use of sodium hypochlorite in contaminated buildings to control anthrax. This program ended on October 3, 2007. Contact: Princess Campbell.

Florida

Department of Agriculture and Consumer Services

Specific Exemption:EPA authorized the use of thiophanate-methyl on cotton to control fusarium hardlock; July 21, 2007 to July 21, 2008. Contact: Stacey Groce.

Georgia

Department of Agriculture

Quarantine: EPA authorized the use of metconazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 10, 2007, to April 19, 2007. Contact: Stacey Groce.

EPA authorized the use of flusilazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 6, 2007, to June 15, 2010. Contact: Andrea Conrath.

EPA authorized the use of cyproconazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 11, 2007, to March 31, 2009. Contact: Stacey Groce.

Illinois

Department of Agriculture

Specific Exemption:EPA authorized the use of fenpyroximate in beehives to control varroa mites; July 3, 2007 to February 28, 2008. Contact: Stacey Groce.

Louisiana

Department of Agriculture and Forestry

Specific Exemption:EPA authorized the use of sulfosulfuron on bermudagrass and bahiagrass pastures and hayfields to control Johnsongrass (*Sorghum halepense*); July 30, 2007 to September 15, 2007. Contact: Libby Pemberton.

Massachusetts

Department of Agricultural Resources

Public Health Exemption: EPA authorized the use of d-Phenothrin and piperonyl butoxide in the air column over agricultural lands to control mosquito vectors of Eastern Equine Encephalitis virus and West Nile Virus and risk for mosquito-borne disease transmission; August 3, 2007 to November 1, 2007. Contact: Princess Campbell.

Minnesota

Department of Agriculture

Specific Exemption:EPA authorized the use of azoxystrobin on wild rice to control stem rot (*Nakataea sigmoidea/ Sclerotium oryzae*); July 2, 2007 to August 31, 2007. Contact: Libby Pemberton.

Nebraska

Department of Agriculture

Specific Exemption:EPA authorized the use of tebuconazole on field corn seed to control head smut; September 12, 2007 to May 30, 2008. Contact: Andrew Ertman.

New Mexico

Department of Agriculture

Crisis: On July 5, 2007, for the use of azoxystrobin on cotton to control southwestern cotton rust. This program ended on July 17, 2007. Contact: Libby Pemberton.

Rhode Island

Division of Agricultural Resources

Public Health Exemption: EPA authorized the use of d-Phenothrin and piperonyl butoxide in the air column over agricultural lands to control mosquito vectors of Eastern Equine Encephalitis Virus and West Nile Virus and risk for mosquito-borne disease transmission; August 3, 2007 to November 1, 2007. Contact: Princess Campbell.

South Carolina

Clemson University

Quarantine: EPA authorized the use of metconazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 10, 2007, to April 19, 2007. Contact: Stacey Groce.

EPA authorized the use of flusilazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 6, 2007, to June 15, 2010. Contact: Andrea Conrath.

EPA authorized the use of cyproconazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); July 11, 2007, to March 31, 2009. Contact: Stacey Groce.

Tennessee

Department of Agriculture

Specific Exemption:EPA authorized the use of fenpyroximate in beehives to control varroa mites; July 19, 2007 to February 28, 2008. Contact: Stacey Groce.

Texas

Department of Agriculture

Crisis: On July 2, 2007, for the use of azoxystrobin on cotton to control southwestern cotton rust. This program ended on July 17, 2007. Contact: Libby Pemberton.

Crisis: On July 24, 2007, for the use of profenofos on rice grown for research only to control rice panicle mite (*Steneotarsonemus Spinki Smiley*). This program ended on August 7, 2007. Contact: Libby Pemberton.

USDA/APHIS

Quarantine: EPA authorized the use of E-11-tetradecen-1-yl acetate and z-11-tetradecen-1-yl acetate on all agricultural crops, all orchards, all nurseries, all parks and forests, all residential and municipal areas, all recreational and non-crop areas to control the light brown apple moth; July 24, 2007, to July 24, 2010. Contact: Andrew Ertman.

Quarantine: EPA authorized the use of E-11-tetradecen-1-yl acetate on all agricultural crops, all orchards, all nurseries, all parks and forests, all residential and municipal areas, all recreational and non-crop areas to control the light brown apple moth in California; July 24, 2007, to June 12, 2010. Contact: Andrew Ertman.

West Virginia

Department of Agriculture

Quarantine: EPA authorized the use of metconazole on soybeans to control Australasian soybean rust (*Phakopsora pachyrhizi*); August 15, 2007, to April 19, 2007. Contact: Stacey Groce.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 14, 2007.

Donald R. Stubbs,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E7–23092 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OW–2007–0282; FRL–8499–8]

EPA and Army Corps of Engineers Guidance Regarding Clean Water Act Jurisdiction After Rapanos

AGENCIES: U.S. Army Corps of Engineers, DoD; and U.S. Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: On June 5, 2007, the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers announced agency guidance regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos* v. *United States* and *Carabell* v. *United States* (''Rapanos''). The agencies issued this guidance to ensure that jurisdictional determinations, administrative enforcement actions, and other relevant agency actions being conducted under CWA section 404 are consistent with the *Rapanos* decision and provide effective protection for public health and the environment. A six-month public comment period to solicit input on early experience with implementing the guidance began on June 8, 2007. The agencies are extending the public comment period by 45 days.

DATES: Public comments are now due by January 21, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2007–0282, by one of the following methods:

- *http:/www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: OW-Docket@epa.gov.* Include the docket number, EPA–HQ–OW–2007–0282 in the subject line of the message.
- *Mail:* Water Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, Dc 20460. Such deliveries are only accepted during the Docket's normal hours of operations, and special arrangements should be made for deliveries of boxed information.
- *Instructions:* Instructions for submitting comments are provided in the notice published on June 8, 2007 (72 FR 31824). Consideration will be given to all comments received by January 21, 2008.

FOR FURTHER INFORMATION CONTACT: Russell Kaiser, Regulatory Community of Practice (CECW–CO), U.S. Army Corps of Engineers, Headquarters, 441 G Street, NW., Washington, DC 20314; telephone number: (202) 761–7763: fax number: (202) 761–5096; e-mail address: *Rapanos.Comments@usace.army.mil.* Donna M. Downing, Office of Water (4502T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 566–1783; e-mail address: *CWAwaters@epa.gov.*

SUPPLEMENTARY INFORMATION: In the June 8, 2007, issue of the **Federal Register** (72 FR 31824), the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers announced the issuance of agency guidance, which took effect on that date, regarding Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's decision in the consolidated cases *Rapanos* v. *Carabell* v. *United States* (126 S. Ct. 2208 (2006)) (''*Rapanos*'').

The agencies invited public comment and case studies during the first six months implementing the guidance, only early experience with implementing the guidance. Several entities have requested an extension of the comment period for the guidance. The EPA and the Corps find that a 45-day extension of the comment period is warranted. Therefore, the comment period is extended until January 21, 2008.

The agencies, within nine months after the *Rapanos* guidance was issued, intend to either reissue, revise, or suspend the guidance after carefully considering the public comments received and field experience with implementing the guidance. A copy of the guidance can be found on EPA's Web site at *http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html* and on the Corps' Web site at *http://www.usace.army.mil/cw/cecwo/reg/.*

Dated: November 21, 2007.

Benjamin H. Grumbles,

Assistant Administrator for Water, U.S. Environmental Protection Agency.

[FR Doc. 07–5867 Filed 11–27–07; 8:45 am]

BILLING CODE 6560–50–M

EXPORT-IMPORT BANK OF THE UNITED STATES

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-IM Bank): Correction

AGENCY: Export-Import Bank of the United States.

ACTION: Notice; correction.

SUMMARY: The Advisory committee was established by Public Law 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

FOR FURTHER INFORMATION CONTACT: Susan Houser, 202–565–3232.

Correction

In the **Federal Register** of November 19, 2007, in FR Doc. 07–5717, on page 65021, in the middle column, in line 21, correct the ''Time and Place'' caption to read:

Time and Place: Thursday, December 6, 2007, from 9:30 a.m. to 12 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Dated: November 21, 2007.

Kamil P. Cook,

Deputy General Counsel.

[FR Doc. 07–5854 Filed 11–27–07; 8:45 am]

BILLING CODE 6690–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the State Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2008 Through September 30, 2009

AGENCY: Office the Secretary, DHHS.

ACTION: Notice.

SUMMARY: The Federal Medical Assistance Percentages and Enhanced Federal Medical Assistance Percentages for Fiscal Year 2009 have been calculated pursuant to the Social Security Act (the Act). These percentages will be effective from October 1, 2008 through September 30, 2009. This notice announces the calculated ''Federal Medical Assistance Percentages'' and ''Enhanced Federal Medical Assistance Percentages'' that The U.S. Department of Health and Human Services (HHS) will use in determining the amount of Federal matching for State medical assistance (Medicaid) and State Children's Health Insurance Program (SCHIP) expenditures, and Temporary Assistance for needy Families (TANF) Contingency Funds, the federal share of Child Support Enforcement collections, Child Care Mandatory and Matching Funds of the Child Care and

Development Funds, Foster Care Title IV–E Maintenance payments, and Adoption Assistance payments. The table gives figures for each of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Programs under title XIX of the Act existing each jurisdiction. Programs under titles I, X, and XIV operate only in Guam and the Virgin Islands, while a program under the title XVI (Aid to the Aged, Blind, or Disabled) operates only in Puerto Rico.

Programs under title XXI began operating in fiscal year 1998. The percentages in this notice apply to State expenditures for most medical services and medical insurance services, and assistance payments for certain social services. The statute provides separately for Federal matching of administrative costs.

Sections 1905(b) and 1101(a)(8)(B) of the Act require the Secretary, HHS to publish the Federal Medical Assistance Percentages each year. The Secretary is to calculate the percentages, using formulas in sections 1905(b) and 1101(a)(8)(B), from the Department of Commerce's statistics of average income per person in each State and for the Nation as a whole. The percentages are within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 states.

The ''Federal Medical Assistance Percentages'' are for Medicaid. Section 1905(b) of the Act specifies the formula for calculating Federal Medical Assistance Percentages as follows:

''Federal medical assistance percentage'' for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the Federal medical assistance percentage shall in no case be less than 50 per centum or more than 83 per centum, (2) the Federal medical assistance percentage for Puerto Rico, the Virgin Islands; Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum. * * *

Section 4725(b) of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the Federal Medical Assistance Percentage for the District of Columbia for purposes of titles XIX, and for the purpose of calculating the enhanced FMAP under title XXI, shall be 70 percent. For the District of Columbia, we note under the table of Federal Medical Assistance Percentages the rate that applies in certain other programs calculated using the formula otherwise applicable, and the rate that applies in certain other programs pursuant to section 1118 of the Social Security Act.

Section 2105(b) of the Act specifies the formula for calculating the Enhanced Federal Medical Assistance Percentages as follows:

The ''enhanced FMAP'', for a State for a fiscal year, is equal to the Federal medical assistance percentage (as defined in the first sentence of section 1905(b)) for the State increased by a number of percentage points equal to 30 percent of the number of percentage points by which (1) such Federal medical assistance percentage for the State, is less than (2) 100 percent; but in no case shall the enhanced FMAP for a State exceed 85 percent.

The ''Enhanced Federal Medical Assistance Percentages'' are for use in the State Children's Health Insurance Program under Title XXI, and in the Medicaid program for certain children for expenditures for medical assistance described in sections 1905(u)(2) and 1905(u)(3) of the Act. There is no specific requirement to publish the Enhanced Federal Medical Assistance Percentages. We include them in this notice for the convenience of the States.

DATES: *Effective Dates:* The percentages listed will be effective for each of the 4 quarter-year periods in the period beginning October 1, 2008 and ending September 30, 2009.

FOR FURTHER INFORMATION CONTACT: Thomas Musco or Carrie Shelton, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D-Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.558: TANF Contingency Funds; 93.563: Child Support Enforcement; 93–596: Child Care Mandatory and Matching Funds of the Child Care and Development Fund; 93.658: Foster Care Title IV–E; 93.659: Adoption Assistance; 93.769: Ticket-to-Work and Work Incentives Improvement Act (TWWIIA) Demonstrations to Maintain Independence and Employment; 93.778: Medical Assistance Program; 93.767: State Children's Health Insurance Program)

Dated: November 19, 2007.

Michael O. Leavitt,

Secretary of Health and Human Services.

FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2008–SEPTEMBER 30, 2009 (FISCAL YEAR 2009)

State	Federal medical assistance percentages	Enhanced federal medical assistance percentages
Alabama	67.98	77.59
Alaska	50.53	65.37
American Samoa*	50.00	65.00
Arizona	65.77	76.04
Arkansas	72.81	80.97
California	50.00	65.00
Colorado	50.00	65.00
Connecticut	50.00	65.00
Delaware	50.00	65.00
District of Columbia**	70.00	79.00
Florida	55.40	68.78
Georgia	64.49	75.14
Guam*	50.00	65.00
Hawaii	55.11	68.58
Idaho	69.77	78.84
Illinois	50.32	65.22
Indiana	64.26	74.98

FEDERAL MEDICAL ASSISTANCE PERCENTAGES AND ENHANCED FEDERAL MEDICAL ASSISTANCE PERCENTAGES, EFFECTIVE OCTOBER 1, 2008–SEPTEMBER 30, 2009 (FISCAL YEAR 2009)—Continued

State	Federal medical assistance percentages	Enhanced federal medical assistance percentages
Iowa	62.62	73.83
Kansas	60.08	72.06
Kentucky	70.13	79.09
Louisiana	71.31	79.92
Maine	64.41	75.09
Maryland	50.00	65.00
Massachusetts	50.00	65.00
Michigan	60.27	72.19
Minnesota	50.00	65.00
Mississippi	75.84	83.09
Missouri	63.19	74.23
Montana	68.04	77.63
Nebraska	59.54	71.68
Nevada	50.00	65.00
New Hampshire	50.00	65.00
New Jersey	50.00	65.00
New Mexico	70.88	79.62
New York	50.00	65.00
North Carolina	64.00	75.22
North Dakota	63.15	74.21
Northern Mariana Islands*	50.00	65.00
Ohio	62.14	73.50
Oklahoma	65.90	76.13
Oregon	62.45	73.72
Pennsylvania	54.52	68.16
Puerto Rico*	50.00	65.00
Rhode Island	52.59	66.81
South Carolina	70.07	79.05
South Dakota	62.55	73.79
Tennessee	64.28	75.00
Texas	59.44	71.61
Utah	70.71	79.50
Vermont	59.45	71.62
Virgin Islands*	50.00	65.00
Virginia	50.00	65.00
Washington	50.94	65.66
West Virginia	73.73	81.61
Wisconsin	59.38	71.57
Wyoming	50.00	65.00

* For purposes of section 1118 of the Social Security Act, the percentage used under titles I, X, XIV, and XVI will be 75 per centum.

** The values for the District of Columbia in the table were set for the state plan under titles XIX and XXI and for capitation payments and DSH allotments under those titles. For other purposes, including program remaining in Title IV of the Act, the percentage for D.C. is 50.00.

[FR Doc. 07–5847 Filed 11–27–07; 8:45 am]

BILLING CODE 4150–24–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Administration and Management; Program Support Center; Statement of Organization, Functions, and Delegations of Authority

Part P, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Office of the Assistant Secretary for Administration and Management (AJ), Program Support Center (P), as last amended at 68 FR 69411–12, dated December 12, 2003 is being amended to reflect changes in Chapter PG, ''Federal Occupational Health Service (FOHS).'' This amendment realigns FOHS functions to increase efficiency, effectiveness, and management controls.

I. Under Chapter PG, ''Federal Occupational Health Service'' (PG), delete the functions entirely and replace with the following:

Section PEK.00 Mission. The mission of the Federal Occupational Health Service (FOHS) is to improve the health, safety, and productivity of the Federal workforce through the provision of comprehensive, high-quality, customer-focused occupational health services in strategic partnership with Federal agencies nation-wide. The services provided include health and wellness programs, employee assistance, work/life, and environmental health and safety services. The services that FOHS provided include consultations to agency management, program design to meet customer needs, service provider selection, direct provision of services, and program oversight and evaluation.

Section PEK.10 Organization. FOHS is headed by a Director who reports to the Deputy Assistant Secretary for Program Support, and includes the following components:

1. Office of the Director (PGA).
2. Division of Clinical Services (PGB).
3. Division of Employee Assistance Program Services (PGC).
4. Division of Environmental Health Services (PGE).
5. Division of Administration and Resource Management (PGF).
6. Division of Business Development (PGG).

Section PEK.20 Functions.

1. *Office of the Director (PGA):* The Office of the Director provides executive leadership, policy, guidance and supervision to all FOHS components. It performs the following functions:

a. Ensures that the delivery of a comprehensive occupational health program is driven by quality standards;

b. Provides leadership to a multi-customer, competitive, fee for service, cost centered organizations;

c. Evaluates effective program and consultation to Federal managers concerning management and delivery of occupational health programs;

d. Provides nationwide assistance in planning, implementing and monitoring health programs for Federal agencies on are reimbursable basis including improved environmental, educational, promotional, clinical, information management, and managerial services;

e. Provides leadership and management for improved business results;

f. Promotes workforce productivity and reduces absenteeism, lost time, and related Federal liability through executive guidance and management;

g. Maintains relationships with health officials in other Federal agencies and private organizations; and

h. Participates in policy and program development and implementation for FOHS components.

2. *Division of Clinical Services (PGB):* The Division of Clinical Services (DCS) designs and delivers comprehensive occupational health and clinical services throughout the Nation to assist client agencies to improve and maintain the physical health of their workforce and to meet regulatory compliance standards regarding occupational health. It performs the following functions:

a. Provides services aimed at promoting healthy work and lifestyle habits and detecting and intervening in those conditions which are deleterious to wellness and productivity;

b. Adopts standards of practice, protocols, and procedures by which clinical services are provided that meet the highest standards established by professional bodies representing appropriate clinical disciplines;

c. Maintains a formal, written system of ancillary program policies to ensure that clinical services are delivered to all clients in accordance with interagency agreements, regardless of location or actual provider of service;

d. Conducts periodic reviews and program audits, and uses performance improvement techniques to assure that the highest quality clinical services are delivered in a compliant, effective, efficient, and consistent manner;

e. Conducts applied research, training, and demonstration projects to address clinical needs, including specific programs requested by clients;

f. Designs and delivers customized programs and services including facility and workplace designs for clients with special needs;

g. Develops methods for evaluation of clinical services and conducts such evaluations on a regular basis;

h. Maintains clinical services information and records; and

i. Assures that all clinical consultation and services have been fully reimbursed by customers.

3. *Division of Employee Assistance Program Services (PGC):* The Division of Employee Assistance Program Services (DEAPS) designs and delivers comprehensive employee assistance program (EAP) services throughout the Nation to assist clients with a spectrum of personal problems and workplace issues affecting workplace functioning and productivity. It performs the following functions:

a. Provides services aimed at promoting healthy work and lifestyle habits and preventing, detecting and intervening in those conditions that are deleterious to wellness and productivity;

b. Adopts standards of practice, protocols, and procedures by which EAP services are provided that meet the highest standards established by professional bodies representing appropriate EAP disciplines;

c. Maintains a formal, written system of ancillary program policies to ensure that EAP services are delivered to all clients in accordance with interagency agreements, regardless of location or actual provider of service;

d. Conducts periodic reviews and program audits, and uses performance improvement techniques to assure that the highest quality EAP services are delivered in a compliant, effective, efficient, and consistent manner;

e. Conducts analyses, trainings, and demonstration projects to address EAP needs, including specific programs requested by clients;

f. Develops and implements methods for evaluation of EAP services;

g. Maintains EAP services information and records; and

h. Assures that all EAP services have been fully reimbursed by customers.

4. *Division of Environmental Health Services (PGE):* The Division of Environmental Health Services (DEHS) designs and delivers comprehensive occupational and environmental health (OEH) services throughout the Nation to assist clients with the complete spectrum of OEH issues and concerns. It performs the following functions:

a. Provides services aimed at promoting healthy and safe work environments and conditions and detecting and intervening in those conditions which are deleterious to the safety and health of the Federal workforce;

b. Provides consultation and services relative to the identification, evaluation and control of exposure to chemical, biological, physical, radiological, dust and/or safety hazards in Federal facilities, operations, and workplaces;

c. Adopts standards of practice, protocols, and procedures by which OEH services are provided that meet the highest standards established by professional bodies representing appropriate OEH disciplines;

d. Maintains a formal, written system of ancillary program protocols and policies to ensure that OEH services are delivered to all agencies and programs in accordance with established procedures and interagency agreements;

e. Conducts periodic technical and administrative reviews and program audits to assure that the highest quality OEH services are delivered in a cost-effective, efficient, and consistent manner;

f. Conducts applied research, training, and demonstration projects to address Federal OEH needs and designs specialized OEH programs for clients based on individual agency needs;

g. Develops methods for evaluation of OEH services and conducts such evaluations on request;

h. Maintains OEH service information and administrative and technical records; and

i. Assures that all consultation and services have been fully reimbursed by customers.

5. *Division of Administration and Resource Management (PGF):* The Division of Administration and Resource Management (DARM) oversees all budgeting, finance, contracting, human resources, and administrative activities for FOHS. It performs the following functions:

a. Provides administration of and expertise to FOHS regarding finance, budgeting, human capital, business technology support, operations support, strategic planning, and performance measurement;

b. Develops, tests, installs, and operates business applications needed to support FOHS services under agreements with its customer Federal agencies;

c. Effectively and efficiently recruits, develops, retains, and strategically manages FOHS workforce;

d. Initiates, manages, and oversees all contracts and other procurements for FOHS;

e. Develops and operates shared services for contracting, cost comparison, analysis, and program formulation;

f. Implements and enforces rigorous internal management controls to ensure accountability of resources;

g. Plans, develops, and monitors policy;

h. Monitors, evaluates, and recommends enhancements base on customer satisfaction instruments and data;

i. Maintains information and administrative and technical records; and

j. Provides oversight for all aspects of customer billing and ensures that all consultations and services have been fully reimbursed by customers.

6. *Division of Business Development (PGG):* The Division of Business Development (DBD) oversees all agreement activity, business growth, and customer satisfaction within FOHS. It performs the following functions:

a. Provides oversight for all account management activities across FOHS product divisions and directly interfaces as the primary point of contact between Federal agency representatives and FOHS;

b. Provides services aimed at delivering superior customer service between FOHS and its Federal agency customers;

c. Develops and utilizes standardized and centralized processes for account management, customer service and business development that promote cost efficiencies and facilitate systematic and consistent application of business practices across the organization;

d. Responds to business growth opportunities and requests for proposals;

e. Develops public relations and marketing plans to include market analysis, forecasting of contract opportunities, procurement and contract analysis, agency profiles including assessment of demographics, occupational health needs, and business case analyses;

f. Presents an array of occupational health solutions and services to assist Federal agencies to meet their occupational health and safety needs;

g. Provides responsive customer service, including assessment of customer satisfaction and compliant resolution; and

h. Assures that all consultation and services have been fully reimbursed by customers.

III. *Continuation of Policy:* Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to the functions contained in this reorganization, heretofore issued and in effect prior to the date of this reorganization, are continued in full force and effect.

IV. *Delegation of Authority:* All delegations and re-delegations of authority previously made to officials and employees of the affected organizational components will continue in them or their successors pending further re-delegation, provided they are consistent with this reorganization.

V. *Funds, Personnel and Equipment:* Transfer of organizations and functions affected by this reorganization shall be accompanied by direct and support funds, positions, personnel, records, equipments, supplies and other sources.

Dated: November 14, 2007.

Joe W. Ellis,

Assistant Secretary for Administration and Management.

[FR Doc. 07–5846 Filed 11–27–07; 8:45 am]

BILLING CODE 4168–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 74 FR 19522–19528, dated April 18, 2007) is amended to reflect the establishment of the Office of Mine Safety and Health within the National Institute for Occupational Safety and Health (CC), Centers for Disease Control and Prevention (C). The reorganization will also realign the Pittsburgh Research Laboratory (CCB) and the Spokane Research Laboratory (CCF) in their entirety and with their current organization structure to the Office of Mine Safety and Health.

I. Section C–B, Organization and Functions, is hereby amended as follows:

Under Part C, *Centers for Disease Control and Prevention (C), National Institute for Occupational Safety and Health (CC),* delete the following components in their entireties:

- Pittsburgh Research Laboratory (CCB).
- Spokane Research Laboratory (CCF).

II. Under Part C, *Centers for Disease Control and Prevention (C), National Institute for Occupational Safety and Health (CC),* add the following organizational unit:

Office of Mine Safety & Health Research (CCM): The Office of Mine Safety and Health (1) provides national and international leadership for the prevention of work-related illness, injury, and fatalities of mine workers through research and prevention activities at the Pittsburgh and Spokane Research Laboratories; (2) performs research, development, and testing of new technologies, equipment, and practices to enhance mine safety and health; (3) awards competitive grants to encourage the development and manufacture of mine safety equipment; (4) awards contracts for product testing or related work with respect to new mine technology and equipment; (5) establishes and leads an interagency working group to share technology and technological research and developments that could be utilized to enhance mine safety and accident response; (6) reports to Congress annually on mine safety technologies that have been considered, studied, and tested; (7) coordinates NIOSH research and prevention activities for the mining sector; and (8) provides policy guidance to the NIOSH Director on mining safety and health issues.

The Pittsburgh Research Laboratory (CCMB) functions and delegations of authority are transferred intact.

The Spokane Research Laboratory (CCMC) functions and delegations of authority are transferred intact.

III. *Delegations of Authority:* All delegations and redelegations of authority made to official and employees of affected organizational components will continue in them or their successors pending further redelegation, provided they are consistent with this reorganization.

IV. *Funds, Personnel and Equipment:* Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment, supplies and other resources.

Dated: November 9, 2007.

Michael O. Leavitt,

Secretary.

[FR Doc. 07–5866 Filed 11–27–07; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974; CMS Computer Match No. 2007–03; HHS Computer Match No. 0407; SSA Computer Match No. 1048; IRS Project No. 241

AGENCY: Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

ACTION: Notice of renewal of an existing computer matching program (CMP) that has an expiration date of April 1, 2007.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, this notice announces the renewal of an existing CMP between CMS, the Internal Revenue Service (IRS), and the Social Security Administration (SSA). We have provided information about the matching program in the **SUPPLEMENTARY INFORMATION** section below. The Privacy Act provides an opportunity for interested persons to comment on the matching program. We may defer implementation of this matching program if we receive comments that persuade us to defer implementation. See ''Effective Dates'' section below for comment period.

DATES: *Effective Dates:* CMS filed a report of the Computer Matching Program (CMP) with the Chair of the House Committee on Oversight and Government Reform, the Chair of the Senate Committee on Homeland Security and Governmental Affairs, and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on November 21, 2007. We will not disclose any information under a matching agreement until 40 days after filing a report to OMB and Congress or 30 days after publication in the **Federal Register** (FR), whichever is later.

ADDRESSES: The public should address comments to: Walter Stone, CMS Privacy Officer, Division of Privacy Compliance, Enterprise Architecture and Strategy Group, Office of Information Services (OIS), CMS, 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: John Albert, Technical Advisor, Division of Medicare Secondary Payer Policy and Operations, Financial Services Group, Office of Financial Management, CMS, Mailstop C3–14–16, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. The telephone number is (410) 786–7457, or e-mail at *John.Albert@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Description of the Matching Program

A. General

The Computer Matching and Privacy Protection Act of 1988 (Public Law (Pub. L.) 100–503), amended the Privacy Act (5 U.S.C. 552a) by describing the manner in which computer matching involving Federal agencies could be performed and adding certain protections for individuals applying for and receiving Federal benefits. Section 7201 of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) further amended the Privacy Act regarding protections for such individuals. The Privacy Act, as amended, regulates the use of computer matching by Federal agencies when records in a system of records are matched with other Federal, state, or local government records. It requires Federal agencies involved in computer matching programs to:

1. Negotiate written agreements with the other agencies participating in the matching programs;
2. Obtain the Data Integrity Board approval of the match agreements;
3. Furnish detailed reports about matching programs to Congress and OMB;
4. Notify applicants and beneficiaries that the records are subject to matching; and,
5. Verify match findings before reducing, suspending, terminating, or denying an individual's benefits or payments.

B. CMS Computer Matches Subject to the Privacy Act

CMS has taken action to ensure that all CMPs that this Agency participates in comply with the requirements of the Privacy Act of 1974, as amended.

Dated: November 7, 2007.

Charlene Frizzera,

Chief Operating Officer, Centers for Medicare & Medicaid Services.

CMS COMPUTER MATCH NO. 2007–03 HHS COMPUTER MATCH NO. 0407 SSA COMPUTER MATCH NO. 1048 IRS PROJECT NO. 241

NAME:

''Medicare Secondary Payer (MSP) Program''.

SECURITY CLASSIFICATION:

Level Three Privacy Act Sensitive.

PARTICIPATING AGENCIES:

Internal Revenue Service (IRS), Social Security Administration (SSA), and the Centers for Medicare & Medicaid Services (CMS).

AUTHORITY FOR CONDUCTING MATCHING PROGRAM:

This Matching Agreement between IRS, SSA and CMS is executed pursuant to the Privacy Act of 1974 (Title 5 United States Code (U.S.C.) § 552a), as amended, (as amended by Public Law (Pub. L.) 100–503, the Computer Matching and Privacy Protection Act (CMPPA) of 1988), the Office of Management and Budget (OMB) Circular A–130, titled ''Management of Federal Information Resources'' at 61 **Federal Register** (FR) 6428–6435 (February 20, 1996), and OMB guidelines pertaining to computer matching at 54 FR 25818 (June 19, 1989).

This agreement implements the information matching provisions of § 6103(l)(12) of the Internal Revenue Code (IRC) (26 U.S.C 6103(1)(12)), and § 1862(b)(5) of the Social Security Act (42 U.S.C. 1395y(b)(5)).

PURPOSE(S) OF THE MATCHING PROGRAM:

The purpose of this agreement is to establish the conditions under which: (1) IRS agrees to disclose return information relating to taxpayer identity to SSA, and (2) SSA agrees to disclose return information relating to beneficiary and employer identity, commingled with information disclosed by the IRS, to CMS.

These disclosures will provide CMS with information for use in determining the extent to which any Medicare beneficiary is covered under any Group Health Plan (GHP).

CATEGORIES OF RECORDS AND INDIVIDUALS COVERED BY THE MATCH:

IRS will disclose taxpayer identity information from the CADE Individual Master File (IMF), Treasury/IRS 24.030, published at 66 FR 63800 (December 10, 2001), and maintained at the Martinsburg Computing Center in Martinsburg, West Virginia. This file includes millions of records of taxpayers who have filed Federal Individual Income Tax Returns. Project 241, IMF/Medicare Beneficiary Match, was established by IRS to facilitate this matching program.

SSA will extract identifying information of Medicare beneficiaries from the Master Beneficiary Record (MBR), SSA/OSR 60–0090, published at 71 FR 1826 (January 11, 2006) and maintained at the National Computer Center (NCC) in Baltimore, MD. This file

includes records of individuals who have received and are receiving benefits under the Social Security Act. SSA will extract employer identity information from the Earnings Recording and Self-Employment Income System, SSA/0SR 60–0059, referred to as the Master Earnings File (MEF) published at 71 FR 1819 (January 11, 2006) and maintained at the NCC. This file contains earnings records of individuals including identifying information of their employees.

CMS will utilize a database, Medicare Advantage Prescription Drug System (MARx) CMS System No. 09–70–4001, published at 70 FR 60530 (October 18, 2005), maintained at the CMS Data Center, located in Baltimore, Maryland, of the GHP information received from employers containing verified instances of employment and GHP coverage for Medicare beneficiaries and Medicare-eligible spouses identified from the IMF and MEF extracts.

CMS will match GHP information against the Medicare Multi Carrier Claims System (MCS) (formerly known as Carrier Medicare Claims Records), CMS System No. 09–70–0501, published at 71 FR 64968 (November 6, 2006), maintained at the CMS Data Center, located in Baltimore, Maryland. These files contain information received from employers containing verified instances of employment and GHP coverage for Medicare beneficiaries and Medicare-eligible spouses identified from the IMF and MEF extracts.

CMS will match GHP information against the Fiscal Intermediary Shared System (FISS) (formerly known as Intermediary Medicare Claims Records, CMS System No. 09–70–0503, published at 71 FR 64961 (November 6, 2006), maintained at the CMS Data Center, located in Baltimore, Maryland. This file contains information or records needed to properly process and pay Medicare benefits to, or on behalf of, eligible individuals. The file is accessed when a claim is submitted for payment.

CMS will match GHP information against the CWF, CMS System No. 09–70–0526, published at 71 FR 64955 (November 6, 2006), which is the repository database for all current hospital and medical coverage MSP information. These files contain information or records needed to properly process and pay medical insurance benefits to, or on behalf of, entitled beneficiaries who have submitted claims for Medicare Medical Insurance Benefits (Medicare Part B). The file is accessed when a claim is submitted for payment.

CMS will match GHP information against the National Claims History (NCH), which is contained in the National Claims History File, CMS System No. 09–70–0558, published at 71 FR 67137 (November 20, 2006), maintained at the CMS Data Center, located in Baltimore, Maryland. NCH contains records needed to facilitate obtaining Medicare utilization review data that can be used to study the operation and effectiveness of the Medicare program.

INCLUSIVE DATES OF THE MATCH:

The Matching Program shall become effective 40 days after the report of the Matching Program is sent to OMB and Congress, or 30 days after publication in the FR, whichever is later. The matching program will continue for 18 months from the effective date and may be extended for an additional 12 months thereafter, if certain conditions are met.

[FR Doc. E7–23139 Filed 11–27–07; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2007N–0432]

Risk Assessment of the Public Health Impact from Foodborne Listeria Monocytogenes in Soft-Ripened Cheese: Request for Comments and for Scientific Data and Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments and for scientific data and information.

SUMMARY: The Food and Drug Administration (FDA) is requesting comments and scientific data and information that would assist the agency in its plans to conduct a risk assessment for *Listeria monocytogenes* in soft-ripened cheese. The purpose of the risk assessment is to ascertain the impact on public health from the reduction and/or prevention of *L. monocytogenes* growth and recontamination during the manufacturing and/or processing of soft-ripened cheese.

DATES: Submit comments and scientific data and information by January 28, 2008.

ADDRESSES: Submit written comments and scientific data and information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments, data, and information to either *http://www.fda.gov/dockets/ecomments* or *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Steven M. Gendel, Center for Food Safety and Applied Nutrition (HFS–06), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2290.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Health and Human Services' *Healthy People 2010* is a comprehensive set of disease prevention and health promotion objectives for the Nation to achieve over the first decade of the new century. Created by scientists both inside and outside of Government, it identifies a wide range of public health priorities and specific, measurable objectives. One of these objectives calls on Federal food safety agencies to reduce foodborne listeriosis (Ref. 1). In support of this goal, in 2003, FDA issued an assessment of the relative risk to the public health from foodborne *L. monocytogenes* among selected categories of ready-to-eat (RTE) foods (*Listeria* risk assessment) (Ref. 2). The *Listeria* risk assessment formed the basis of the 2003 FDA/Centers for Disease Control and Prevention (CDC) *Listeria* Action Plan (Ref. 3), which identifies prevention and control activities that FDA and CDC will take to reduce the incidence of foodborne listeriosis in the United States. The Public Health Risk Assessment: *Listeria monocytogenes* in Soft-Ripened Cheese supports the agency's commitment to fulfilling the *Listeria* Action Plan.

The 2003 *Listeria* risk assessment provided the first quantitative estimate of the relative risk of listeriosis from consumption of a variety of RTE foods. Among the dairy foods, soft unripened cheese was considered to present a high risk, and fresh soft cheese, semi-soft cheese, and soft-ripened cheese was considered to present a moderate risk of listeriosis. This risk assessment estimated that the risk of listeriosis from the consumption of fresh soft cheese made using unpasteurized (raw) milk could be as much as 40-fold higher than the risk from consumption of these cheeses made from pasteurized milk.

The United States (U.S.) and Canada have experienced sporadic illnesses and outbreaks of listeriosis associated with the consumption of cheese. In both countries, there is a strong epidemiological correlation between consumption of soft cheese and listeriosis. For example, a 1985 outbreak of listeriosis associated with the consumption of a Mexican-style soft cheese resulted in 142 illnesses in Los Angeles (Ref. 4), a similar outbreak in 2000 in North Carolina resulted in 12 illnesses, and a 2002 soft cheese-

associated outbreak in Quebec resulted in 17 illnesses including 2 premature births (Ref. 5). Both FDA and Health Canada (HC) continue to evaluate the safety of soft cheese, particularly soft cheese made from unpasteurized milk.

As a followup to the *Listeria* risk assessment, FDA and HC have agreed to collaborate on the development of a model for the production of soft-ripened cheese that will evaluate the public health impact of factors such as the microbiological status of milk used in cheese production, the impact of various cheese manufacturing steps, conditions during distribution and storage, and cross contamination during processing and handling. The risk assessment model also will be used to evaluate the effectiveness of various process changes and intervention strategies in reducing human illness.

Specifically, the objectives of the *Listeria* in soft-ripened cheese risk assessment model are to quantitatively evaluate the impact on public health of the following: (1) Variations in *L. monocytogenes* levels in the raw materials used to produce cheese; (2) changes in *L. monocytogenes* levels as a result of growth, inactivation, or re-contamination at each step of the manufacturing process, between final packaging and sale at retail, and between retail sale and consumption; and (3) the impact of various intervention and control strategies.

II. Request for Comment and for Scientific Data and Information

FDA requests comments on the risk assessment approach outlined previously in this document and the submission of data and information relevant to the risk assessment. The agency specifically requests information for the following:

(1) Characteristics of the manufacturing and marketing processes for soft-ripened cheese including:

- The number of large and small (artisan) facilities producing soft-ripened cheese in the U.S. and Canada, and
- The amount of soft-ripened cheese produced each year in the U.S. and Canada by large and small facilities including information on different sizes of cheese that are produced and the relative production volumes for these sizes.

(2) Factors that influence the levels of *L. monocytogenes* in milk used for cheese manufacturing including:

- On-farm practices that influence the frequency and level of *L. monocytogenes* in raw milk used for cheese making,
- *L. monocytogenes* levels and/or frequencies in raw milk in the U.S. and Canada,
- Bulk tank sizes and mixing practices used by large and small manufacturers,
- Growth of *L. monocytogenes* in raw milk,
- Conditions of storage (temperatures and times) encountered by milk prior to cheese manufacture, and
- The identity and effectiveness of processes other than pasteurization used to treat raw milk prior to cheese making.

(3) Factors that influence the levels of *L. monocytogenes* in products during cheese manufacturing including:

- Changes in *L. monocytogenes* levels and frequency (i.e., growth, inactivation, or re-contamination) at each step in cheese manufacturing (i.e., during curd formation, ripening, packaging, aging);
- Conditions of storage (temperatures and times) encountered during post-production holding at the producer; and
- Pathways for transfer of *L. monocytogenes* to soft-ripened cheese from environmental sources during packaging, cutting, transport, and handling at retail, including data on frequencies or amounts of transfer.

(4) Factors that influence the levels of *L. monocytogenes* in cheese post-production including:

- Levels and/or frequencies of *L. monocytogenes* that occur in cheese at retail; and
- The conditions (temperature and time) encountered during transport and storage throughout the distribution process, including at retail, in the U.S. and Canada.

(5) Factors the influence the levels of *L. monocytogenes* in cheese at consumption including:

- Storage conditions (temperature and times) encountered in consumers' homes, and
- Consumption patterns for soft cheese (including serving size and frequency) in the U.S. and Canada.

(6) The identity and effectiveness of control measures or interventions to reduce levels and frequency of *L. monocytogenes* in cheese during processing, manufacturing, packaging, storage, and transportation prior to retail sale.

(7) Any other data related to the occurrence, growth, and control of *L. monocytogenes* in soft-ripened cheese.

Interested persons should submit comments, scientific data, and information to the Division of Dockets Management (see **ADDRESSES**). Three copies of all comments, scientific data, and information are to be submitted. Individuals submitting written information or anyone submitting electronic comments may submit one copy. Submissions are to be identified with the docket number found in brackets in the heading of this document and may be accompanied by supporting information. Received submissions may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday. Information submitted after the closing date will not be considered, except by petition under 21 CFR 10.30.

III. References

The following references are on display in the Division of Dockets Management (see **ADDRESSES**) 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 any subsequent changes to the nonFDA Web sites after this document publishes in the **Federal Register**.)

1. U.S. Department of Health and Human Services, *Healthy People 2010*, vol. 1, Washington, DC, 2000, *http://www.healthypeople.gov*.

2. U.S. Department of Health and Human Services and U.S. Department of Agriculture/Food Safety and Inspection Service, ''Quantitative Assessment of Relative Risk to Public Health from Foodborne *Listeria monocytogenes* Among Selected Categories of Ready-to-Eat Foods,'' September 2003, *http://www.foodsafety.gov/~dms/lmr2-toc.html*.

3. U.S. Department of Health and Human Services, Food and Drug Administration/Centers for Disease Control and Prevention, ''Reducing the Risk of *Listeria monocytogenes* FDA/CDC 2003 Update of the *Listeria* Action Plan,'' November 2003, *http://www.cfsan.fda.gov/~dms/lmr2plan.html*.

4. Linnan et al., ''Epidemic Listeriosis Associated With Mexican-Style Cheese,'' *New England Journal of Medicine*, 319 (13):823–8, 1988.

5. Gaulin et al., ''First Documented Outbreak of *Listeria monocytogenes* in Quebec, 2002,'' *Canada Communicable Disease Report*, 29 (21):181–6, 2003.

Dated: November 20, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–23104 Filed 11–27–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket Nos. TSA–2006–24191; Coast Guard–2006–24196]

Transportation Worker Identification Credential (TWIC); Enrollment Dates for the Ports of Mobile, AL; Brunswick, GA; Milwaukee, WI; and Philadelphia, PA

AGENCY: Transportation Security Administration; United States Coast Guard; DHS.

ACTION: Notice.

SUMMARY: The Department of Homeland Security (DHS) through the Transportation Security Administration (TSA) issues this notice of the dates for the beginning of the initial enrollment for the Transportation Worker Identification Credential (TWIC) for the Ports of Mobile, AL; Brunswick, GA; Milwaukee, WI; and Philadelphia, PA.

DATES: TWIC enrollment in Mobile, AL will begin on December 5, 2007; in Brunswick, GA and Milwaukee, WI on December 12, 2007; and Philadelphia, PA on December 13, 2007.

ADDRESSES: You may view published documents and comments concerning the TWIC Final Rule, identified by the docket numbers of this notice, using any one of the following methods.

(1) Searching the Federal Docket Management System (FDMS) Web page at *www.regulations.gov;*

(2) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html;* or

(3) Visiting TSA's Security Regulations Web page at *http://www.tsa.gov* and accessing the link for ''Research Center'' at the top of the page.

FOR FURTHER INFORMATION CONTACT: James Orgill, TSA–19, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220. Transportation Threat Assessment and Credentialing (TTAC), TWIC Program, (571) 227–4545; e-mail: *credentialing@dhs.gov.*

Background

The Department of Homeland Security (DHS), through the United States Coast Guard and the Transportation Security Administration (TSA), issued a joint final rule (72 FR 3492; January 25, 2007) pursuant to the Maritime Transportation Security Act (MTSA), Public Law 107–295, 116 Stat. 2064 (November 25, 2002), and the Security and Accountability for Every Port Act of 2006 (SAFE Port Act), Public Law 109–347 (October 13, 2006). This rule requires all credentialed merchant mariners and individuals with unescorted access to secure areas of a regulated facility or vessel to obtain a TWIC. In this final rule, on page 3510, TSA and Coast Guard stated that a phased enrollment approach based upon risk assessment and cost/benefit would be used to implement the program nationwide, and that TSA would publish a notice in the **Federal Register** indicating when enrollment at a specific location will begin and when it is expected to terminate.

This notice provides the start date for TWIC initial enrollment at the Ports of Mobile, AL; Brunswick, GA; Milwaukee, WI; and Philadelphia, PA. Enrollment in Mobile, AL will begin on December 5, 2007; Brunswick, GA and Milwaukee, WI on December 12, 2007; and Philadelphia, PA on December 13, 2007. The Coast Guard will publish a separate notice in the **Federal Register** indicating when facilities within the Captain of the Port Zone Mobile, including those in the Port of Mobile; Captain of the Port Zone Savannah, including those in the Port of Brunswick; Captain of the Port Zone Lake Michigan, including those in the Port of Milwaukee; and Captain of the Port Zone Delaware Bay, including those in Philadelphia, must comply with the portions of the final rule requiring TWIC to be used as an access control measure. That notice will be published at least 90 days before compliance is required.

To obtain information on the pre-enrollment and enrollment process, and enrollment locations, visit TSA's TWIC Web site at *http://www.tsa.gov/twic.*

Issued in Arlington, Virginia, on November 21, 2007.

Rex Lovelady,

Program Manager, TWIC, Office of Transportation Threat Assessment and Credentialing, Transportation Security Administration.

[FR Doc. E7–23125 Filed 11–27–07; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5118–N–08]

Notice of Proposed Information Collection: Comment Request; Technical Assistance for Community Planning and Development Programs

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 28, 2008.

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: Pamela M. Williams, Reports Liaison Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7234, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Mark Horwath, Office of Technical Assistance and Management, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone number (202) 402–2576 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for Technical Assistance for Community Planning and Development (CPD) Programs.

OMB Control Number, if applicable: 2506–0166.

Description of the Need for the Information and Proposed Use: Application information is needed to

determine competition winners, i.e., those technical assistance (TA) providers best able to offer local jurisdictions an ability to shape their CPD resources and other available resources into effective, coordinated, neighborhood and community development strategies to revitalize and to physically, socially and economically strengthen their communities. The application for the competition requires the completion of Standard Forms 424, 424 Supplemental, LLL (if engaged in lobbying), as well as supplementary information such as identification of field offices to be served and amounts of funds requested for each field office, a narrative statement addressing the factors for award, and a budget summary. After awards are made, providers are required to submit a workplan which includes a planned schedule for accomplishing each of the planned activities/tasks to be accomplished with TA funds, the amount of funds budgeted for each activity/task and the staff and other resources allocated to each activity/task. Narrative quarterly reports are required so that the provider's performance can be evaluated and measured against the workplan. Quarterly reports also require the submission of the SF–269A, a financial report and final SF–269A are also required.

Agency Form Numbers (if applicable): SF–424, SF–424 Supplemental, and SF–LLL.

Members of Affected Public: For-profit and non-profit organizations or State and local governments equipped to provide technical assistance to recipients of CPD programs.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response.

Status of the proposed information collection: The FY 2006 Notice of Funding Availability (NOFA) for technical assistance providers for CPD programs elicited 286 responses. The Department estimates that each application required an average of 60 hours to prepare an application. Each year approximately 50 applicants are chosen for awards. Winners of the competition are required to develop a workplan, requiring approximately 20 hours, submit quarterly reports needing approximately six hours each (including a final report) and perform recordkeeping to include submission of vouchers for reimbursement, estimated at 12 hours annually. Because these actions are undertaken for each field office in which the applicant wins funds, the numbers reflect more than the base number of winners. Approximately 179 workplans were developed as a result of the FY 2006 competition and each requires quarterly reports and recordkeeping. The specific numbers are as follows:

Frequency of Submission: On occasion, quarterly.

Reporting Burden:

	Number of respondents	Number of responses per respondent frequency	×	Hours per response	=	Total hours
Applications	286	1		60		17,160
Workplan Development	179	1		20		3,580
Quarterly Reports (including final)	179	4		6		4,296
Recordkeeping	179	12		2		4,296

Total Estimated Burden Hours: 29,332.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: November 21, 2007.

Nelson R. Bregón,

General Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. E7–23116 Filed 11–27–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Information Collection; OMB Control Number 1018–0102, Special Use Permit Applications on National Wildlife Refuges Outside Alaska

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on January 31, 2008. We 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.

DATES: You must submit comments on or before January 28, 2008.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); *hope_grey@fws.gov* (e-mail); or (703) 358–2269 (fax).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail, fax, or e-mail (see **ADDRESSES**) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Wildlife Refuge System Improvement Act of 1997 that amends the National Wildlife Refuge Administration Act of 1966 (16 U.S.C. 668dd–668ee) requires that we authorize economic privileges on any national wildlife refuge by permit only when the activity will be compatible with and contribute to refuge purposes (50 CFR 29.21). We make provision in our general refuge regulations for public entry for specialized purposes, including economic activities such as the operation of guiding and other visitor services on refuges by concessionaires or cooperators under the appropriate legal instrument or special use permits (50 CFR 25.41, 25.61, 26.36, 27.71, 27.91, 27.97, 29.1, 29.2, 30.11, 31.2, 31.13, 31.14, 31.16, and 43 CFR 5). These regulations provide the authorities and procedures for allowing permits on refuges outside of Alaska.

We will provide the permit applications as requested by interested citizens. Information that we collect helps us to:

(1) Determine if requested activities are compatible and appropriate with the

purpose for which the refuge was established.

(2) Ensure that the applicant is eligible for the permit.

We will issue special use permits for a specific period as determined by the type and location of the use or visitor service provided. These permits authorize activities such as:

(1) Farming operations (haying and grazing, 50 CFR 29.2).

(2) Beneficial management tools that we use to provide the best habitat possible on some refuges (50 CFR 30.11, 31.14, 31.16).

(3) Recreational visitor service operations (50 CFR 25.41 and 25.61).

(4) Commercial filming (50 CFR 27.71) other commercial activities (50 CFR 29.1).

(5) Research, and other noncommercial activities (50 CFR 26.36).

II. Data

OMB Control Number: 1018–0102.

Title: Special Use Permit Applications on National Wildlife Refuges Outside Alaska, 50 CFR 25.41, 25.61, 26.36, 27.71, 27.91, 27.97, 29.1, 29.2, 30.11, 31.2, 31.13, 31.14, 31.16, and 43 CFR 5.

Service Form Number(s): 3–1383.

Type of Request: Revision of existing collection.

Affected Public: Individuals and households; business and other for-profit organizations; nonprofit institutions; farms; and State, local, or tribal governments.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Estimated Annual Number of Respondents: 14,500.

Estimated Total Annual Responses: 14,500.

Estimated Time Per Response: 1 hour.

Estimated Total Annual Burden Hours: 14,500.

III. Request for Comments

We invite comments concerning this IC on:

(1) whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include and/or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: November 14, 2007

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. E7–23132 Filed 11–27–07; 8:45 am

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0095; Endangered and Threatened Wildlife, Experimental Populations

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. The ICR, which is summarized below, describes the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on November 30, 2007. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before December 28, 2007.

ADDRESSES: Send your comments and suggestions on this ICR to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395–6566 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or hope_grey@fws.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail, fax, or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0095.

Title: Endangered and Threatened Wildlife, Experimental Populations, 50 CFR 17.84 and 17.85.

Service Form Number(s): None.

Type of Request: Extension of currently approved collection.

Affected Public: Individuals and households, private sector, and State/local/tribal governments.

Respondent's Obligation: Voluntary.

Frequency of Collection: On occasion.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
Notification—general take or removal	25	25	15 minutes	6
Notification—depredation-related take	22	22	15 minutes	6
Notification—specimen collection	25	25	15 minutes	6
Totals	72	72		18

Abstract: Section 10(j) of the Endangered Species Act of 1973 (ESA), as amended, (16 U.S.C. 1531 et seq.) authorizes the Secretary of the Interior to establish experimental populations of endangered or threatened species. Because individuals of experimental populations are categorically protected under the ESA, the information we collect is important for monitoring the success of reintroduction efforts and recovery efforts in general. Information collection requirements for experimental populations of endangered and threatened species are in 50 CFR 17.84. We collect three categories of information:

(1) General take or removal. Relates to human-related mortality including unintentional taking incidental to otherwise lawful activities (e.g., highway mortalities); animal husbandry actions authorized to manage the population (e.g., translocation or providing aid to sick, injured, or orphaned individuals); take in defense of human life; take related to defense of property (if authorized); or take in the form of authorized harassment.

(2) Depredation-related take. Involves take for management purposes where livestock depredation is documented, and may include authorized harassment or authorized lethal take of experimental animals in the act of attacking livestock.

(3) Specimen collection, recovery, or reporting of dead individuals. This information documents incidental or authorized scientific collection. Most of the contacts with the public deal primarily with the reporting of sightings of experimental population animals or the inadvertent discovery of an injured or dead individual.

The information that we collect includes:

(1) Name, address, and phone number of reporting party.

(2) Species involved.

(3) Type of incident.

(4) Location and time of the reported incident.

(5) Description of the circumstances related to the incident.

This information helps us to assess the effectiveness of control activities and to develop better means to reduce problems with livestock for those species where depredation is a problem. Service recovery specialists use the information to determine the success of reintroductions in relation to established recovery plan goals for the threatened and endangered species involved.

Comments: On July 11, 2007, we published in the Federal Register (72 FR 37793) a notice of our intent to request that OMB renew this information collection. In that notice, we solicited comments for 60 days, ending on September 10, 2007. We received no comments.

We again invite comments concerning this information collection on:

(1) whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: November 14, 2007

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. E7–23133 Filed 11–27–07; 8:45 am

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Information Collection Sent to the Office of Management and Budget (OMB) for Approval; OMB Control Number 1018–0066; Marine Mammal Tagging, Marking, and Reporting Certificates

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. The ICR, which is summarized below, describes the nature of the collection and the estimated burden and cost. This ICR is scheduled to expire on November 30, 2007. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before December 28, 2007.

ADDRESSES: Send your comments and suggestions on this ICR to the Desk Officer for the Department of the Interior at OMB-OIRA at (202) 395–6566 (fax) or OIRA_DOCKET@OMB.eop.gov (e-mail). Please provide a copy of your comments to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); (703) 358–2269 (fax); or hope_grey@fws.gov (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey by mail, fax, or e-mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 1018–0066.

Title: Marine Mammal Tagging, Marking, and Reporting Certificates, 50 CFR 18.23(f).

Service Form Number(s): R7–50, R7–51, R7–52.

Type of Request: Extension of currently approved collection.

Affected Public: Individuals and households.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
R7–50 (walrus)	1,190	1,190	15 minutes	298
R7–51 (polar bear)	52	52	15 minutes	13
R7–52 (sea otter)	796	796	15 minutes	199
Totals	2,038	2,038		510

Abstract: Under Section 101(b) of the Marine Mammal Protection Act of 1972 (MMPA), as amended (16 U.S.C. 1361–1407), Alaska Natives residing in Alaska and dwelling on the coast of the North Pacific or Arctic Oceans may harvest polar bears, northern sea otters, and Pacific walrus for subsistence or handicraft purposes. Section 109(i) of the MMPA authorizes the Secretary of the Interior to prescribe marking, tagging, and reporting regulations applicable to the Alaska Native subsistence and handicraft take.

On behalf of the Secretary, we implemented regulations at 50 CFR 18.23(f) for Alaska Natives harvesting polar bear, northern sea otter, and Pacific walrus. These regulations enable us to gather data on the Alaska Native subsistence and handicraft harvest and on the biology of polar bear, northern sea otter, and Pacific walrus in Alaska to determine what effect such take may be having on these populations. The regulations also provide us with a means of monitoring the disposition of the harvest to ensure that any commercial use of products created from these species meets the criteria set forth in Section 101(b) of the MMPA. The information we collect includes, but is not limited to:

(1) Date of kill.

(2) Sex of the animal.

(3) Kill location.

(4) Form of transportation used to make the kill of polar bears.

(5) Amount of time (i.e., hours/days hunted) spent hunting polar bears.

(6) Type of take (live killed or beach found) for walrus.

(7) Number of otters present in and number of otters harvested from pod.

(8) Condition of the bear and whether or not polar bear cubs were present.

(9) Name of the hunter or possessor of the specified parts at the time of marking, tagging, and reporting.

Comments: On July 12, 2007, we published in the Federal Register (72 FR 38096) a notice of our intent to request that OMB renew this ICR. In that notice, we solicited comments for 60 days, ending on September 10, 2007. We received one comment. The comment expressed opposition to the killing of wildlife by Alaska Natives. We note the concerns raised by this individual; however, the harvest of marine mammals by certain Alaska Natives for certain purposes is specifically exempted from otherwise prohibited activities by Section 101(b) of the Marine Mammal Protection Act (MMPA) of 1972, as amended (16 U.S.C. 1361 et seq.). We did not make any changes to our information collection requirements.

We again invite comments concerning this information collection on:

(1) whether or not the collection of information is necessary, including whether or not the information will have practical utility;

(2) the accuracy of our estimate of the burden for this collection of information;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: November 14, 2007

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. E7–23134 Filed 11–27–07; 8:45 am

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–050–5853–ES; N–75716 and N–41566–14; 8–08807]

Notice of Realty Action: Lease/Conveyance for Recreation and Public Purposes of Public Lands in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: Recreation and Public Purposes (R&PP) Act request for lease and subsequent conveyance of approximately 20 acres in two separate parcels of public land in Clark County, Nevada. The Clark County School District (CCSD) proposes to use the land for one 15-acre public elementary school and one five-acre addition to an existing public high school.

DATES: Interested parties may submit written comments regarding the proposed lease/conveyance of the lands until January 14, 2008.

ADDRESSES: Mail written comments to the BLM Las Vegas Field Manager, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130–2301.

FOR FURTHER INFORMATION CONTACT: Brenda Warner, (702) 515–5084.

SUPPLEMENTARY INFORMATION: The following described public lands in Las Vegas, Clark County, Nevada have been examined and found suitable for lease and subsequent conveyance under the provisions of the R&PP Act, as amended (43 U.S.C. 869 *et seq.*) On parcel one, identified as serial number N–75716, CCSD proposes to use 15 acres of land for an elementary school. The elementary school structure will be similar to the design of Marshall Darnell Elementary School. The building consists of 62,500 square feet and contains twenty-nine classrooms, one library, a multipurpose room, and a teachers' lounge. The structure will feature tilt-up concrete slabs with a refrigerated air-conditioned system and a heating system. The school will accommodate an estimated enrollment of 660 students. This area is currently serviced by Aggie Roberts Elementary school which is on a year-round schedule. The new school will alleviate overcrowding and allow both schools to maintain nine month schedules. This parcel is located in the southeastern part of valley, northeast of the intersection of Spencer Street and Pebble Road, and can be described as:

Mount Diablo Meridian, Nevada

T. 22 S., R. 61 E.,
Sec. 14, W½NW¼NE¼SW¼SE¼,
W½SW¼NE¼SW¼SE¼,
NE¼NW¼SW¼SE¼,
E½NW¼NW¼SW¼SE¼,
E½SW¼NW¼SW¼SE¼,
SE¼NW¼SW¼SE¼,
NE¼SW¼SW¼SE¼,
E½NW¼SW¼SW¼SE¼,
W½NW¼SE¼SW¼SE¼.

On parcel two, identified as BLM serial number N–41566–14, CCSD proposes to use five acres of land to add to their current twenty-acre lease for the Career and Technical Academy (high school). Increased student enrollment has created a need for a larger structure and campus. N–41566–14 is located in the southwestern part of the valley, southwest of the intersection of Windmill Lane and South Rainbow Boulevard and can be described as:

Mount Diablo Meridian, Nevada

T. 22 S., R. 60 E.,
Sec. 15, E½SE¼NW¼NE¼.

The land is not required for any federal purpose. The proposed actions are in conformance with the Las Vegas Resource Management Plan approved on October 5, 1998, and would be in the public interest. The Plans of Development have been reviewed and it is determined the proposed actions conform with land use plan decision, LD–1, established in accordance with Section 202 of Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1712). The leases/conveyances, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove such deposits from the lands under applicable law and such regulations as the Secretary of the Interior may prescribe, including all necessary access and exit rights.

The leases/conveyances will be subject to:

(1) Valid and existing rights.

(2) N–75716:

(a) A right-of-way for road, public utility, and drainage purposes granted to Clark County, its successors or assigns, by right-of-way N–75018, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

(b) A right-of-way for power line purposes granted to Nevada Power Company, its successors or assigns, by right-of-way N–00597, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

(c) A right-of-way for power line purposes granted to Nevada Power Company, its successors or assigns, by right-of-way N–07664, pursuant to the Act of March 4, 1911 (43 U.S.C. 961);

(d) A right-of-way for telephone purposes granted to Central Telephone, its successors or assigns, by right-of-way N–79652, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761);

(e) A right-of-way for telephone purposes, granted to Central Telephone, its successors or assigns, by right-of-way N–06486, pursuant to the Act of February 15, 1901 (43 U.S.C. 959); and

(f) A right-of-way for power line purposes granted to Nevada Power Company, its successors or assigns, by right-of-way N–79259, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).

(3) N–41566–14:

(a) A right-of-way for a sewer line granted to Clark County Water Reclamation District, its successors or assigns, by right-of-way N–78573, pursuant to the Act of October 21, 1976, (43 U.S.C. 1761); and

(b) A right-of-way for drainage purposes granted to Clark County, its successors or assigns, by right-of-way N–78802, pursuant to the Act of October 21, 1976, (43 U.S.C. 1761).

On November 28, 2007, the lands described above will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease/conveyance under the R&PP Act, leasing under the mineral leasing laws, and disposals under the mineral material disposal laws.

Detailed information concerning these actions is available for review at the office of the Bureau of Land Management, Las Vegas Field Office at the address listed above. Interested parties may submit comments regarding the specific use proposed in the applications and Plans of Development, whether the BLM followed proper administrative procedures in reaching the decision to lease/convey under the R&PP Act, or any other factor not directly related to the suitability of the land for public schools. Any adverse comments will be reviewed by the BLM Nevada State Director who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action will become the final determination of the Department of the Interior.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Only written comments submitted by postal service or overnight mail to the Field Manager BLM Las Vegas Field Office will be considered properly filed. Electronic mail, facsimile or telephone comments will not be considered properly filed.

In the absence of any adverse comments, the decision will become effective on January 28, 2008. The lands will not be available for lease/conveyance until after the decision becomes effective.

(Authority: 43 CFR 2741.5)

Dated: November 14, 2007.

Mark R. Chatterton,

Assistant Field Manager, Non-Renewable Resources, Las Vegas, Nevada.

[FR Doc. E7–23121 Filed 11–27–07; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–050–5853–ES; N–82423; 8–08807; TAS–14X5232]

Notice of Realty Action: Lease/Conveyance for Recreation and Public Purposes in Clark County, NV

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The Bureau of Land Management (BLM) has examined and found suitable for classification for lease and subsequent conveyance under the provisions of the Recreation and Public Purposes (R&PP) Act, as amended, approximately 670 acres of public land in Clark County, Nevada. The City of Mesquite proposes to use the land for a regional park.

DATES: Interested parties may submit comments regarding the proposed lease/conveyance or classification of the lands until January 14, 2008.

ADDRESSES: Mail written comments to BLM Field Manager, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, NV 89130–2301.

FOR FURTHER INFORMATION CONTACT: Kim Liebhauser, (702) 515–5088.

SUPPLEMENTARY INFORMATION: In accordance with Section 7 of the Taylor Grazing Act, (43 U.S.C. 315(f)), and Executive Order No. 6910, the following described land in Clark County, Nevada, has been examined and found suitable for classification for lease and subsequent conveyance under the provisions of the R&PP Act, as amended, (43 U.S.C. 869 et seq):

Mount Diablo Meridian, Nevada

T. 13 S., R. 70 E.,
Sec. 2, portion of E½NE¼, portion of SE¼SW¼, portion of SE¼.
Sec. 11, E½NE¼, portion of W½SE¼, portion of E½NW¼, portion of SW¼, portion of W½SE¼.
Sec. 14, W½NE¼, E½NW¼, portion of NW¼NW¼, SW¼NW¼.
Sec. 15, portion of E½NE¼.

The area described contains 670.16 acres, more or less.

Note: This description will be replaced by a lot description upon final approval of the official plat of survey.

The overall park master plan consists of 670 acres, which will be developed as a multi-use regional park. Approximately 135 acres will be developed as intensive use areas supporting a diverse range of outdoor recreational activities. Trails and open space will be located in strategic areas

and used to link connections between adjacent public and private land, including intensively developed areas immediately adjacent to the regional park. Planned development for this site includes:

135 acres of intensively developed areas, including a tennis complex, an amphitheater with shared parking for soccer and turf areas, group picnic areas with adventure playgrounds, a botanical garden, sand volleyball courts and restroom facilities;

425 acres of trails and open space, including seven miles of trail with three trailheads;

19 acres of open play (turf) areas;

46 acres of multiple use fields for soccer and associated sports; and

45 acres for a baseball and softball field complex.

Additional detailed information pertaining to this application, Plan of Development, and site plans are in case file N–82343, which is located in the BLM Las Vegas Field Office.

Cities are a common applicant under the public purposes provision of the R&PP Act. The City of Mesquite is a political subdivision of the State of Nevada and is therefore a qualified applicant under the Act. The land is not required for any Federal purpose. The lease/conveyance is consistent with the BLM Las Vegas Resource Management Plan, dated October 5, 1998, and would be in the public interest.

The lease and subsequent conveyance, when issued, will be subject to the provisions of the R&PP Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe. The patent will be subject to:

1. All valid existing rights;

2. A Right-of-Way N–55066 in favor of Overton Power District, its successors or assigns, for roads and power line purposes, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761); and

3. A Right-of-Way N–80466 in favor of Virgin Valley Water District, its successors or assigns, for water tank, water lines and road purposes, pursuant to the Act of October 21, 1976 (43 U.S.C. 1761).

On November 28, 2007, the above described land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease and subsequent conveyance under the R&PP Act, leasing under the mineral leasing laws, and disposals under the mineral material disposal laws.

Comments, including names and addresses of respondents, will be available for public review.

Interested parties may submit comments involving the suitability of the land for park sites. Comments on the classification are restricted to whether the land is physically suitable for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision to lease/convey under the R&PP Act, or any other factor not directly related to the suitability of the land for public park sites.

Only written comments submitted by postal service or overnight mail to the Field Manager, BLM Las Vegas Field Office will be considered properly filed. Electronic mail, facsimile, or telephone comments will not be considered properly filed. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. Any adverse comments will be reviewed by the BLM Nevada State Director. In the absence of any adverse comments, the classification of the land described in this notice will become effective on January 28, 2008. The lands will not be available for lease/conveyance until after the classification becomes effective.

(Authority: 43 CFR 2741.5)

Dated: November 16, 2007.

Mark R. Chatterton,

Assistant Field Manager, Non-Renewable Resources, Las Vegas, Nevada.

[FR Doc. E7–23140 Filed 11–27–07; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–957–08–1420–BJ]

Notice of Filing of Plats of Survey, WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats of Survey, Wyoming.

SUMMARY: The Bureau of Land Management (BLM) has filed the plats of survey of the lands described below in the BLM Wyoming State Office, Cheyenne, Wyoming, on the dates indicated.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Land Management, and are necessary for the management of resources. The lands surveyed are:

The plat and field notes representing the dependent resurvey of the south and west boundaries and the subdivisional lines, Township 48 North, Range 79 West, Sixth Principal Meridian, Wyoming, Group No. 755, was accepted and filed August 29, 2007.

The plat representing the entire record of the survey of a portion of the boundary between the Grand Teton National Park and the Bridger-Teton National Forest, along the hydrographic divide as defined by Congressional Act, February 26, 1929, Public Law 70–817, within the unsurveyed portion of Township 42 North, Range 117 West, Sixth Principal Meridian, Wyoming, Group No. 764, was accepted and filed September 17, 2007.

The plats and field notes representing the dependent resurvey of a portion of the Eighth Standard Parallel North, through Range 109 West, a portion of the north boundary, the west boundary, a portion of the subdivisional lines, and the subdivision of certain sections, Township 33 North, Range 109 West, Sixth Principal Meridian, Wyoming, Group No. 757, was accepted and filed October 31, 2007.

The plat and field notes representing the dependent resurvey of the south and west boundaries and the subdivisional lines, Township 47 North, Range 79 West, Sixth Principal Meridian, Wyoming, Group No. 756, was accepted and filed November 2, 2007.

Copies of the preceding described plats and field notes are available to the public at a cost of $1.10 per page.

Dated: November 21, 2007.

John P. Lee,

Chief Cadastral Surveyor, Division of Support Services.

[FR Doc. E7–23138 Filed 11–27–07; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Clean Air Act

Notice is hereby given that on November 14, 2007, a proposed Consent Decree (''Decree'') in *United States* v. *Aspen Petroleum Products, Inc., et al.,* Civil Action No. 07–cv–02382–WYD–BNB was lodged with the United States District Court for the District of Colorado.

The Decree resolves the United States' claims against Aspen Petroleum Products, Inc., and Terrance Tschatschula under Section 211 of the Clean Air Act (''Act''), 42 U.S.C. 7545, for injunctive relief and civil penalties for violations of the Act and the Fuels regulations promulgated under the Act at 40 CFR part 80. The Decree requires Defendants to pay the United States a civil penalty of $25,000 and also requires Defendants to perform specific injunctive relief if they engage in further activities under the Act.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Aspen Petroleum Products, et al.,* D.J. Ref. 90–5–2–1–09035.

The Consent Decree may be examined at the Office of the United States Attorney, 1225 Seventeenth Street, Suite 700, Denver, CO 80202, and at U.S. EPA, Office of Enforcement and Compliance Assurance, 12345 W. Alameda, Suite 214, Denver, Co 80228. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, to *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $7.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

W. Benjamin Fisherow,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–5868 Filed 11–27–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on November 4, 2007, a proposed consent decree in *United States* v. *Edward Shaw, et al.,* Civil Action No. 04–2503–RDR–JPO, was lodged with the United States District Court for the District of Kansas.

In this action the United States sought recovery of response costs incurred by the U.S. Environmental Protection Agency in cleaning up asbestos contamination at a site near Shallow Water, Kansas. Based on financial information provided by the defendants, the government has concluded that the defendants have no ability to pay. The proposed decree terminates the case, contingent on the accuracy of the information that the defendants have given to the government.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 200447–7611, and should refer to *United States* v. *Edward Shaw, et al.,* Civil Action No. 04–2503–RDR–JPO, D.J. Ref. 90–11–3–08329.

During the public comment period, the consent decree may be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–5870 Filed 11–27–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on November 13, 2007, a proposed Consent Decree in *United States* v. *Wilhelm Enterprises Corp., et al.,* Civil Action No. 07–CV–765, was lodged with the United States District Court for the Western District of New York.

The proposed Consent Decree will settle the United States' claims on behalf of the U.S. Environmental Protection Agency (''EPA'') against 16 defendants pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (''CERCLA''), 42 U.S.C. 9606 and 9607, with respect to the Peter Cooper (Markhams) Superfund Site, located in the Hamlet of Markhams, Town of Dayton, Cattaraugus County, New York. The defendants include: Wilhelm Enterprises Corporation; Brown Shoe Company, Inc.; Seton Company; GST AutoLeather; Prime Tanning Company, Inc.; Viad Corporation; ConAgra Grocery Products Company, Inc.; Leucadia National Corporation; Beggs & Cobb Corporation; Wolverine Worldwide, Inc.; Genesco, Inc.; Albert Trostel & Sons Co.; Blackhawk Leather Ltd.; Eagle Ottawa, LLC; S.B. Foot Tanning Company; and Horween Leather Company (''Settling Defendants''). Pursuant to the Consent Decree, Settling Defendants will pay a total of $511,000 in reimbursement of the United States' response costs for the Site, plus interest. In addition, 12 of the Settling Defendants will finance and perform the remedy selected by EPA for the Site, estimated to cost $1.3 million.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this

publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Wilhelm Enterprises Corp., et al.,* Civil Action No. 07–CV–765, D.J. Ref. 90–11–2–06887/4.

The proposed Consent Decree may be examined at the Office of the United States Attorney, Western District of New York, 128 Delaware Avenue, Buffalo, New York 14202, and at EPA, Region 2, 290 Broadway, New York, New York 10007–1866. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax number (202) 514–0097, phone confirmation number (202) 514–1547. If requesting a copy by mail from the Consent Decree Library, please enclose a check in the amount of $84.25 ($0.25 per page reproduction cost) payable to the United States Treasury or, if requesting by e-mail or fax, forward the check in that amount to the Consent Decree Library at the address stated above. If requesting a copy exclusive of exhibits, please enclose a check in the amount of $22.25 ($0.25 per page reproduction cost) payable to the United States Treasury.

Ronald Gluck,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–5869 Filed 11–27–07; 8:45 am]

BILLING CODE 4410–15–M

LEGAL SERVICES CORPORATION

Notice of Availability of Calendar Year 2008 Competitive Grant Funds

AGENCY: Legal Services Corporation.

ACTION: Solicitation for Proposals for the Provision of Civil Legal Services.

SUMMARY: The Legal Services Corporation (LSC) is the national organization charged with administering federal funds provided for civil legal services to low-income people. LSC hereby announces the availability of competitive grant funds for the provision of a full range of civil legal services to eligible clients throughout the VA–20 service area in northern Virginia. The annualized grant amount is anticipated to be approximately $1.1 million. The grant will be awarded in or around June 2008.

DATES: See **SUPPLEMENTARY INFORMATION** section for grants competition dates.

ADDRESSES: Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

FOR FURTHER INFORMATION CONTACT: Office of Program Performance by e-mail at *competition@lsc.gov,* or visit the grants competition Web site at *www.ain.lsc.gov.*

SUPPLEMENTARY INFORMATION: The Request for Proposals (RFP) is available at *http://www.ain.lsc.gov.* Once at the Web site, click on ''Bulletin Board'' to access the RFP and other information pertaining to the LSC competitive grants process. Refer to the RFP for instructions on preparing the grant proposal; the regulations and guidelines governing LSC funding; a description of the service area; the definition of a full range of legal services; and grant proposal submission requirements.

Applicants must file a Notice of Intent to Compete (NIC; RFP Form–H) to participate in the competitive grants process. The deadline for filing the NIC is December 17, 2007, 5 p.m., e.d.t. The deadline for filing grant proposals is February 15, 2008, 5 p.m., e.d.t. The dates shown in this notice for filing the NIC and the grant proposals supersede the dates in the RFP. All other instructions, regulations, guidelines, service area descriptions, definitions, and grant proposal submission requirements remain in effect unless otherwise noted.

LSC is seeking proposals from: (1) Non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) state or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose governing boards are controlled by locally elected officials.

LSC will not fax the RFP to interested parties. Interested parties are asked to visit *http://www.ain.lsc.gov* regularly for updates on the LSC competitive grants process.

Dated: November 20, 2007.

Michael A. Genz,

Director, Office of Program Performance, Legal Services Corporation.

[FR Doc. E7–23009 Filed 11–27–07; 8:45 am]

BILLING CODE 7050–01–P

LEGAL SERVICES CORPORATION

Notice of Availability of Calendar Year 2008 Competitive Grant Funds

AGENCY: Legal Services Corporation.

ACTION: Solicitation for Proposals for the Provision of Civil Legal Services.

SUMMARY: The Legal Services Corporation (LSC) is the national organization charged with administering federal funds provided for civil legal services to low-income people. LSC hereby announces the availability of competitive grant funds for the provision of a full range of civil legal services to eligible clients in American Samoa. The annualized grant amount is anticipated to be approximately $310,000. The grant will be awarded in or around June 2008.

DATES: See **SUPPLEMENTARY INFORMATION** section for grants competition dates.

ADDRESS: Legal Services Corporation—Competitive Grants, 3333 K Street, NW., Third Floor, Washington, DC 20007–3522.

FOR FURTHER INFORMATION CONTACT: Office of Program Performance by e-mail at *competition@lsc.gov,* or visit the grants competition Web site at *www.ain.lsc.gov.*

SUPPLEMENTARY INFORMATION: The Request for Proposals (RFP) is available at *http://www.ain.lsc.gov.* Once at the Web site, click on ''Bulletin Board'' to access the RFP and other information pertaining to the LSC competitive grants process. Refer to the RFP for instructions on preparing the grant proposal; the regulations and guidelines governing LSC funding; the definition of a full range of legal services, and grant proposal submission requirements.

Applicants must file a Notice of Intent to Compete (NIC; RFP Form-H) to participate in the competitive grants process. The deadline for filing the NIC is December 31, 2007, 5 p.m., e.d.t. The deadline for filing grant proposals is March 3, 2008, 5 p.m., e.d.t. The dates shown in this notice for filing the NIC and the grant proposals supersede the dates in the RFP. All other instructions, regulations, guidelines, service area descriptions, definitions, and grant proposal submission requirements remain in effect unless otherwise noted.

LSC is seeking proposals from: (1) Non-profit organizations that have as a purpose the provision of legal assistance to eligible clients; (2) private attorneys; (3) groups of private attorneys or law firms; (4) state or local governments; and (5) sub-state regional planning and coordination agencies that are composed of sub-state areas and whose

governing boards are controlled by locally elected officials.

LSC will not fax the RFP to interested parties. Interested parties are asked to visit *http://www.ain.lsc.gov* regularly for updates on the LSC competitive grants process.

Dated: November 20, 2007.

Michael A. Genz,

Director, Office of Program Performance, Legal Services Corporation.

[FR Doc. E7–23011 Filed 11–27–07; 8:45 am]

BILLING CODE 7050–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meeting

November 21, 2007.

TIME AND DATE: 10 a.m., Tuesday, December 4, 2007.

PLACE: The Richard V. Backley Hearing Room, 9th Floor, 601 New Jersey Avenue, NW., Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Empire Iron Mining Partnership,* Docket No. LAKE 2006–60–RM. (Issues include whether the Administrative Law Judge correctly ruled that the Secretary of Labor may properly allege violations of alternative standards in a citation and whether the Judge correctly determined that the operator violated 30 CFR 56.14105.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen, (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Jean H. Ellen,

Chief Docket Clerk.

[FR Doc. 07–5880 Filed 11–26–07; 4:04 pm]

BILLING CODE 6735–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

Meeting Agenda

Time and Date: 9:30 a.m., Tuesday, December 4, 2007.

Place: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

Status: The two items are open to the public.

Matters to be Considered:

7772A Aircraft Accident Report—Inflight Cargo Fire, United Parcel Service Company Flight 1307, McDonnell Douglas DC–8–71F, N748UP, Philadelphia, Pennsylvania, February 7, 2006.

7949 Highway Accident Brief and Safety Recommendation Letters—Rear-End Chain Reaction Collision, Interstate 94 East, Near Chelsea, Michigan, July 16, 2004.

News Media Contact: Telephone (202) 314–6100.

Individuals requesting specific accommodations should contact Chris Bisett at (202) 314–6305 by Friday, November 30, 2007.

The public may view the meeting via a live or archived Webcast by accessing a link under ''News & Events'' on the NTSB home page at *http://www.ntsb.gov*.

For Further Information Contact: Vicky D'Onofrio, (202) 314–6410.

Dated: November 23, 2007.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 07–5871 Filed 11–27–07; 8:45 am]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–261]

Carolina Power & Light Company; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, or the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–23 issued to the Carolina Power & Light Company (the licensee), now doing business as Progress Energy Carolinas, Inc., for operation of the H.B. Robinson Steam Electric Plant, Unit No. 2, located in Darlington County, South Carolina.

The proposed amendment would change the Technical Specifications related to rod position indication. The requirements would be modified for the condition where one demand position indicator per bank for one or more banks is inoperable, and new requirements would be added for the condition where two demand position indicators per bank for one or more banks are inoperable.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person(s) whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in Title 10 of the Code of Federal Regulations (10 CFR) Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the

requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E–Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E–Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E–Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E–Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E–Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E–Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket, which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, see the application for amendment dated November 15, 2007, which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should

contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 21st day of November, 2007.

For the Nuclear Regulatory Commission.

Stewart N. Bailey,

Senior Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7–23130 Filed 11–27–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251]

Florida Power and Light Company; Notice of Consideration of Issuance of Amendment to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–31, issued to Florida Power and Light Company (FPL, the licensee), for operation of the Turkey Point Nuclear Plant, Units 3 and 4, located in Miami-Dade County, Florida.

The proposed amendment would revise Technical Specification (TS) 3.1.3.2, on a permanent basis to allow the use of an alternate method of determining rod position for a control rod or shutdown rod with an inoperable rod position indicator (RPI). The proposed alternate method of monitoring the stationary gripper coil voltage has been previously submitted by FPL per References 1, 2 and 3, and approved by the NRC for use at Turkey Point Units 3 and 4. The NRC approved the alternate method for monitoring rod position on October 5, 2006, by issuance of License Amendment 230 for Turkey Point Unit 3 for control rod M–6 in Control Rod Bank C during Cycle 22 operation. The licensee indicated the need for expedited review of this amendment due to the unanticipated failure of the Turkey Point Unit 3 Analog RPI for control rod F–2 in Control Rod Bank B. The proposed amendment will revise TS 3.1.3.2 on a permanent basis to allow use of an alternate method of monitoring rod position for a control rod or shutdown rod with an inoperable RPI. Additionally, there is a concern that exercising the movable incore detectors every 8 hours (90 times per month) to comply with the compensatory actions required by the current Action Statement a. of TS 3.1.3.2 will result in excessive wear. In summary, the proposed change will add new requirements to allow alternate monitoring of the rod position when the analog RPI is not operable. This allowance can only be used for one rod indication per unit and can only be used until the next opportunity to safely correct the problem. The alternate method of monitoring rod position provides reasonable indication of rod position without subjecting the movable incore detectors to excessive wear.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in title 10 of the Code of Federal Regulations (10 CFR), section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. The proposed change provides an alternative method for verifying rod position of one control rod or shutdown rod with an inoperable rod position indicator (RPI). The proposed change meets the intent of the current specification in that it ensures verification of position of the control rod or shutdown rod within one hour of unintended rod motion and at least once every eight (8) hours. The proposed change provides only an alternative method of monitoring control rod position and does not change the assumption or results of any previously evaluated accident.

Therefore, operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

No. As described above, the proposed change provides only an alternative method of determining the position of one control rod or shutdown rod with an inoperable RPI. No new accident initiators are introduced by the proposed alternative manner of performing rod position verification. The proposed change does not affect the reactor protection system or the reactor control system. Hence, no new failure modes are created that would cause a new or different kind of accident from any accident previously evaluated.

Therefore, operation of the facility in accordance with the proposed amendments would not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

No. The bases of Specification 3.1.3.2 state that the operability of the rod position indicators is required to determine control rod positions and thereby ensure compliance with the control rod alignment and insertion limits. The proposed change does not alter the requirement to determine rod position but provides an alternative method for determining the position of control rod or shutdown rod with an inoperable RPI. As a result, the initial conditions of the accident analysis are preserved and the consequences of previously analyzed accidents are unaffected.

Therefore, operation of the facility in accordance with the proposed amendments would not involve a significant reduction in the margin of safety. Therefore, operation of the facility in accordance with the proposed amendments would not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comment received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a

timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the Federal Register a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room 6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestors/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-*

submittals.html. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737. Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this action, see the application for amendment dated May 17, 2007, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 20th day of November 2007.

Brenda L. Mozafari,

Senior Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7–23131 Filed 11–27–07; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Request for Review by OMB

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15c3–3; SEC File No. 270–087; OMB Control No. 3235–0078.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget requests for extension of the previously approved collections of information discussed below. The Code of Federal Regulation citation to this collection of information is the following rule: 17 CFR 240.15c3–3 Customer Protection—Reserves and Custody of Securities.

Rule 15c3–3 under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) requires that a broker-dealer that hold customer securities obtain and maintain possession and control of fully-paid and excess margin securities they hold for customers. In addition, the Rule requires that a broker-dealer that holds customer funds make either a weekly or monthly computation to determine whether certain customer funds need to be segregated in a special reserve bank account for the exclusive benefit of the firm's customers. It also requires that a broker-dealer maintain a written notification from each bank where a Special Reserve Bank Account is held acknowledging that all assets in the account are for the exclusive benefit of the broker-dealer's customers, and to provide written notification to the Commission (and its designated examining authority) under certain, specified circumstances. Finally, Rule 15c3–3 was amended in 2001 to add paragraph (o), which only applies to broker-dealers that sell securities futures products to customers. Paragraph (o) requires that such broker-dealers provide certain notifications to customers, and to make a record of any changes of account type.

There are approximately 344 broker-dealers fully subject to the Rule (i.e., broker-dealers that can not claim any of the exemptions enumerated at paragraph (k)), of which approximately 9 make daily, 245 make weekly, and 90 make monthly, reserve computations. On average, each of these respondents require approximately 2.5 hours to complete a computation. Accordingly, Commission staff estimates that the resulting burden totals 39,950 hours annually ((2.5 hours × 240 computations × 9 respondents that calculate daily) + (2.5 hours × 52 computations × 245 respondents that calculate weekly) + (2.5 hours × 12 computations × 90 respondents that calculate monthly)).

A broker-dealer required to maintain the Special Reserve Bank Account prescribed by Rule 15c3–3 must obtain

and retain a written notification from each bank in which it has a Special Reserve Bank Account to evidence bank's acknowledgement that assets deposited in the Account are being held by the bank for the exclusive benefit of the broker-dealer's customers. As stated previously, 344 broker-dealers are presently fully-subject to Rule 15c3–3. In addition, 140 broker-dealers operate in accordance with the exemption provided in paragraph (k)(2)(i) which also requires that a broker-dealer maintain a Special Reserve Bank Account. The staff estimates that of the total broker-dealers that must comply with this rule, only 25%, or 121 ((344 + 140) × .25) must obtain 1 new letter each year (either because the broker-dealer changed the type of business it does and became subject to either paragraph (e)(3) or (k)(2)(i) or simply because the broker-dealer established a new Special Reserve Bank Account). The staff estimates that it would take a broker-dealer approximately 1 hour to obtain this written notification from a bank regarding a Special Reserve Bank Account because the language in these letters is largely standardized. Therefore, Commission staff estimates that broker-dealers will spend approximately 121 hours each year to obtain these written notifications.

In addition, a broker-dealer must immediately notify the Commission and its designated examining authority if it fails to make a required deposit to its Special Reserve Bank Account. Commission staff estimates that broker-dealers file approximately 65 such notices per year. Broker-dealers would require approximately 30 minutes, on average, to file such a notice. Therefore, Commission staff estimates that broker-dealers would spend a total of approximately 33 hours each year to comply with the notice requirement of Rule 15c3–3.

Finally, a broker-dealer that effects transactions in securities futures products (''SFPs'') for customers [1] also will have paperwork burdens associated with the requirement in paragraph (o) of Rule 15c3–3 to make a record of each change in account type.[2] More specifically, a broker-dealer that changes the type of account in which a customer's SFPs are held must create a record of each change in account type that includes the name of the customer, the account number, the date the broker-dealer received the customer's request to change the account type, and the date the change in account type took place. As of December 31, 2006, broker-dealers that were also registered as futures commission merchants (''FCMs'') reported that they maintained 38,815,092 customer accounts. The staff estimates that 8% of these customers may engage in SFP transactions (38,815,092 accounts × 8% = 3,105,207). Further, the staff estimates that 20% per year may change account type. Thus, broker-dealers may be required to create this record for up to 621,041 accounts (3,105,207 accounts × 20%). The staff believes that it will take approximately 3 minutes to create each record.[3] Thus, the total annual burden associated with creating a record of change of account type will be 31,052 hours (621,041 accounts × (3min/60min)).

Consequently, the staff estimates that the total annual burden hours associated with Rule 15c3–3 would be approximately 71,156 hours (39,950 hours + 121 hours + 33 hours + 31,052 hours).

In addition, a broker-dealer that effects transactions in SFPs for customers also will have an annualized cost burden associated with the requirements in paragraph (o) of Rule 15c3–3 to (1) provide each customer that plans to effect SFP transactions with a disclosure document containing certain information,[4] and (2) send each SFP customer notification of any change of account type.[5] Approximately 8% of the accounts held by broker-dealers that are also registered as FCMs, or 3,105,207 accounts, may engage in SFP transactions. The staff estimates that the cost of printing and sending each disclosure document will be approximately $.12 per document sent.[6] Thus, the staff estimates that the cost of printing and sending disclosure documents would be approximately $372,625 (3,105,207 accounts × $.12). In addition, approximately 621,041 accounts (3,105,207 accounts × 20%) may change account type per year requiring that broker-dealers provide notification to those customers. The staff estimates that the cost of sending this notification to customers will be about $74,525 (621,041 accounts × $.12). Consequently, the staff estimates that the total annual cost associated with Rule 15c3–3 would be $447,150 ($372,625 + $74,525).

Records required to be created and notices required to be filed with the Commission pursuant to Rule 15c3–3 must be maintained in accordance with Rule 17a–4 (17 CFR 240.17a–4). The collection of information is mandatory and the information required to be provided to the Commission pursuant to these Rules are deemed confidential, notwithstanding any other provision of law under Section 24(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78x(b)) and Section 552(b)(3)(B) of the Freedom of Information Act (5 U.S.C. 552(b)(3)(B)).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *Alexander_T._Hunt@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: November 19, 2007.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–23111 Filed 11–27–07; 8:45 am]

BILLING CODE 8011–01–P

[1] Broker-dealers that do not engage in an SFP business with or for customers are not affected by this section of Rule 15c3–3. Broker-dealers that engage in an SFP business must also register with the CFTC as a futures commission merchant (''FCM''). As of January 31, 2007 there were 64 broker-dealers that were also registered as FCMs.

[2] 17 CFR 240.15c3–3(o)(3)(i).

[3] In fact, the staff believes that most firms will have this process automated. To the extent that no person need be involved in the generation of this record, the burden will be very minimal.

[4] 17 CFR 240.15c3–3(o)(2).

[5] 17 CFR 240.15c3–3(o)(3)(ii).

[6] Based on past conversations with industry representatives regarding other rule changes as adjusted to account for inflation.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56822; File No. SR–FINRA–2007–023]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay Implementation of Certain Rule Changes Approved in SR–NASD–2005–146

November 20, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

16, 2007, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) 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 substantially prepared by FINRA. FINRA filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to establish January 14, 2008 as the final implementation date of the rule changes approved in SR–NASD–2005–146.[6] There are no new changes to the text of FINRA rules.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 26, 2007, the Commission approved SR–NASD–2005–146, which, among other things, amended IM–2110–2 [7] to expand the scope to apply to OTC equity securities and modify the minimum price-improvement standards for securities trading in decimals. The amendments relating to OTC equity securities and the minimum price-improvement provisions are scheduled to become effective on November 26, 2007.[8]

On June 27, 2007, FINRA filed a proposed rule change (SR–NASD–2007–041) to amend the minimum price-improvement standards in IM–2110–2 that were approved as part of SR–NASD–2005–146.[9] FINRA has proposed to implement the changes in SR–NASD–2007–041 on the final implementation date of SR–NASD–2005–146. SR–NASD–2007–041 remains pending at the Commission.

To provide additional time for the Commission to consider and act upon the proposed changes in SR–NASD–2007–041 and, if SR–NASD–2007–041 is approved, allow firms sufficient time to make the required technological changes to implement the proposed changes in SR–NASD–2007–041, FINRA is proposing that the final implementation date of SR–NASD–2005–146 currently scheduled for November 26, 2007 be delayed until January 14, 2008.[10] In doing so, the proposed minimum price-improvement provisions in SR–NASD–2007–041, if approved, would become effective on January 14, 2008. FINRA has filed the proposed rule change for immediate effectiveness. FINRA proposes to implement the proposed rule change as described herein.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[11] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is consistent with the provisions of the Act noted above because extending the final implementation date of SR–NASD–2005–146 will ensure that the Commission has adequate time to act on the proposed changes in SR–NASD–2007–041 and, if SR–NASD–2007–041 is approved, ensure firms have sufficient time to make the necessary changes to comply with the new price-improvement standards.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) [13] thereunder.[14]

A proposed rule change filed under Commission Rule 19b–4(f)(6) [15] normally does not become operative prior to thirty days after the date of filing. FINRA requests that the Commission waive the 30-day operative delay, as specified in Rule 19b–4(f)(6)(iii), and designate the proposed rule change to become operative immediately to allow FINRA to delay the implementation date of SR–NASD–2005–146 currently scheduled for November 26, 2007 until January 14, 2008. The Commission believes that waiving the 30-day operative delay is

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] FINRA has requested that the Commission waive the 5 day pre-filing notice and 30-day operative delay required by Rule 19b–4(f)(6)(iii), 17 CFR 240.19b–4(f)(6)(iii). *See* discussion *infra* Section III.

[6] *See* Securities Exchange Act Release No. 55351 (February 26, 2007), 72 FR 9810 (March 5, 2007) (order approving SR–NASD–2005–146). *See also* NASD Notice to Members 07–19 (April 2007) (announcing the effective date of the rule changes in SR–NASD–2005–146).

[7] Currently, IM–2110–2 generally prohibits a member from trading for its own account in an exchange-listed security at a price that is equal to or better than an unexecuted customer limit order in that security, unless the member immediately thereafter executes the customer limit order at the price at which it traded for its own account or better.

[8] *See* Securities Exchange Act Release No. 56103 (July 19, 2007), 72 FR 40918 (July 25, 2007) (notice of filing and immediate effectiveness of SR–NASD–2007–039). *See also* Member Alert, dated June 20, 2007 (announcing a revised implementation date of certain rule changes approved in SR–NASD–2005–146 until November 26, 2007).

[9] *See* File No. SR–NASD–2007–041.

[10] Certain other rule changes that were approved as part of SR–NASD–2005–146 became effective on July 26, 2007 and are not effected by this proposed rule change. *See supra* note 8.

[11] 15 U.S.C. 78o–3(b)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] FINRA has requested that the Commission waive the requirement that it provide the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which FINRA filed the proposed rule change pursuant to Rule 19b–4(f)(6)(iii). The Commission hereby grants this request. *See* 17 CFR 240.19b–4(f)(6)(iii).

[15] 17 CFR 240.19b–4(f)(6).

consistent with the protection of investors and the public interest because if SR–NASD–2007–041 is approved by the Commission, it would allow firms sufficient time to make the required technological changes. For these reasons, the Commission designates the proposed rule change as operative upon filing.[16]

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 the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2007–023 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2007–023. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2007–023 and should be submitted on or before December 19, 2007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–23113 Filed 11–27–07; 8:45 am]

BILLING CODE 8011–01–P

[16] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56832; File No. SR–NYSEArca–02007–102]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Trade Units of the United States 12 Month Oil Fund, LP and the United States 12 Month Natural Gas Fund, LP Pursuant to Unlisted Trading Privileges

November 21, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 2, 2007, NYSE Arca, Inc. (the ''Exchange''), through its wholly owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to trade pursuant to unlisted trading privileges (''UTP'') units (''Units'') of the United States 12 Month Oil Fund, LP (''12 Month Oil Fund'') and the United States 12 Month Natural Gas Fund, LP (''12 Month Natural Gas Fund'') (each, a ''Partnership,'' and collectively, the ''Partnerships''). The text of the proposed rule change is available at the Exchange's principal office, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Under NYSE Arca Equities Rule 8.300, which sets forth criteria to permit the trading of Partnership Units[3] either by listing or pursuant to UTP, the Exchange proposes to trade pursuant to UTP the Units of each Partnership. The Commission has approved the listing and trading of such Units on the American Stock Exchange LLC (''Amex'').[4]

Ownership of each Partnership Unit represents a fractional undivided unit of a beneficial interest in the net assets of the applicable Partnership.[5] The net assets of each of the Partnerships will consist primarily of investments in futures contracts for crude oil, heating oil, gasoline, natural gas, and other petroleum-based fuels that are traded on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYSE Arca Equities Rule 8.300(b)(2) defines Partnership Units as securities issued by a partnership that invests in any combination of futures contracts, options on futures contracts, forward contracts, commodities, and/or securities and that are redeemed daily in specified aggregate amounts at net asset value (''NAV'').

[4] *See* Securities Exchange Act Release No. 56831 (November 21, 2007) (SR–Amex–2007–98) (granting approval to list and trade the Units on Amex); Securities Exchange Act Release No. 56719 (October 29, 2007), 72 FR 62277 (November 2, 2007) (SR–Amex–2007–98) (providing notice of Amex's proposal to list and trade the Units) (''Amex Notice'').

[5] Each Partnership is a commodity pool that will issue Units that may be purchased and sold on the Exchange.

the New York Mercantile Exchange (''NYMEX''), Intercontinental Exchange (''ICE Futures''), or other U.S. and foreign exchanges (collectively, the ''Futures Contracts''). In the case of the 12 Month Oil Fund, the predominant investments are expected to be based on, or related to, crude oil. Similarly, for the 12 Month Natural Gas Fund, the predominant investments are expected to be based on, or related to, natural gas.

The investment objective of the 12 Month Oil Fund is for the changes in percentage terms of a Unit's NAV to reflect the changes in percentage terms of the price of light, sweet crude oil delivered to Cushing, Oklahoma, as measured by the changes in the average prices of 12 crude oil futures contracts traded on NYMEX (the ''Oil Benchmark Futures Contracts''), *less* the 12 Month Oil Fund's expenses. The investment objective of the 12 Month Natural Gas Fund is for changes in percentage terms of a Unit's NAV to reflect the changes in percentage terms of the price of natural gas delivered to Henry Hub, Louisiana, as measured by the changes in the average of the prices of 12 futures contracts on natural gas traded on NYMEX (the ''Natural Gas Benchmark Futures Contracts''), *less* the 12 Month Natural Gas Fund's expenses.[6]

The Exchange represents that quotes and last-sale information for the Futures Contracts are widely disseminated through a variety of market data vendors worldwide. The daily settlement prices for the NYMEX-traded Futures Contracts are publicly available on the NYMEX Web site at *http://www.nymex.com,* and real-time futures data is available by subscription from various financial information services. NYMEX also provides delayed futures information on current and past trading sessions and market news free of charge on its Web site. The specific contract specifications for the Futures Contracts are also available on the NYMEX Web site and the ICE Futures Web site at *http://www.icefutures.com.*

Amex will disseminate through the facilities of the Consolidated Tape Association (''CTA'') an updated Indicative Partnership Value (''Indicative Partnership Value''). The Indicative Partnership Value for each Partnership will be disseminated on a per-Unit basis at least every 15 seconds during the regular trading hours from 9:30 a.m. to 4:15 p.m. Eastern Time (''ET''). The Indicative Partnership Value is based on open-outcry trading of the relevant Oil or Natural Gas Benchmark Futures Contracts on NYMEX. Open outcry trading on NYMEX closes daily at 2:30 p.m. ET, while NYMEX's energy futures contracts are traded on the Chicago Mercantile Exchange's CME Globex® electronic trading platform on a 24-hour basis.[7] After the close of open outcry on NYMEX at 2:30 p.m. ET, the Indicative Partnership Value will reflect changes to the relevant Benchmark Futures Contracts as provided for through CME Globex®. The value of the relevant Benchmark Futures Contracts will be available on a 15-second delayed basis from 9:30 a.m. to 4:15 p.m. ET.

While NYMEX is open for trading, the Indicative Partnership Value can be expected to closely approximate the value per Unit of the Basket Amount. However, during Exchange trading hours when the Futures Contracts have ceased trading in NYMEX's open outcry, spreads and resulting premiums or discounts may widen and, therefore, increase the difference between the price of the Units and the NAV of the Units. The Exchange submits that the Indicative Partnership Value disseminated from 9:30 a.m. to 4:15 p.m. ET, on a per-Unit basis, should not be viewed as a real-time update of the NAV, which is calculated only once daily.

Amex will make available on its Web site at *http://www.amex.com* the following information: (1) The prior business day's NAV and the reported closing price; (2) the mid-point of the bid-ask price in relation to the NAV as of the time the NAV is calculated (''Bid-Ask Price''); [8] (3) calculation of the premium or discount of such price against such NAV; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV, within appropriate ranges for each of the four previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the Commission or required by the Commodity Futures Trading Commission (''CFTC''); and (6) other applicable quantitative information.

The total portfolio composition of the 12 Month Oil Fund and the 12 Month Natural Gas Fund will be disclosed each business day that Amex is open for trading on their respective Web sites at *http://www.unitedstates 12monthoilfund.com* and *http://www.unitedstates12monthnatural gasfund.com.* The 12 Month Oil Fund's Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each Futures Contract and other crude oil-related investments (''Crude Oil Interests''), the specific types and characteristics of the Crude Oil Interests, short-term obligations of the United States of two years or less (''Treasuries''), and the amount of cash and cash equivalents held in the portfolio of the 12 Month Oil Fund. The 12 Month Natural Gas Fund's Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name and value of each Futures Contract and other natural gas-related investments (''Natural Gas Interests''), the specific types and characteristics of the Natural Gas Interests, Treasuries, and the amount of cash and cash equivalents held in the portfolio of the 12 Month Natural Gas Fund.

The public Web site disclosure of the portfolio composition of each of the 12 Month Oil Fund and the 12 Month Natural Gas Fund will coincide with the disclosure on each business day of the NAV for the applicable Units and the Basket Amount [9] (for orders placed during the day) for each Partnership. Therefore, the same portfolio information will be provided on the public Web site for each Partnership as well as in the facsimile or e-mail

[6] A detailed discussion of the crude oil, gasoline, heating oil, and natural gas markets; futures regulation and the structure and regulation of the Partnerships; investment strategies (including specific crude oil- and natural gas-related investments), objectives, procedures, and policies; impact of accountability and position limits on the Futures Contracts; creations and redemptions of baskets of Units; arbitrage; Partnership termination events; and calculation methodology of the NAV for the Units, among others, can be found in the Amex Notice. In addition, information regarding the Partnerships and the investment manager for each Partnership, the manner in which the Units will be offered and sold, and the investment strategy of the 12 Month Oil Fund and the 12 Month Natural Gas Fund is included in respective registration statements of the Partnerships regarding the offering of the Units filed with the Commission under the Securities Act of 1933. *See* 12 Month Oil Fund Form S–1 filed July 5, 2007, as amended (File No. 333–144348); 12 Month Natural Gas Fund Form S–1 filed July 6, 2007 (File No. 333–144409).

[7] CME Globex® (''Globex'') is an open-access marketplace that operates virtually 24 hours each trading day. Electronic trading on Globex is conducted from 6 p.m. ET Sunday through 5:15 p.m. ET Friday each week. There is a 45-minute break each day between 5:15 p.m. ET and 6 p.m. ET.

[8] The Bid-Ask Price of Units is determined using the highest bid and lowest offer as of the time of calculation of the NAV.

[9] A ''Basket Amount'' is the amount equal to the NAV per Unit, times 100,000 Units (each such aggregation of Units, a ''Basket'') calculated for the purpose of issuing Baskets to Authorized Purchasers. *See* Amex Notice, *supra* note 4, 72 FR at 62283. An ''Authorized Purchaser'' is a person, who, at the time of submitting an order to create or redeem Units, is (1) a registered broker-dealer or other market participant, such as a bank or other financial institution, that is exempt from broker-dealer registration; and (2) a Depository Trust Company participant. *See* Amex Notice, *supra* note 4, 72 FR at 62282 n.14.

message to Authorized Purchasers containing the NAV and Basket Amount (''Daily Dissemination''). The format of the public Web site disclosure and the Daily Dissemination will differ because the public Web site will list all portfolio holdings while the Daily Dissemination will provide the portfolio holdings in a format appropriate for Authorized Purchasers, *i.e.*, the exact components of a Creation Unit.

Each Partnership's NAV will be calculated and disseminated daily.[10] Amex disseminates for each Partnership on a daily basis by means of the CTA/Consolidated Quote (''CQ'') High Speed Lines information with respect to the Indicative Partnership Value, recent NAV, Units outstanding, Basket Amount, and Deposit Amount.[11] Amex will also make available on its Web site daily trading volume, closing prices, and the NAV for the Units.

The Exchange represents that it will cease trading the Units of a Partnership if the listing market stops trading the Units. The Exchange states further that UTP trading in the Units is governed by the trading halts provisions of NYSE Arca Equities Rule 7.34 relating to temporary interruptions in the calculation or wide dissemination of an Indicative Partnership Value or the value of the applicable underlying Benchmark Futures Contracts.[12] In addition, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Units. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Units inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying Futures Contracts; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the Units could be halted pursuant to the Exchange's ''circuit breaker'' rule[13] or by the halt or suspension of trading of the underlying securities.

The Exchange deems the Units to be equity securities, thus rendering trading in the Units subject to the Exchange's existing rules governing the trading of equity securities. Units will trade on the Exchange from 4 a.m. to 8 p.m. ET in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange represents that it has appropriate rules to facilitate transactions in the Units during all trading sessions.

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products to monitor trading in the Units. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Units in all trading sessions and to deter and detect violations of Exchange rules. The Exchange notes that NYSE Arca Equities Rule 8.300(e) sets forth certain restrictions on ETP Holders[14] acting as registered Market Makers in Units to facilitate surveillance.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG. In addition, the Exchange has an information sharing agreement in place with each of NYMEX and ICE Futures for the purpose of providing information in connection with trading in or related to futures contracts traded on NYMEX and ICE Futures, respectively. To the extent that a Partnership invests in Crude Oil Interests or Natural Gas Interests traded on other exchanges, the Exchange will seek to enter into information sharing agreements with those particular exchanges.

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Units. Specifically, the Bulletin will discuss the following: (1) The risks involved in trading the Units during the Opening and Late Trading Sessions when an updated Indicative Partnership Value will not be calculated or publicly disseminated;[15] (2) the procedures for purchases and redemptions of Units in Baskets (and that Units are not individually redeemable); (3) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Units; (4) how information regarding the Indicative Partnership Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Units prior to or concurrently with the confirmation of a transaction; and (6) trading information. In addition, the Bulletin will reference that each Partnership is subject to various fees and expenses described in the relevant registration statement; there is no regulated source of last-sale information regarding physical commodities; the Commission has no jurisdiction over the trading of crude oil, natural gas, heating oil, gasoline, or other petroleum-based fuels; and the CFTC has regulatory jurisdiction over the trading of crude-oil-based and natural-gas-based futures contracts and related options. The Bulletin will also discuss any exemptive, no-action, or interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Units will be calculated after 4 p.m. ET each trading day.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(b)(5) of the Act,[17] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. In addition, the Exchange believes that the proposed rule change is consistent with Rule 12f–5 under the Act[18] because the Exchange deems the Units to be equity securities, thus rendering trading in the Units subject to the Exchange's existing rules governing the trading of equity securities.

[10] Amex will obtain a representation from each Partnership that the respective NAV per Unit will be calculated daily and made available to all market participants at the same time. *See* Amex Notice, *supra* note 4, 72 FR at 62283 n.18.

[11] The ''Deposit Amount'' is the amount transferred from a purchaser to Brown Brothers Harriman & Co. for the purpose of purchasing a Basket of Units. *See* Amex Notice, *supra* note 4, 72 FR at 62283.

[12] The Exchange states that NYSE Arca Equities Rule 7.34(a) literally addresses temporary interruptions in the calculation or wide dissemination of the Indicative Intra-Day Value and the value of an underlying index. The Units of each Partnership, however, do not have an underlying index, but have underlying Benchmark Futures Contracts. Therefore, the Exchange hereby represents that the provisions in NYSE Arca Equities Rule 7.34(a) that address interruptions in the calculation or wide dissemination of the value of an underlying index shall also apply, in this case, to interruptions in the calculation or wide dissemination of the value of the underlying Benchmark Futures Contracts.

[13] *See* NYSE Arca Equities Rule 7.12.

[14] ''ETP Holder'' means a sole proprietorship, partnership, corporation, limited liability company, or other organization in good standing that has been issued an Equity Trading Permit or ''ETP.'' An ETP Holder must be a registered broker or dealer pursuant to Section 15 of the Act, 15 U.S.C. 78o(b).

[15] *See* NYSE Arca Equities rule 7.34(e) (Customer Disclosures).

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] 17 CFR 240.12f–5.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2007–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2007–102. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2007–102 and should be submitted on or before December 19, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[19] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[20] which requires that an exchange have rules designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that this proposal should benefit investors by increasing competition among markets that trade the Units. The Commission notes that it previously approved for trading on the Exchange pursuant to UTP Partnership Units issued by the United States Oil Fund, LP and the United States Natural Gas Fund, LP, which are similar to the Units that the Exchange proposes to trade herein.[21]

In addition, the Commission finds that the proposal is consistent with Section 12(f) of the Act,[22] which permits an exchange to trade, pursuant to UTP, a security that is listed and registered on another exchange.[23] The Commission notes that it has approved the original listing and trading of the Units on Amex.[24] The Commission finds that the proposal is consistent with Rule 12f–5 under the Act,[25] which provides that an exchange shall not extend UTP to a security unless the exchange has in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends UTP. The Exchange has represented that it meets this requirement because it deems the Units to be equity securities, thus rendering trading in the Units subject to the Exchange's existing rules governing the trading of equity securities.

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,[26] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations for and last-sale information regarding the Units will be disseminated through the Consolidated Quotation System and CTA, respectively.[27] In addition, Amex will disseminate a variety of information for each Partnership on a daily basis through the facilities of the CTA/CQ High Speed Lines including the Indicative Partnership Value on a per-Unit basis, at least every 15 seconds during regular Amex trading hours, the recent NAV, the number of Units outstanding, the Basket Amount, and the Deposit Amount. The daily closing and settlement prices for the NYMEX-traded Futures Contracts held by each Partnership, delayed futures information on current and past trading sessions, and market news are publicly available on the NYMEX Web site. Quotations and last-sale information for the Futures Contracts are widely disseminated through a variety of market data vendors worldwide. Amex's Web site contains information related to the NAV, the premium or discount of the Bid-Ask Price against the NAV, the prospectus and other periodically-filed reports, daily trading volume data, Unit

[19] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78f(b)(5).

[21] *See* Securities Exchange Act Release No. 53875 (May 25, 2006), 71 FR 32164 (June 2, 2006) (SR–NYSEArca–2006–11) (approving NYSE Arca Equities Rule 8.300 and the trading of Partnership Units of the United States Oil Fund, LP pursuant to UTP); Securities Exchange Act Release No. 56042 (July 11, 2007), 72 FR 39118 (July 17, 2007) (SR–NYSEArca–2007–45) (approving the trading of Partnership Units of the United States Natural Gas Fund, LP pursuant to UTP).

[22] 15 U.S.C. 78*l*(f).

[23] Section 12(a) of the Act, 15 U.S.C. 78*l*(a), generally prohibits a broker-dealer from trading a security on a national securities exchange unless the security is registered on that exchange pursuant to Section 12 of the Act. Section 12(f) of the Act excludes from this restriction trading in any security to which an exchange ''extends UTP.'' When an exchange extends UTP to a security, it allows its members to trade the security as if it were listed and registered on the exchange even though it is not so listed and registered.

[24] *See supra* note 4.

[25] 17 CFR 240.12f–5.

[26] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[27] E-mail from Timothy J. Malinowski, Director, NYSE Euronext, to Edward Cho, Special Counsel, Division of Trading and Markets, Commission, dated November 15, 2007 (confirming the dissemination of information concerning quotations and last-sale information).

closing prices, and other quantitative information. Finally, the 12 Month Oil Fund and the 12 Month Natural Gas Fund's Web sites will disclose, on each business day that the Amex is open for trading, the total portfolio composition.

The Commission also believes that the Exchange's trading halt rules are reasonably designed to prevent trading in the Units when transparency is impaired. Existing NYSE Arca Equities Rule 7.34(a)(4), which will apply to the trading of the Units, provides that, if the Benchmark Futures Contract or Indicative Partnership Value is no longer calculated or disseminated as required (a) during the Opening Session (4 a.m. to 9:30 a.m. ET), the Exchange may continue to trade the Units for the remainder of the Opening Session; (b) during the Core Trading Session (9:30 a.m. to 4 p.m. ET), the Exchange must halt trading in the Units; and (c) during the Late Trading Session (4 p.m. to 8 p.m. ET), the Exchange may continue trading in the Units only if the original listing market traded such Units until the close of its regular trading session without halt. If the Benchmark Futures Contract or Indicative Partnership Value continues not to be calculated or disseminated as of the next business day's Opening Session, the Exchange will not commence trading in the Units in such Opening Session.[28]

The Commission notes that, if the Units should be delisted by the listing exchange, the Exchange would no longer have authority to trade the Units pursuant to this order.

In support of this proposal, the Exchange has made the following representations:

(1) The Exchange's surveillance procedures are adequate to properly monitor the trading of the Units on a UTP basis during all trading sessions.

(2) The Exchange would inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Units, including risks inherent with trading the Units during the Opening and Late Trading Sessions when the updated Indicative Partnership Value is not calculated and disseminated and suitability recommendation requirements.

(3) The Exchange would require its members to deliver a prospectus to investors purchasing Units prior to or concurrently with a transaction in such Units and will note this prospectus delivery requirement in the Information Bulletin.

This approval order is based on the Exchange's representations.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted above, the Commission has approved the original listing and trading of the Units on Amex.[29] The Commission presently is not aware of any regulatory issue that should cause it to revisit that finding or would preclude the trading of the Units on the Exchange pursuant to UTP. Accelerating approval of this proposal should benefit investors by creating, without undue delay, additional competition in the market for such Units.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (SR–NYSEArca–2007–102) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–23112 Filed 11–27–07; 8:45 am]

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[28] The Exchange may resume trading in the Units only if the calculation and dissemination of the Benchmark Futures Contract or Indicative Partnership Value resumes, or trading in the Units resumes in the original listing market. *See* NYSE Arca Equities Rule 7.34(a)(4)(C)(2).

[29] *See supra* note 4.

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56828; File No. SR–Phlx–2007–87]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Trading Sessions for Selected ETFs

November 20, 2007.

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 19, 2007, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by Phlx. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Phlx proposes to update the list in Phlx Rule 101 of securities eligible to trade in one or more, but not all three, of the Exchange's trading sessions. The securities to be added are: (1) iShares® MSCI Canada Index Fund; (2) iShares® MSCI EAFE Index Fund; (3) iShares® MSCI EAFE Value Index Fund; (4) iShares® MSCI Emerging Markets Index Fund; (5) iShares® MSCI S&P Europe 350 Index Fund; (6) SPDR® DJ Global Titans ETF; and (7) Vanguard Emerging Markets ETF.[5] The text of the proposed rule change is available at Phlx's principal office, the Commission's Public Reference Room, and *http://www.phlx.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] Recently, NYSEArca, Inc. (''NYSEArca'') filed and received approval for a proposed rule change to expand the trading hours of the securities of certain exchange-traded funds (''ETFs'') traded on the NYSE Arca Marketplace to include all three trading sessions. *See* Securities Exchange Act Release No. 56627 (October 5, 2007), 72 FR 58145 (October 12, 2007) (SR–NYSEArca–2007–75). Phlx is not proposing to adopt these changes at this time. Prior to this, NYSEArca restricted the trading of certain ETFs, including those referred to in this proposed rule change, to one or two, but not all three, of its trading sessions. In this proposed rule change, Phlx is proposing to adopt the same restricted sessions that NYSEArca had for the named ETFs prior to the approval of SR–NYSEArca–2007–75.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to accommodate the trading of various securities that may not trade during all three trading sessions on XLE. Phlx Rule 101 provides that XLE shall have three trading sessions each day: A Pre Market Session (8 a.m. Eastern Time (''ET'') to 9:30 a.m. ET), a Core Session (9:30 a.m. ET to 4 p.m. or 4:15 p.m. ET), and a Post Market Session (end of Core Session to 6 p.m. ET). Phlx Rule 101 includes a list of those securities that are eligible to trade in one or more, but not all three, of XLE's trading sessions. The Exchange maintains on its Web site (*http://www.phlx.com*) a list that identifies all securities traded on XLE that do not trade for the duration of each of the three sessions specified in Phlx Rule 101. The Exchange proposes to add the following securities to this list: (1) iShares® MSCI Canada Index Fund; (2) iShares® MSCI EAFE Index Fund; (3) iShares® MSCI EAFE Value Index Fund; (4) iShares® MSCI Emerging Markets Index Fund; (5) iShares® MSCI S&P Europe 350 Index Fund; (6) SPDR® DJ Global Titans ETF; and (7) Vanguard Emerging Markets ETF. These securities are traded on the Exchange pursuant to unlisted trading privileges and are Index Fund Shares, described in Phlx Rule 803(*l*).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[6] in general, and furthers the objectives of Section 6(b)(5) of the Act[7] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

Phlx has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative immediately. The Commission believes that granting this request is consistent with the protection of investors and the public interest because the Exchange is merely clarifying which ETFs do not trade in all three of its trading sessions when such trading hours have been established pursuant to other proposed rule changes. Therefore, the Commission designates the proposed rule change as operative upon filing.[10]

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 the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Phlx has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which the Exchange filed the proposed rule change. *See* 17 CFR 240.19b–4(f)(6)(iii).

[10] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2007–87 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2007–87. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2007–87 and should be submitted on or before December 19, 2007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Nancy M. Morris,

Secretary.

[FR Doc. E7–23122 Filed 11–27–07; 8:45 am]

BILLING CODE 8011–01–P

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56827; File No. SR–Phlx–2007–75]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change as Modified by Amendment Number 1 Thereto Relating to Market Data Distribution Network Fees

November 20, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 27, 2007, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Phlx. On November 7, 2007, Phlx filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice, as modified by Amendment No. 1 thereto, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to eliminate a fee assessed by the Exchange's wholly owned subsidiary, the Philadelphia Board of Trade (''PBOT''), on market data vendors for certain equity index values that subscribers receive over PBOT's Market Data Distribution Network (''MDDN''). The text of the proposed rule change is available at Phlx, the Commission's Public Reference Room, and *http://www.phlx.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to eliminate, effective January 1, 2008, one of the alternative fees charged by the PBOT for certain index market data disseminated over the MDDN.[3] Specifically, the Phlx has licensed the current and closing index values underlying most of the Phlx's proprietary indexes to PBOT for the purpose of selling, reproducing, and distributing the index values over PBOT's MDDN. Similarly, Hapoalim Securities USA, Inc. has licensed the current and closing Hapoalim American Israeli Index™ (HAI℠) values to PBOT for the purpose of selling, reproducing, and distributing those values over the MDDN. On each trading day, the Exchange or its third party designee calculates and makes available to PBOT a real-time index value every 15 seconds and a closing index value at the end of the day. In exchange for subscriber fees paid to PBOT, market data vendors (''Vendors'' or ''Market Data Vendors'') are allowed to widely disseminate this market data for all the values of Phlx's proprietary indexes and of HAI to their subscribers.[4]

As approved by the Commission, the market data fees charged by PBOT currently include a monthly fee of $1.00 per Device,[5] used by Vendors and their subscribers to receive and re-transmit Market Data on a real-time basis (''device fee'') and also a $.0025 per request fee for ''snapshot data,'' which is essentially market data that is refreshed no more frequently than once every 60 seconds, or $1,500 per month for unlimited snapshot data requests.[6] Additionally, eligible Vendors may pay an Enterprise License Fee of $10,000 per year or $850 per month for unlimited real-time data as an alternative to the device fee.[7]

Of these alternatives, the Exchange is now proposing to eliminate the ability to access the market data on a ''snapshot'' basis and consequently will eliminate the snapshot data fee, effective January 1, 2008.[8] The purpose for the change is to reduce PBOT's operational and accounting expenses of administering the snapshot data fee, given the extremely limited number of Vendors making use of the snapshot data fee. Vendors of Market Data will continue to be able to access Market Data by paying the monthly fee of $1.00 per Device. Additionally, eligible Vendors may pay the Enterprise License Fee of $10,000 per year or $850 per month for unlimited real-time data as an alternative to the device fee. The Exchange anticipates that firms that currently receive and re-transmit snapshot data will qualify for the Enterprise License Fee for unlimited real-time Market Data.

[3] The MDDN is an internet protocol multicast network developed by PBOT and SAVVIS Communications.

[4] The PBOT has contracted with several major Market Data Vendors to receive real-time and closing index values over the MDDN and promptly redistribute such values. Approximately 96 Market Data Vendors, including for example Reuters Limited, Charles Schwab & Co., Bloomberg L.P., Telekurs Financial Information Ltd. and Thomson Financial, have entered into such market data agreements with PBOT. The fees described in this proposed rule change cover values of all the indexes disseminated over the MDDN.

[5] The agreements provide that ''Device'' shall mean, in case of each Subscriber and in such Subscriber's discretion, either any Terminal or any End User. A Subscriber's Device may be exclusively Terminals, exclusively End Users or a combination of Terminals or End Users and shall be reported in a manner that is consistent with the way the Vendor identifies such Subscriber's access to Vendor's data. An ''End User'' is defined as an individual authorized or allowed by a Vendor to access and display real-time market data that is distributed by PBOT over the MDDN; and a ''Terminal'' is any type of equipment (fixed or portable) that accesses and displays such market data. Market data vendors which provide market data to 200,000 or more Devices in any month qualify for a 15% Administrative Fee credit for that month, to be deducted from the monthly Subscriber Fees that they collect and are obligated to pay PBOT under the Vendor/Subvendor Agreement.

[6] *See* Securities Exchange Act Release Nos. 53790 (May 11, 2006), 71 FR 28738 (May 17, 2006) (SR–Phlx–2006–04) and 55111 (January 16, 2007), 72 FR 3188 (January 24, 2007) (SR–Phlx–2006–59). The subscriber fees are set out in agreements that PBOT executed with various market data vendors for the right to receive, store, and retransmit the current and closing index values transmitted over the MDDN. In its original proposal, the Exchange stated that, under these vendor agreements PBOT may change any of the fees enumerated in the agreement by giving the Vendor or subvendor advance written notice of such changes. The Commission conditioned any such fee change on the submission by Phlx of a proposed rule change under Section 19(b) of the Act, and approval of such proposal. *See* 71 FR at 28740.

[7] A Vendor is eligible for the Enterprise License Fee if it is a firm acting as a retail broker-dealer conducting a material portion of its business via one or more proprietary Internet Web sites by which the firm distributes Market Data to predominately non-professional Market Data users with whom the firm has a brokerage relationship (''Eligible Firm''). An Eligible Firm may also distribute Market Data to professional users with whom such firm has a brokerage relationship, provided such Market Data distribution is predominantly to non-professional users. The Eligible Firm's Market Data distribution to professional users cannot exceed 10%. *See* Securities Exchange Act Release No. 55424 (March 8, 2007), 72 FR 12242 (March 15, 2007) (SR–Phlx–2006–63).

[8] This proposed rule change also would correct an incorrect reference to the Commodity Futures Trading Commission in the table of MDDN fees set forth as Exhibit 5.

Finally, as noted above, Market data vendors which provide market data to 200,000 or more Devices in any month qualify for a 15% Administrative Fee credit for that month, to be deducted from the monthly Subscriber Fees that they collect and are obligated to pay PBOT under the Vendor/Subvendor Agreement. The Exchange proposes to eliminate the applicability of the 15% Administrative Fee credit to the Enterprise License Fee because Vendors electing to receive Market Data pursuant to the Enterprise License Fee, unlike Vendors electing to receive Market Data pursuant to the device fee, are not required to bear the ongoing administrative expense of reporting the number of Devices to PBOT.[9] Vendors paying the device fee must prepare and deliver to PBOT a detailed monthly accounting and report of devices. By contrast, a vendor paying the Enterprise License Fee is not required to submit any accounting to PBOT.[10] Instead, to be eligible for the Enterprise License Fee, a Vendor must certify to PBOT that it qualifies for the Enterprise License Fee, including that market distribution is predominantly to non-professional users, and must immediately notify PBOT if it can no longer certify its qualification. The administrative costs to a firm associated with monitoring its ongoing eligibility for the Enterprise License Fee should be substantially less than the administrative costs to a firm subject to the device fee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[11] in general, and furthers the objectives of Section 6(b)(5) of the Act[12] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, in that it will permit the MDDN to operate with greater efficiency while still permitting investors access to market data under the remaining alternative fee structures from which qualified Market Data Vendors will be permitted to choose. For the same reasons the Exchange also believes that the proposal is consistent with Section 6(b)(4) of the Act,[13] in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members and issuers and other persons using its facilities. The Exchange believes that the proposed fee changes are also consistent with Rule 603 under the Act.[14]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–Phlx–2007–75 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2007–75. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2007–75 and should be submitted on or before December 19, 2007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Nancy M. Morris,

Secretary.

[FR Doc. E7–23123 Filed 11–27–07; 8:45 am]

BILLING CODE 8011–01–P

[9] Phlx clarified that the elimination of the 15% Administrative Fee credit for the Enterprise License Fee will be effective immediately upon Commission approval. As stated above, the snapshot data fee would be effective on January 1, 2008, subject to Commission approval. Telephone conference between Carla Behnfeldt, Director, Phlx; Brian Trackman, Special Counsel, Division of Trading and Markets (''Division''), Commission; and Jan Woo, Special Counsel, Division, Commission, on November 20, 2007.

[10] The Exchange notes that several large vendors are currently paying the Enterprise License Fee.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(4).

[14] 17 CFR 242.603.

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 5997]

Notice of Availability of the Draft Environmental Assessment for the Proposed Enbridge Southern Lights Pipeline Project

AGENCY: Department of State.

ACTION: Notice.

A draft Environmental Assessment (EA) for the Proposed Enbridge Southern Lights Pipeline Project has been prepared on behalf of the Department of State by Enbridge Pipelines (Southern Lights) LLC (''EPSL''). On April 9, 2007, The Department of State received an application from EPSL for a Presidential permit, pursuant to Executive Order 13337 of April 30, 2004, as amended, to construct, connect, operate, and maintain facilities (including a 20-inch diameter crude oil and liquid hydrocarbon pipeline) at the U.S.-Canadian border at Neche, Pembina County, North Dakota, for the purpose of transporting liquid hydrocarbons and other petroleum products between the United States and Canada. EPSL has stated that it seeks this authorization in connection with its Southern Lights Pipeline Project (''LSr Project''), which is designed to transport Canadian crude oil from the Western Canadian Sedimentary Basin (''WCSB'') to existing refinery markets in the Midwest region of the United States.

The Secretary of State is designated and empowered to receive all applications for Presidential permits, as referred to in Executive Order 13337, as amended, for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country.

SUPPLEMENTARY INFORMATION: On July 27, 2007, the Department of State published in the **Federal Register** a Notification of Receipt and intent to prepare an Environment Assessment (EA). [** public comments were received in connection with that notice.] In accordance with Section 102(C) of the National Environmental Policy Act of 1969 (NEPA) (*42 U.S.C. 4332(C)*) and implementing regulations promulgated by the Council on Environmental Quality (40 CFR parts 1500–1508) and the Department of State (22 CFR part 161), including in particular *22 CFR 161.7(c)(1)*, a draft environmental assessment (EA) was prepared by EPSL on behalf of the Department of State to determine if there are any potential significant impacts and to address alternatives to the proposed action.

The U.S. Army Corp. of Engineers was a Federal cooperating agency for the development of this EA. Cooperating agencies either have jurisdiction by law or special expertise with respect to the environmental impacts assessed in connection with the proposal and are involved in the Department's analysis of those environmental impacts.

The draft EA addresses the potential environmental effects of the construction and operation of the United States portion of the Southern Lights Pipeline Project. EPSL is a limited liability company, organized under the laws of the State of Delaware. EPSL is a wholly-owned subsidiary of Enbridge Energy Company, Inc., a Delaware corporation, and an indirectly-owned subsidiary of Enbridge Inc., a corporation organized under the laws of Canada. EPSL's primary U.S. business address is 1100 Louisiana St., Suite 3300, Houston, Texas 7702. According to the description in EPSL's application, the proposed new border crossing would consist of approximately forty (40) feet of pipeline on each side of the international boundary, which would be buried to a minimum depth of three (3) feet below ground level; the border crossing would be part of the LSr Project, which would consist in the U.S. of 136 miles of 20-inch diameter pipeline from the U.S.-Canadian border at Pembina County, North Dakota, to the existing Enbridge Clearbrook tank farm and terminal facilities in Clearwater County, Minnesota.

Comment Procedures: Any person wishing to comment on the draft EA may do so. To ensure consideration of comments prior to a Department of State decision on the application, it is important that we receive your comments by no later than December 28, 2007. Options for submitting comments on the Draft EA are as follows:

- *By mail to:* Jeff Izzo, U.S. Department of State, EEB/ESC Room 4843, Washington, DC 20520. Please note that Department of State mail can be delayed due to security screening.
- *Fax to:* (202) 647–4037, attention Jeff Izzo.
- *E-mail to: izzojr@state.gov.*

After comments are reviewed, significant new issues (if any) are investigated, and modifications (if any) are made to the draft EA, a final EA will be made available by the Department of State, along with a Finding of No Significant Impact (FONSI), if such a determination is made. The final EA will contain the Department's response to timely comments received on the draft EA.

FOR FURTHER INFORMATION CONTACT: For information on the proposed project or a CD–ROM copy of the draft EA contact Jeff Izzo, EEB/ESC Room 4843, U.S. Department of State, Washington, DC 20520, or by telephone (202) 647–1291, or by fax at (202) 647–4037.

Matthew T. McManus,

Acting Director, International Energy and Commodity Policy, Department of State.

[FR Doc. E7–23135 Filed 11–27–07; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activity Seeking OMB Approval

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA invites public comments about our intention to request the Office of Management and Budget's (OMB) revision of a current information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 15, 2007, vol. 72, no. 157, page 45862–45863. Feedback from this survey is used in the prevention of runway collisions and in the Department of the severity and frequency of runway incursions.

DATES: Please submit comments by December 28, 2007.

FOR FURTHER INFORMATION CONTACT: Carla Mauney at *Carla.Mauney@faa.gov.*

SUPPLEMENTARY INFORMATION:

Federal Aviation Administration (FAA)

Title: Information for the Prevention of Aircraft Collisions on Runways at Towered Airports.

Type of Request: Revision of a currently approved collection.

OMB Control Number: 2120–0692.

Forms(s): There are no FAA forms associated with this collection.

Affected Public: An estimated 10,000 Respondents.

Frequency: This information is collected on occasion.

Estimated Average Burden Per Response: Approximately 10 minutes per response.

Estimated Annual Burden Hours: An estimated 1,667 hours annually.

Abstract: Runway incursions are a risk to the public traveling in aircraft. Feedback from this survey is used in the prevention of runway collisions and in the Department of the severity and frequency of runway incursions.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory

Affairs, Office of Management and Budget. Comments should be addressed to Nathan Lesser, Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Dated: Issued in Washington, DC, on November 20, 2007.

Carla Mauney,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 07–5849 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Environmental Impact Statement: Sitka Rocky Gutierrez Airport, Sitka, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental Notice of intent.

SUMMARY: The Federal Aviation Administration announces that it will be including the assessment of the transfer of lands from federal to state ownership for aviation uses within the Environmental Impact Statement (EIS) currently being prepared by the Federal Aviation Administration. Public and Agency Scoping comments are being sought by the Federal Aviation Administration to receive input regarding the assessment of this additional proposed project within the EIS.

Responsible Official: Patricia A. Sullivan, Environmental Protection Specialist, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513–7587, Telephone (907) 271–5454.

FOR FURTHER INFORMATION CONTACT: Patricia A. Sullivan, Environmental Protection Specialist, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513–7587, Telephone (907) 271–5454.

Submit Written Comments, Send to: Patricia A. Sullivan, Environmental Protection Specialist, Federal Aviation Administration, Alaskan Region, Airports Division, 222 W. 7th Avenue, #14, Anchorage, AK 99513–7587, Telephone (907) 271–5454.

SUPPLEMENTARY INFORMATION: The FAA is currently preparing an EIS for the implementation of proposed projects at the Sitka Rocky Gutierrez Airport. Major projects already included in the EIS include improvements to the runway safety area; installation of an approach light system; construction of a parallel taxiway; construction of a seaplane pullout; and repairs and improvements to the airport seawall. These projects, along with other projects proposed to improve safety and efficiency and accommodate growing aviation demand, were identified in the Sitka Airport Master Plan.

It has been determined that portions of property believed to be existing airport lands are not currently state owned, but instead are federally owned, and managed by the Bureau of Land Management. If the proposed airport improvements are approved through the EIS process, portions of the federal lands, including those commonly referred to as the Makhnati lands, would need to be transferred from federal to state ownership before implementation of proposed airport improvements. As such, the FAA is adding the transfer of the lands necessary for implementation of the projects being assessed in the EIS as well as lands necessary for other existing and future aviation uses, as a proposed action that will be examined in the EIS. The federally owned lands needed for aviation uses include segments of filled land on Japonski Island, Charcoal Island, and portions of submerged land surrounding the airport.

To ensure that the full range of issues related to the proposed actions are addressed and that all significant issues are identified, the FAA intends to coordinate and consult with the public; tribal governments; and Federal, State, and local agencies that have jurisdiction by law or have special expertise with respect to any environmental impacts associated with the proposed projects.

Agencies and the public may submit written comments via the address under, ''To Submit Written Comments, Send to.'' Comments must be submitted by December 31, 2007.

Issued in Anchorage, Alaska, on November 19, 2007.

Byron K. Huffman,

Manager, Airports Division, AAL–600.

[FR Doc. 07–5850 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–0054]

Agency Information Collection Activities; Revision of an Approved Information Collection: Motor Carrier Safety Assistance Program

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval. This information collection consists of grant application preparation, quarterly reports and electronic data documenting the results of driver/vehicle inspections performed by the States. On September 21, 2007, FMCSA published a **Federal Register** notice allowing for a 60-day comment period on the ICR. One comment was received.

DATES: Please send your comments by December 28, 2007. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: All comments should reference DOT Docket No. FMCSA–2007–0054. You may submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street, NW., Washington, DC 20503, *Attention: DOT/FMCSA Desk Officer.*

FOR FURTHER INFORMATION CONTACT: John E. Kostelnik, Office of Safety Programs, State Programs Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. Telephone: 202–366–5721; e-mail: *Jack.kostelnik@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Motor Carrier Safety Assistance Program.

OMB Control Number: 2126–0010.

Type of Request: Revision of a currently approved collection.

Respondents: State MCSAP lead agencies and local agencies.

Estimated Number of Respondents: 52 [50 States + Puerto Rico + District of Columbia = 52].

Estimated Time per Response: 80 hours per grant application preparation; 8 hours per quarterly report preparation; and 1 minute per inspection and data upload.

Expiration Date: November 30, 2007.

Frequency of Response: 1 grant application annually; 4 quarterly reports annually; and approximately 3 million total inspection and data uploads annually.

Estimated Total Annual Burden: 12,280 hours.

The methods used to calculate the hours necessary to prepare grant applications, upload data, and prepare quarterly reports are based on interviews with the State and Federal personnel charged with those responsibilities. The information required to prepare the applications for grants and the subsequent reports is based on general information ordinarily maintained by the States in the general course of business, and only simple computations are required to determine burden hours. The grant applications and reports are submitted by the 50 States, four Territories, Puerto Rico, and the District of Columbia. The four territories of American Samoa, Guam, U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands are funded at 100 percent; therefore they are not included in the computation of the annual burden. Each entity submits one grant request and four quarterly reports per year. In addition, about three million total inspection reports are uploaded each year.

This figure reflects only 20 percent of the total estimated annual hours to perform the activities because MCSAP reimburses 80 percent of the eligible costs incurred in the administration of an approved plan as set forth in 49 CFR 350.303, 350.309 and 350.311. Labor hours are estimated and an average hourly rate for professional personnel is applied.

Background: Sections 401 through 404 of the Surface Transportation Assistance Act of 1982 (STAA) (Pub. L. 97–424) established a program of financial assistance to the States to implement programs to enforce: (a) Federal rules, regulations, standards, and orders applicable to commercial motor vehicle safety; and (b) compatible State rules, regulations, standards and orders. This grant-in-aid program is known as the Motor Carrier Safety Assistance Program (MCSAP). Section 402(c) of the STAA requires that the Secretary of Transportation (Secretary), on the basis of reports submitted by the States and the Secretary's own inspections, make a continuing evaluation of the manner in which each State is carrying out its approved safety enforcement plan.

The Transportation Equity Act for the 21st Century (TEA–21) further revised the MCSAP to broaden its purpose beyond enforcement activities and programs by requiring participating States to assume greater responsibility for improving motor carrier safety. TEA–21 required States to develop performance-based plans reflecting national priorities and performance goals, revised the MCSAP funding distribution formula, and created a new incentive funding program. As a result, States are given greater flexibility in designing programs to address national and State goals of reducing the number and severity of commercial motor vehicle (CMV) accidents.

The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) amended 49 U.S.C. 31102(b)(1) to modify and augment the conditions a State must meet to qualify for basic program funds under the MCSAP. The statute requires a State to document in the State Commercial Vehicle Safety Plan (CVSP) its commitment to meet the following additional conditions:

- Deploy technology to enhance the efficiency and effectiveness of CMV safety programs;
- Include, in both the training manual for the licensing examination to drive a non-CMV and the training manual for the licensing examination to drive a CMV, information on best practices for driving safely in the vicinity of noncommercial and commercial motor vehicles;
- Conduct comprehensive and highly visible traffic enforcement and CMV safety inspection programs in high-risk locations and corridors; and
- Except in the case of an imminent or obvious safety hazard, ensure that an inspection of a vehicle transporting passengers for a motor carrier of passengers is conducted at a station, terminal, border crossing, maintenance facility, destination, or other location where a motor carrier may make a planned stop.

Additionally, SAFETEA–LU provided that States may use a portion of MCSAP basic grant funds to conduct documented enforcement of State traffic laws—both laws and regulations designed to promote the safe operation of CMVs and laws and regulations relating to non-CMVs, when necessary to promote the safe operation of CMVs. Section 4106 amended 49 U.S.C. 31102(c) to provide that a State may use a portion of MCSAP grant funds to conduct documented enforcement of State traffic laws.

In order for the Federal Motor Carrier Safety Administration (FMCSA) to evaluate program effectiveness, it is necessary for the State to provide and maintain information concerning past, present and future program activity. The Final Rule that revised Part 350 (MCSAP) to comply with the congressionally-mandated provisions of TEA–21 was published in the **Federal Register** (65 FR 15092) on March 21, 2000. Part 350 is currently being revised to implement the changes to the MCSAP made by SAFETEA–LU. The State's grant application, known as the Commercial Vehicle Safety Plan (CVSP), must contain the information required by 49 CFR 350.201, 350.211 and 350.213. This information is necessary to enable the FMCSA to determine whether a State meets the statutory and administrative criteria to be eligible for a grant. It is necessary that a State's work activities and accomplishments be reported so that the FMCSA can monitor and evaluate a State's progress under its approved plan and make the determinations and decisions required of 49 CFR 350.205 and 350.207. The FMCSA is required to determine whether each State's efforts meet the intended objectives of its plan. In the event of nonconformity with any approved plan and failure on the part of a State to remedy deficiencies, the FMCSA is required to take action to cease Federal participation in that State's plan.

This information collection supports the DOT Strategic Goal of Safety (i.e., reducing commercial truck-related fatalities by providing financial and technical support to State CMV enforcement efforts).

The FMCSA uses the information in the CVSP to determine whether a State has the necessary resources and authority to undertake the program intended by Congress. After a grant has been awarded to a State, a continuing and final evaluation of the State's activities is performed to determine whether continued funding is appropriate and if revisions in the State's CVSP should be made. A quarterly report in narrative form is submitted by the States to provide the minimum necessary information to assist in appropriate monitoring of a State's performance, compared to its CVSP, and to permit the FMCSA to determine whether the effort of a State is cost efficient and whether Federal

assistance should be continued. In addition, inspection data and reports are submitted electronically by the inspecting officer from the field to the FMCSA at the time of completion of the inspection.

SAFETEA–LU provides that States may now conduct traffic enforcement activities against non-CMVs to promote the safe operation of CMVs. The States have been routinely conducting traffic enforcement activities on CMVs and have been reimbursed, provided an appropriate inspection was conducted at the time. Previously, non-CMV traffic enforcement was not an eligible MCSAP activity for reimbursement so the States have not captured activity levels for this type of enforcement. It is anticipated that the number of non-CMV enforcement activities conducted by the States will be minimal since SAFETEA–LU limits the amount of MCSAP grant funding that can be used for non-CMV traffic enforcement activities to no more than five percent of the basic amount the State receives annually.

The quarterly report is created by the State and submitted to the FMCSA using inspection data and other information. The collection of uniform data permits analysis and comparison of State programs and facilitates program administration and reporting; e.g., comparison of the data from a single State to the national average, equipment violation and out-of-service trends, etc.

The FMCSA routinely uses quarterly report information to measure individual and collective State program accomplishment and to assist with future program development.

Description of MCSAP forms:

a. Form MCSAP–1, Motor Carrier Safety Assistance Program: The MCSAP–1 form is submitted with the CVSP grant application. It specifies the name of the applicant agency, the amount applied for, and contains the signatures of the responsible State authorities.

b. Form MCSAP–2, Grant Agreement: The MCSAP–2 form is the grant agreement that specifies the total amount of the State Program, the State and Federal participating shares, the period of the grant, and the signatures of the responsible State official and the FMCSA Division Administrator. The reverse side of the MCSAP–2 contains the ''General Provisions for the Agreement.''

c. Form MCSAP–2A, Grant Amendment for Fiscal Year_: The MCSAP–2A form is used to modify the terms of the grant. It is used to increase or decrease the amount of the grant, or to extend the period of the grant. It contains the signatures of the responsible State official and the FMCSA Division Administrator.

In addition, the following documents are provided as part of the CVSP package:

a. State Training Plan (optional format): This document is a request for commercial vehicle training courses. It is used by the FMCSA's National Training Center to more effectively schedule training courses to meet the needs of State enforcement agencies.

b. State Certification: The CVSP must contain a State Certification signed by the Governor, the State Attorney General, or other specially designated State official. The Certification contains requirements of conditions that must be met by the State to receive MCSAP grant funds.

Virtually all (99%) of the information required by the MCSAP grant program is submitted electronically. This includes over three million inspection reports, which are uploaded electronically from laptop computers at inspection sites in the field to the FMCSA annually. The near-universal use of laptops for submitting these inspection reports has resulted in a dramatic cut of the time burden. The annual CVSPs require signed certifications by State personnel and are not, therefore, electronically transmitted.

The FMCSA is the only Federal agency given authority to enforce safety regulations applicable to commercial trucks and buses in interstate commerce. The type of information to be gathered from the States through this information collection is unique to the MCSAP. No duplication was identified through the rulemaking process to implement relevant sections of SAFETEA–LU.

The legislative requirement is that grants be extended to the States predicated on annual submission of CVSPs. The FMCSA has determined that although monthly or bimonthly reports are not needed, a semiannual report would not be sufficiently frequent to allow for timely evaluation and changes in State program direction. Therefore, quarterly reports were determined to be the most appropriate, considering burden and Federal need. If the reports were submitted less frequently, the FMCSA would be unable to exercise appropriate oversight and administration of the program as envisioned by the Congress.

On September 21, 2007, FMCSA published a **Federal Register** notice (72 FR 54096) allowing for a 60-day comment period on the proposed revision of this ICR. One comment was received from a private citizen that did not discuss the revised burden hours and cost aspects related to this ICR.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued on: November 20, 2007.

Terry Shelton,

Associate Administrator for Research and Information Technology.

[FR Doc. E7–23078 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Solicitation of Applications for FY 2008, Commercial Motor Vehicle (CMV) Operator Safety Training Grant Opportunity

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice.

SUMMARY: FMCSA announces that it has published an opportunity to apply for FY 2008 funding for the CMV Operator Safety Training Grant on the grants.gov Web site (*http://www.grants.gov*). This opportunity was established by Section 4134 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59). This legislation requires grant recipients to train current and future drivers in the safe operation of CMVs, as defined in Section 31301 of Title 49, United States Code. Funding priority will be given to regional or multi-state educational or nonprofit associations serving economically distressed regions of the United States. Eligible awardees can also include State governments, local governments, and accredited post-secondary educational institutions (public or private) such as colleges, universities, vocational-technical schools and truck driver training schools. To apply for funding, applicants must first be registered with grants.gov at the following link: *http://www.grants.gov/applicants/get_registered.jsp*. Note that grants.gov registration takes three to five business days to process your information before you can apply. Applications for grant

funding must be submitted electronically to the FMCSA through the grants.gov Web site following the instructions provided on the site. The Catalog of Federal Domestic Assistance (CFDA) number for the CMV Safety Training Grant Opportunity 20.235.

DATES: FMCSA will initially consider funding of applications submitted by January 5, 2008 from qualified applicants. If additional funding remains available, applications submitted after January 5, 2008 will be considered on a case-by-case basis. Funds will not be available for allocation until such time as FY 2008 appropriations legislation is passed and signed into law. Funding is subject to reductions resulting from obligation limitations or rescissions as specified in SAFETEA–LU or other legislation.

FOR FURTHER INFORMATION CONTACT: Ms. Julie Otto, Transportation Specialist, Federal Motor Carrier Safety Administration, Office of Safety Programs, State Programs Division (MC–ESS), 202–366–0710, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 8:30 a.m. to 5:30 p.m., EST, Monday through Friday, except Federal holidays.

Issued on: November 19, 2007.

Michael Lamm,

Acting Associate Administrator for Enforcement and Program Delivery.

[FR Doc. E7–23108 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket Nos. FMCSA–99–5578, FMCSA–99–6480, FMCSA–00–7363, FMCSA–01–9561, FMCSA–03–15892]

Qualification of Drivers; Exemption Renewals; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 19 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has reviewed the comments submitted in response to the previous announcement and concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

Background

Under 49 U.S.C. 31136(e) and 31315, 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 statutes also allow the Agency to renew exemptions at the end of the 2-year period. The Notice was published on October 15, 2007. The comment period ended on November 14, 2007.

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 27 renewal applications, FMCSA renews the Federal vision exemptions for Lauren C. Allen, Tracey A. Ammons, Randy B. Combs, Robert L. Cross, Jr., James D. Davis, Edward J. Genovese, Dewayne E. Harms, Mark D. Kraft, David F. LeClerc, Charles L. Lovern, Jimmy R. Millage, Carson E. Rohrbaugh, Robert E. Sanders, Donald J. Snider, John A. Sortman, Jesse L. Townsend, James A. Welch, Edward W. Yeates, Jr., and Michael E. Yount.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: November 19, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–23105 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket ID FMCSA–2007–0017]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemptions; request for comments.

SUMMARY: FMCSA announces receipt of applications from 28 individuals for exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations. If granted, the exemptions would enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the Federal vision standard.

DATES: Comments must be received on or before December 28, 2007.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2007–0017 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket ID for this Notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey

Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78; Apr. 11, 2000). This information is also available at *http://Docketinfo.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, 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.'' FMCSA can renew exemptions at the end of each 2-year period. The 28 individuals listed in this notice each have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10), 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 statute.

Qualifications of Applicants

Thomas E. Anderson

Mr. Anderson, age 53, has complete loss of vision in his left eye due to a traumatic injury sustained 35 years ago. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2007, his optometrist noted, ''Mr. Anderson has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Anderson reported that he has driven straight trucks for 35 years, accumulating 1.6 million miles. He holds a Class C operator's license from Washington. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Garry A. Baker

Mr. Baker, 45, has a macular scar in his right eye due to an ocular injury sustained 25 years ago. The best corrected visual acuity in his right eye is 20/400 and in the left, 20/20. Following an examination in 2007, his ophthalmologist noted, ''I believe that despite Mr. Baker's small central visual field defect and relatively poor vision in the right eye, his left eye is absolutely normal and the right eye has more than adequate visual field remaining to be able to perform the driving task required to operate a commercial vehicle for driving.'' Mr. Baker reported that he has driven straight trucks for 29 years, accumulating 499,989 miles. He holds a Class A Commercial Driver's License (CDL) from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Richard D. Becotte

Mr. Becotte, 30, has central loss of vision in his left eye due to a large macular scar. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/400. Following an examination in 2007, his optometrist noted, ''His ocular health is otherwise normal and the reduced central vision he has in his left eye does not prevent him from operating a commercial vehicle in a safe manner because he has a perfectly normal and healthy right eye to compensate adequately.'' Mr. Becotte reported that he has driven straight trucks for 10 years, accumulating 250,000 miles. He holds a Class A CDL from New Hampshire. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Timothy W. Bickford

Mr. Bickford, 58, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/100 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''Therefore, in my opinion, because he has held a commercial license for a number of years without incident, I see no visual reason to deny him continuance of his commercial license.'' Mr. Bickford reported that he has driven straight trucks for 30 years, accumulating 1.1 million miles. He holds a Class A CDL from Maine. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

James E. Blazer

Mr. Blazer, 75, has had macular degeneration in his right eye since 2003. The best corrected visual acuity in his right eye is 20/200 and in the left, 20/25. Following an examination in 2007, his ophthalmologist noted, ''In my medical opinion, his vision is sufficient to perform the tasks required to operate a commercial vehicle.'' Mr. Blazer reported that he has tractor-trailer combinations for 50 years, accumulating 6.9 million miles. He holds a Class D operator's license from Tennessee. His driving record for the last 3 years shows no crashes and one conviction for a moving violation in a CMV, passing vehicles in a no passing zone.

Terry S. Brookshire, Jr.

Mr. Brookshire, 29, has had amblyopia in his right eye since childhood. The visual acuity in his right eye is light perception and in the left, 20/15. Following an examination in 2007, his optometrist noted, ''In my opinion, Mr. Steven has sufficient vision to perform the tasks required to operate commercial vehicles. Mr. Brookshire reported that he has driven straight trucks for 5 years, accumulating 110,000 miles. He holds a Class A CDL from Tennessee. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Wayne A. Burnett

Mr. Burnett, 44, has complete loss of vision in his right eye due to an injury sustained in 1997. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2007, his optometrist noted, ''Wayne has sufficient vision to perform driving a commercial vehicle. Mr. Burnett reported that he has driven straight trucks for 2 years, accumulating 420,000 miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows one crash and no convictions for moving violations in a CMV.

Theodore W. Cozat

Mr. Cozat, 64, has had a prosthetic right eye since childhood due to a birth defect. The best corrected visual acuity in his right eye is no light perception and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''In my medical opinion, he has the vision to operate a commercial vehicle safely, as he has done so for the

past 33 years with a reportedly clean driving record. Mr. Cozat reported that he has driven tractor-trailer combinations for 17 years, accumulating 884,000 miles. He holds a Class A CDL from Michigan. His driving record for the last 3 years shows one crash and no convictions for moving violations in a CMV.

Zibbie L. Dawsey

Mr. Dawsey, 72, has a prosthetic right eye as a result of retinal detachment sustained in 1994. The best corrected visual acuity in his left eye is 20/25. Following an examination in 2007, his ophthalmologist noted, ''This gentleman has for a number of years demonstrated that he can operate a commercial vehicle despite the fact he has lost his right eye. I would recommend that his waiver be granted for continued commercial operation.'' Mr. Dawsey reported that he has driven straight trucks for 12 years, accumulating 300,000 miles, and tractor-trailer combinations for 18 years, accumulating 450,000 miles. He holds a Class A CDL from Alabama. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Alex G. Dlugolenski

Mr. Dlugolenski, 57, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is count-finger vision and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''Mr. Dlugolenski is well adapted to his vision and in my medical opinion capable of operating a commercial vehicle in interstate commerce.'' Mr. Dlugolenski reported that he has driven straight trucks for 30 years, accumulating 300,000 miles. He holds a Class D operator's license from Connecticut. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Karen Y. Duvall

Ms. Duvall, 48, has had amblyopia in her left eye since birth. The best corrected visual acuity in her right eye is 20/20 and in the left, 20/200. Following an examination in 2007, her ophthalmologist noted, ''In my opinion, Karen Duvall has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Ms. Duvall reported that she has driven tractor-trailer combinations for 24 years, accumulating 3 million miles. She holds a Class A CDL from Georgia. Her driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gordon R. Fritz

Mr. Fritz, 45, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/70 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''Mr. Fritz has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Fritz reported that he has driven straight trucks for 1 year, accumulating 500 miles, and tractor-trailer combinations for 8 years, accumulating 480,000 miles. He holds a Class D operator's license from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John A. Graham

Mr. Graham, 57, has had corneal laceration and cataract in his right eye due to a traumatic injury sustained as a child. The best corrected visual acuity in his right eye is light perception and in the left, 20/20. Following an examination in 2007, his ophthalmologist noted, ''I see not contraindication to operate a commercial vehicle with the knowledge that he is monocular and should be wearing safety glasses at all times.'' Mr. Graham reported that he has driven straight trucks for 34 years, accumulating 11.2 million miles. He holds a Class A CDL from Pennsylvania. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Jimmy D. Gregory

Mr. Gregory, 67, has complete loss of vision in his right eye due to a detached retina and optic nerve atrophy as a result of a traumatic injury sustained as a child. The best corrected visual acuity in his left eye is 20/20. Following an examination in 2007, his optometrist noted, ''I think Mr. Gregory has sufficient vision for driving a commercial vehicle.'' Mr. Gregory reported that he has driven straight trucks for 10 years, accumulating 100,000 miles, and tractor-trailer combinations for 3 years, accumulating 75,000 miles. He holds a Class A CDL from Arkansas. His driving record for the last 3 years shows no crashes and one conviction for a moving violation, speeding in a CMV. He exceeded the speed limit by 15 mph.

Taras G. Hamilton

Mr. Hamilton, 41, has had a prosthetic left eye due to a traumatic injury sustained as a child. The best corrected visual acuity in his right eye is 20/20. Following an examination in 2007, his optometrist noted, ''It is my opinion that Taras should be exempt from vision standards for his left eye, since his right eye is within normal limits (no restrictions).'' Mr. Hamilton reported that he has driven straight trucks for 7 years, accumulating 299,999 miles, tractor-trailer combinations for 10 years, accumulating 700,000 miles, and buses for 1 year, accumulating 30,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Larry K. Lentz

Mr. Lentz, 51, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/60 and in the left, 20/20. Following an examination in 2007, his ophthalmologist noted, ''In my medial opinion, Mr. Lentz has sufficient vision or visual field to operate a commercial vehicle.'' Mr. Lentz reported that he has driven straight trucks for 2 years, accumulating 90,000 miles, and tractor-trailer combinations for 20 years, accumulating 1.5 million miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Boleslaw Makowski

Mr. Makowski, 58, has age related macular degeneration in his left eye since 1994. The best corrected visual acuity in his right eye is 20/25 and in the left, 20/200. Following an examination in 2007, his optometrist noted, ''With proper rear view mirrors and appropriate caution considering his limitations in his left eye, I feel Mr. Makowski can still operate a commercial vehicle.'' Mr. Makowski reported that he has driven straight trucks for 1 year, accumulating 3,000 miles, and tractor-trailer combinations for 24 years, accumulating 1.9 million miles. He holds a Class A CDL from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Joseph W. Meacham

Mr. Meacham, 45, has loss of vision in his right eye due to a traumatic injury sustained as a child. The best corrected visual acuity in his right eye is 20/400 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''It is my opinion that Joseph has sufficient vision to perform as a commercial operator of vehicles.'' Mr.

Meacham reported that he has driven straight trucks for 2 years, accumulating 500,000 miles, and tractor-trailer combinations for 13 years, accumulating 4.7 million miles. He holds a Class A CDL from North Carolina. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Charles M. Moore

Mr. Moore, 52, has mild edema and a cataract removal from his left eye. The visual acuity in his right eye is 20/25 and in the left, 20/50. Following an examination in 2007, his ophthalmologist noted, ''In my medical opinion, he has sufficient vision to perform all the driving tasks required to operate a commercial vehicle, and is able to distinguish red, green, and amber traffic signals.'' Mr. Moore reported that he has driven straight trucks for 20 years, accumulating 100,000 miles, and tractor-trailer combinations for 10 years, accumulating 150,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and one conviction for a moving violation, speeding in a CMV. He exceeded the speed limit by 13 mph.

Anthony D. Ovitt

Mr. Ovitt, 44, has had a retinal scar in his left eye since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/80. Following an examination in 2007, his optometrist noted, ''With the excellent acuity of the right eye and the normal fields of both eyes, I certify that Mr. Ovitt's vision is sufficient to operate a commercial vehicle safely.'' Mr. Ovitt reported that he has driven straight trucks for 2 years, accumulating 40,000 miles, and tractor-trailer combinations for 9 years, accumulating 900,000 miles. He holds a Class A CDL from Vermont. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John R. Parsons, III

Mr. Parsons, 47, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/50 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''This condition is stable and in my opinion based on the physical examination of Mr. Parsons through all the perimeters of standard vision, Mr. Parson demonstrates the ability required to perform duties driving a commercial vehicle as long as he wears corrective lenses, either in the form of eye glasses or contact lenses.'' Mr. Parsons reported that he has driven tractor-trailer combinations for 8 years, accumulating 1 million miles. He holds a Class A CDL from Virginia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Steven S. Reinsvold

Mr. Reinsvold, 45, has had amblyopia in his right eye since birth. The best corrected visual acuity in his right eye is 20/200 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''He shows normal color vision capability and, in my opinion, has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Reinsvold reported that he has driven straight trucks for 25 years, accumulating 750,000 miles. He holds a Class D operator's license from Wisconsin. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Michael J. Richard

Mr. Richard, 48, has had constant alternating exotropia since birth. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/20. Due to his condition, Mr. Richard lacks binocular vision. Following an examination in 2007, his optometrist noted, ''In my opinion, Mr. Richard has vision adequate to drive a commercial vehicle, especially in light of his long work history doing this very job with an apparently successful track record.'' Mr. Richard reported that he has driven straight trucks for 17 years, accumulating 544,986 miles, and tractor-trailer combinations for 15 years, accumulating 1.3 million miles. He holds a Class A CDL from Lousiana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Glenn T. Riley

Mr. Riley, 48, has had amblyopia in his left eye since childhood. The best corrected visual acuity in his right eye is 20/20 and in the left, 20/100. Following an examination in 2007, his ophthalmologist noted, ''There is no ocular contraindication for operating a commercial vehicle.'' Mr. Riley reported that he has driven straight trucks for 15 years, accumulating 1.3 million miles, and tractor-trailer combinations for 15 years, accumulating 1.1 million miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

George E. Todd

Mr. Todd, 59, has complete loss of vision in his left eye due to a traumatic injury sustained as a child. The best corrected visual acuity in his right eye is 20/25. Following an examination in 2007, his ophthalmologist noted, ''In opinion, this gentleman has sufficient vision to perform driving tasks that are required to operate a commercial vehicle.'' Mr. Todd reported that he has driven straight trucks for 12 years, accumulating 600,000 miles, and tractor-trailer combinations for 12 years, accumulating 1 million miles. He holds a Class A CDL from West Virginia. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gary S. Warren

Mr. Warren, 43, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/60 and in the left, 20/20. Following an examination in 2007, his ophthalmologist noted, ''In my medical opinion, he does have sufficient vision to operate a commercial vehicle out of his left eye.'' Mr. Warren reported that he has driven straight trucks for 22 years, accumulating 440,000 miles, and tractor-trailer combinations for 4 years, accumulating 120 miles. He holds a Class A CDL from Iowa. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Bradley A. Weiser

Mr. Weiser, 41, has had amblyopia in his right eye since childhood. The best corrected visual acuity in his right eye is 20/50 and in the left, 20/20. Following an examination in 2007, his optometrist noted, ''In my medical opinion, this patient has sufficient vision, to perform the driving tasks required to operate a commercial vehicle out of his left eye.'' Mr. Weiser reported that he has driven tractor-trailer combinations for 14 years, accumulating 1.1 million miles. He holds a Class A CDL from Ohio. His driving record for the last 3 years shows no crashes and one conviction for a moving violation, speeding in a CMV. He exceeded the speed limit by 12 mph.

Eddie L. Williams

Mr. Williams, 42, has had reduced vision in his right eye since childhood. The best corrected visual acuity in his right eye is hand-motion vision and in the left, 20/15. Following an examination in 2007, his ophthalmologist noted, ''the patient has sufficient vision to perform the driving tasks required to operate a commercial

vehicle.'' Mr. Williams reported that he has driven tractor-trailer combinations for 4 years, accumulating 120,000 miles. He holds a Class A CDL from Nevada. His driving record for the last 3 years shows one crash and no convictions for moving violations in a CMV.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business December 28, 2007. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice.

The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: November 19, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–23106 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–29019]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 27 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs). The exemptions will enable these individuals to operate commercial motor vehicles (CMVs) in interstate commerce without meeting the prescribed vision standard. The Agency has concluded that granting these exemptions will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these CMV drivers.

DATES: The exemptions are effective November 28, 2007. The exemptions expire on November 30, 2009.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202)–366–4001, *fmcsamedical@dot.gov*, FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The FDMS is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78; Apr. 11, 2000). This information is also available at *http://Docketinfo.dot.gov*.

Background

On October 15, 2007, FMCSA published a notice of receipt of exemption applications from certain individuals, and requested comments from the public (72 FR 58362). That notice listed 27 applicants' case histories. The 27 individuals applied for exemptions from the vision requirement in 49 CFR 391.41(b)(10), for drivers who operate CMVs in interstate commerce.

Under 49 U.S.C. 31136(e) and 31315, 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. Accordingly, FMCSA has evaluated the 27 applications on their merits and made a determination to grant exemptions to all of them. The comment period closed on November 14, 2007.

Vision and Driving Experience of the Applicants

The vision requirement in the FMCSRs provides:

A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber (49 CFR 391.41(b)(10)).

FMCSA recognizes that some drivers do not meet the vision standard, but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely. The 27 exemption applicants listed in this notice are in this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, retinal detachment, macular scar, cataract, retinoblastoma, and loss of vision due to trauma. In most cases, their eye conditions were not recently developed. All but two of the applicants were either born with their vision impairments or have had them since childhood. The two individuals who sustained their vision conditions as adults have had them for periods ranging from 4 to 24 years.

Although each applicant has one eye which does not meet the vision standard in 49 CFR 391.41(b)(10), each has at least 20/40 corrected vision in the other eye, and in a doctor's opinion, has sufficient vision to perform all the tasks necessary to operate a CMV. Doctors' opinions are supported by the applicants' possession of valid commercial driver's licenses (CDLs) or non-CDLs to operate CMVs. Before issuing CDLs, States subject drivers to knowledge and skills tests designed to evaluate their qualifications to operate a CMV. All these applicants satisfied the testing standards for their State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a commercial vehicle, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL or non-CDL, these 27 drivers have been authorized to drive a CMV in intrastate

commerce, even though their vision disqualified them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 3 to 42 years. In the past 3 years, three of the drivers had convictions for traffic violations and none of them was involved in a crash.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in the October 15, 2007 notice (72 FR 58362).

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the vision standard in 49 CFR 391.41(b)(10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether an equal or greater level of safety is likely to be achieved by permitting each of these drivers to drive in interstate commerce as opposed to restricting him or her to driving in intrastate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered not only the medical reports about the applicants' vision, but also their driving records and experience with the vision deficiency. To qualify for an exemption from the vision standard, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at docket number FMCSA–98–3637.

We believe we can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrate the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, 13345, March 26, 1996). The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly. (See Bates and Neyman, University of California Publications in Statistics, April 1952.) Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes. (*See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971*) A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past 3-year record of the 27 applicants, one of the applicants had a traffic violation for speeding, and one applicant was involved in two crashes. The applicants achieved this record of safety while driving with their vision impairment, demonstrating the likelihood that they have adapted their driving skills to accommodate their condition. As the applicants' ample driving histories with their vision deficiencies are good predictors of future performance, FMCSA concludes their ability to drive safely can be projected into the future.

We believe the applicants' intrastate driving experience and history provide an adequate basis for predicting their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways on the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas exposes the driver to more pedestrian and vehicular traffic than exists on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances between them are more compact. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated CMVs safely under those conditions for at least 3 years, most for much longer. Their experience and driving records lead us to believe that each applicant is capable of operating in interstate commerce as safely as he/she has been performing in intrastate commerce. Consequently, FMCSA finds that exempting these applicants from the vision standard in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to that existing without the exemption. For this reason, the Agency is granting the exemptions for the 2-year period allowed by 49 U.S.C. 31136(e) and 31315 to the 27 applicants listed in the notice of October 15, 2007 (72 FR 58362).

We recognize that the vision of an applicant may change and affect his/her ability to operate a CMV as safely as in the past. As a condition of the exemption, therefore, FMCSA will impose requirements on the 27 individuals consistent with the grandfathering provisions applied to drivers who participated in the Agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

Advocates for Highway and Auto Safety (Advocates) expressed opposition to FMCSA's policy to grant exemptions from the FMCSRs, including the driver qualification standards. Specifically, Advocates: (1) Objects to the manner in which FMCSA presents driver information to the public and makes

safety determinations; (2) objects to the Agency's reliance on conclusions drawn from the vision waiver program; (3) claims the Agency has misinterpreted statutory language on the granting of exemptions (49 U.S.C. 31136(e) and 31315); and finally (4) suggests that a 1999 Supreme Court decision affects the legal validity of vision exemptions.

The issues raised by Advocates were addressed at length in 64 FR 51568 (September 23, 1999), 64 FR 66962 (November 30, 1999), 64 FR 69586 (December 13, 1999), 65 FR 159 (January 3, 2000), 65 FR 57230 (September 21, 2000), and 66 FR 13825 (March 7, 2001). We will not address these points again here, but refer interested parties to those earlier discussions.

Conclusion

Based upon its evaluation of the 27 exemption applications, FMCSA exempts Christopher L. Bagby, Robert W. Bequeaith, William R. Braun, Lloyd K. Brown, Kecia D. Clark-Welch, Earl S. Cooper, Tommy R. Crouse, Ben W. Davis, Charles A. DeKnikker, Sr., Everett E. Denny, Nigel L. Farmer, Earl M. Frederick, Jr., Lorne H. Geiken, John E. Halcomb, Michael A. Hershberger, Patrick J. Hogan, Jr., Donald W. Holt, Judy L. Marshall, Mark A. Massengill, Todd A. McBrain, Amilton T. Monteiro, Dennis D. Moore, David G. Oakley, John S. Olsen, Thomas J. Prusik, Glen W. Sterling, Calvin D. Tubergen, from the vision requirement in 49 CFR 391.41(b)(10), subject to the requirements cited above (49 CFR 391.64(b)).

In accordance with 49 U.S.C. 31136(e) and 31315, each exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: November 19, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–23107 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[U.S. DOT Docket Number NHTSA–2007–0031]

Reports, Forms, and Recordkeeping Requirements Agency

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comment on proposed collection of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatement of previously approved collections.

This document describes one collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before January 28, 2008.

FOR FURTHER INFORMATION CONTACT: George Stevens, Office of Vehicle Safety Compliance, NHTSA (202–366–5308).

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must first publish a document in the **Federal Register** providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulation (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(ii) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) How to enhance the quality, utility, and clarity of the information to be collected;

(iv) How to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks for public comments on the following proposed collections of information:

Title: 49 CFR 556, Exemption for Inconsequential defect or Noncompliance.

OMB Control Number: 2127–0045.

Affected Public: Business or other for profit.

Abstract: The National Highway Traffic Safety Administration's statue at 49 U.S.C. 30118, *Notification of Defects and Noncompliance* generally requires manufacturers of motor vehicles and items of replacement equipment to conduct a notification and remedy campaign (recall) when their products are determined to contain a safety-related defect or a noncompliance with a Federal motor vehicle safety standard (FMVSS). Pursuant to 49 U.S.C. 30118(d) and 30120(h), a manufacturer may seek an exemption from these notification and remedy requirements on the basis that the defect or noncompliance is inconsequential as it relates to motor vehicle safety. 49 CFR part 566, *Exemption for Inconsequential Defect or Noncompliance*, establishes the procedures for manufacturers to submit exemption petitions to the agency and the procedures the agency will use in evaluating those petitions. Part 556 allows the agency to ensure that inconsequentiality petitions are both properly substantiated and efficiently processed.

Estimated Annual Burden: 200 hours.

Number of Respondents: 40.

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

ADDRESSES: Comments should refer to the docket and notice numbers above and be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

• *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

• *Fax:* 202–493–2251.

Instructions: Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided.

If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

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 DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketInfo.dot.gov.*

How to Read Comments submitted to the Docket: You may read the comments received by Docket Management at the address and times given above. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Federal Docket Management System (FDMS) Web page *http://www.regulations.gov.*

(2) On that page, click on ''search for dockets.''

(3) On the next page (*http://www.regulations.gov/fdmspublic/component/main*), select NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION from the drop-down menu in the Agency field, enter the Docket ID.

(4) After entering that information, click on ''submit.''

(5) The next page contains docket summary information for the docket you selected. Click on the comments you wish to see. You may download the comments. Although the comments are imaged documents, instead of the word processing documents, the ''pdf'' versions of the documents are word searchable. Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically search the Docket for new material.

Issued on: November 21, 2007.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. E7–23109 Filed 11–27–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0260]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Health Administration (VHA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 28, 2007.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0260'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005G2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, fax (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0260.''

SUPPLEMENTARY INFORMATION:

Titles:

a. Request for and Authorization to Release Medical Records or Health Information, VA Form 10–5345.

b. Individual's Request for a Copy of their Own Health Information, VA Form 10–5345a.

OMB Control Number: 2900–0260.

Type of Review: Extension of a currently approved collection.

Abstract:

a. VA Form 10–5345 is used to obtain a written consent from patients before information concerning his or her treatment for alcoholism or alcohol abuse, drug abuse, sickle cell anemia, or infection with the human immunodeficiency virus (HIV) can be disclosed to private insurance companies, physicians, and other third parties.

b. Patients complete VA Form 10–5345 to request a copy of their medical records from the Department of Veterans Affairs.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 12, 2007 at pages 52201–52202.

Affected Public: Business or other for profit, Individuals or households, and not for profit institutions.

Estimated Total Annual Burden:

a. VA Form 10–5345—16,667 hours.

b. VA Form 10–5345a—16,667 hours.

Estimated Average Burden Per Respondent:

a. VA Form 10–5345—2 minutes.

b. VA Form 10–5345a—2 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. VA Form 10–5345—29,667.

b. VA Form 10–5345a—29,667.

Dated: November 19, 2007.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E7–23099 Filed 11–27–07; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0568]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration (VBA), Department of

Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 28, 2007.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov*; or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to ''OMB Control No. 2900–0568'' in any correspondence.

FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail: *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0568).''

SUPPLEMENTARY INFORMATION:

Title: Submission of School Catalog to the State Approving Agency.

OMB Control Number: 2900–0568.

Type of Review: Extension of a previously approved collection.

Abstract: Accredited and nonaccredited educational institutions, with the exceptions of elementary and secondary schools, must submit copies of their catalog to State approving agency when applying for approval of a new course. State approval agencies use the catalog to determine what courses can be approved for VA training. VA pays educational assistance to veterans, persons on active duty or reservists, and eligible persons pursuing an approved program of education. Educational assistance is not payable when claimants pursue unapproved courses.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 12, 2007, at page 52200.

Affected Public: Not-for-profit institutions, business or other for-profit.

Estimated Annual Burden: 2,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On Occasion.

Estimated Number of Respondents: 8,000.

Dated: November 19, 2007.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E7–23100 Filed 11–27–07; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0036]

Agency Information Collection Activities Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATE: Comments must be submitted on or before December 28, 2007.

ADDRESSES: Submit written comments on the collection of information through *http://www.Regulations.gov* or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0036'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Denise McLamb, Records Management Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 273–0443 or e-mail *denise.mclamb@mail.va.gov*. Please refer to ''OMB Control No. 2900–0036.''

SUPPLEMENTARY INFORMATION:

Title: Statement of Disappearance, VA Form 21–1775.

OMB Control Number: 2900–0036.

Type of Review: Extension of a previously approved collection.

Abstract: VA Form 21–1775 is used to gather information from a claimant to make a decision regarding the unexplained absence of a veteran for over 7 years. The data collected will be used to determine the claimant's entitlement to death benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on September 19, 2007, at page 53620.

Affected Public: Individuals or households.

Estimated Annual Burden: 28 hours.

Estimated Average Burden Per Respondent: 2 hours 45 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 10.

Dated: November 20, 2007.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Records Management Service.

[FR Doc. E7–23101 Filed 11–27–07; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register

Vol. 72, No. 228

Wednesday, November 28, 2007

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

NATIONAL SCIENCE FOUNDATION

Research Performance Progress Report Format

Correction

In notice document 07–5601 beginning on page 63629 in the issue of Friday, November 9, 2007, make the following correction:

On page 63630, in the first column, in the first full paragraph, in the fifth, sixth, and seventh lines, ''may be required to report on the mandatory category and may be required to report on any of the optional'' should read ''may be required to report on any of the optional''.

[FR Doc. C7–5601 Filed 11–27–07; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Wednesday,
November 28, 2007

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

Confined Spaces in Construction; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket ID–OSHA–2007–0026]

RIN 1218–AB47

Confined Spaces in Construction

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule.

SUMMARY: OSHA is proposing a rule to protect employees from the hazards resulting from exposure to confined spaces in the construction industry. Under the proposed rule, employers would first determine whether there is a confined space at a job site. If there is a confined space, the employer would determine if there are existing or potential hazards in the space. If there are such hazards, the employer then would classify the space according to the physical and atmospheric hazards found in it. The four classifications are: Isolated-Hazard Confined Space, Controlled-Atmosphere Confined Space, Permit-Required Confined Space, and Continuous System-Permit-Required Confined Space. The proposed requirements for each type of confined space are tailored to control the different types of hazards.

DATES: Submit comments (including comments to the information-collection (paperwork) determination described under the section titled **SUPPLEMENTARY INFORMATION** of this notice), hearing requests, and other information by January 28, 2008. All submissions must bear a postmark or provide other evidence of the submission date. (See the following section titled **ADDRESSES** for methods you can use in making submissions.)

ADDRESSES: Comments and hearing requests may be submitted as follows:

- *Electronic:* Comments may be submitted electronically to *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.
- *Facsimile:* OSHA allows facsimile transmission of comments and hearing requests that are 10 pages or fewer in length (including attachments). Send these documents to the OSHA Docket Office at (202) 693–1648; hard copies of these documents are not required. Instead of transmitting facsimile copies of attachments that supplement these documents (e.g., studies, journal articles), commenters may submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and Docket ID (i.e., OSHA–2007–0026) so that the Agency can attach them to the appropriate document.
- *Regular mail, express delivery, hand (courier) delivery, and messenger service:* Submit three copies of comments and any additional material (e.g., studies, journal articles) to the OSHA Docket Office, Docket ID OSHA–2007–0026 or RIN No. 1218–AB47, Technical Data Center, Room N–2625, OSHA, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; *telephone:* (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) Please contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA Docket ID (*i.e.*, OSHA–2007–0026). Comments and other material, including any personal information, are placed in the public docket without revision, and will be available online at *http://www.regulations.gov*. Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as social security numbers, birth dates, and medical data.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or to the OSHA Docket Office at the address above. Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (*e.g.*, copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

- *General information and press inquiries:* Contact Mr. Kevin Ropp, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999 or fax (202) 693–1634.
- *Technical inquiries:* Contact Mr. Garvin Branch, Directorate of Construction, Room N–3468, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2020 or fax (202) 693–1689.
- *Copies of this Federal Register notice:* Available from the OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1888.
- *Electronic copies of this notice:* Go to OSHA's Web site (*http://www.osha.gov*), and select ''**Federal Register**,'' ''Date of Publication,'' and then ''2007.''
- *Additional information for submitting documents:* See section V.I. (''Public Participation'') of this notice.

SUPPLEMENTARY INFORMATION:

I. General

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B. Hearing

Requests for a hearing should be submitted to the Agency as set forth above under **DATES** and **ADDRESSES**.

II. Background

A. History

On March 25, 1980, OSHA published an Advanced Notice of Proposed Rulemaking (ANPR) on confined spaces for the construction industry (45 FR

19266 [1]). The ANPR posed 31 questions concerning confined-space hazards in the construction industry, and the Agency received 75 comments in response to these questions. However, OSHA took no further action on this regulatory initiative at the time.

OSHA issued the general industry confined-spaces rule (29 CFR 1910.146) on January 14, 1993 (58 FR 4462), as well as a similar rule for the shipyard industry 29 CFR 1915.7, 11–16) on July 25, 1994 (59 FR 37816). The general industry standard requires employers to classify hazardous confined spaces as ''permit-required confined spaces,'' and to implement specific procedures to ensure the safety of employees who enter them.

It contains detailed procedures for developing a written confined-space program, monitoring atmospheric hazards, training employees, preventing unauthorized employees from entering these spaces, providing for both non-entry and entry rescue, and maintaining records.

The general industry standard specifies a limited exception from some of the permit-required confined-space requirements when the only hazard in a confined space is an atmospheric hazard and ventilation equipment will control the atmospheric hazard at safe levels. It also provides protection to employees from non-atmospheric (for example, physical) hazards within non-permit-required, as well as permit-required, confined spaces. However, the general industry standard does not apply to construction employers, and, as such, does not specify the appropriate level of employee protection based on the hazards created by construction activities performed in confined spaces. Table 1 provides a description of the key differences between the general industry standard and the proposed standard for confined spaces in construction.

TABLE 1.—KEY DIFFERENCES IN REGULATORY PROVISIONS BETWEEN THE GENERAL INDUSTRY AND PROPOSED CONSTRUCTION STANDARDS

General industry standard	Proposed construction standard
Organization of the Standard	
The standard begins with requirements for entering PRCSs	The proposed standard takes a step-by-step approach, explaining how to assess hazards, determine the classification for the space, and how to safely enter it.
Information Exchange	
The standard requires a host employer to coordinate entry operations with a contractor when the host employer and the contractor both have employees working in or near a permit space.	The proposed standard requires the controlling contractor to coordinate entry operations among contractors who have employees in a confined space regardless of whether or not the controlling contractor has employees in the confined space.
Confined Space with Hazards Isolated	
Does not address working in confined spaces in which the hazard has been isolated.	Allows employers to establish an Isolated-Hazard Confined Space by isolating or eliminating all physical and atmospheric hazards in a confined space.
Controlled-Atmosphere Permit-Required Confined Space	
Monitoring required as necessary	Continuous monitoring required unless the employer demonstrates that periodic monitoring is sufficient.
Permit-Required Confined Spaces (PRCS)	
No explicit requirement for entry supervisor to monitor PRCS conditions during entry.	Explicit requirement for entry supervisor to monitor PRCS conditions during entry.
Requires a written PRCS plan	No written plan required when employer maintains a copy of the standard at the worksite.
No specific early-warning requirements for up-stream hazards	Early-warning requirement for up-stream hazards in sewer-type spaces.

The Agency recognizes that a number of requirements of the proposed standard for confined spaces in construction duplicate, or are similar to, the provisions of the general industry standard for permit-required confined spaces. Nevertheless, OSHA does not believe that the general industry standard addresses adequately the unique characteristics of confined spaces in construction. Compared to general industry, the construction industry experiences higher employee turnover rates, with construction employees more often working at multiple worksites performing short-term tasks. Unlike most general industry worksites, construction worksites are continually evolving, with the number and characteristics of confined spaces changing as work progresses. Multiple contractors and controlling contractors are found more often at construction worksites than at general industry worksites. Also, in contrast to general industry, OSHA believes that many contractors who perform construction work in sewer systems are unfamiliar with the hazards associated with these worksites. Therefore, OSHA placed

[1] ''FR'' refers to ''**Federal Register**,'' with the volume number (for example, 45) before, and the page number (for example, 19266) after, ''FR.''

more emphasis in this proposed standard on assessing hazards at sewer worksites than it did in the general industry confined-spaces standard.

The differences in employee and worksite characteristics between the construction industry and general industry prompted OSHA to develop a proposed standard for regulating confined spaces in the construction industry that varied substantially from the general industry confined-spaces standard as described above in Table 1 of this preamble. Because of the regulatory differences between this proposed standard and the general industry standard, the general industry standard would not be considered a substitute for this proposed construction standard except where the provisions are essentially the same.

In 1993, as part of the litigation activity surrounding the newly promulgated general industry standard, OSHA agreed in a settlement with the United Steel Workers of America to issue a proposed rule to extend confined-space protection to construction employees. On February 18, 1994, OSHA submitted a draft proposed standard for confined spaces in construction to the Advisory Committee for Construction Safety and Health (ACCSH) for comment. ACCSH established a work group on March 22, 1994 to address the OSHA draft proposed standard and report its findings to the full committee.

ACCSH adopted the work group report on May 17, 1994, and recommended that OSHA incorporate it into a rulemaking docket. In this report, ACCSH noted that the general industry standard did not meet the needs of the construction industry because it did not provide adequate information to contractors for distinguishing among the different types of confined spaces, or to determine the appropriate level of employee protection based on the hazards resulting from construction activities performed in confined spaces. In addition, ACCSH found that confined spaces encountered or created in construction often are not identified or classified prior to the beginning of a construction project.

Consequently, ACCSH established a work group to draft a proposed standard that would meet the unique needs of the construction industry. The draft proposed standard emphasized identifying different types of confined spaces encountered in construction (for example, where the hazard has been isolated, where atmospheric hazards are controlled at safe levels, and permit-required spaces), inter-contractor information exchange, and the detailed protections necessary to eliminate or control specific hazards.

As the result of the ACCSH work group review, a draft proposed standard for confined spaces in construction was submitted to OSHA in the winter of 1996 and ACCSH recommended that it be used as a proposed confined-spaces standard. OSHA determined that the ACCSH draft proposed standard needed to be reworked to make it easier to understand, especially for small employers who do not employ a separate safety staff. The Agency also determined that certain hazards, such as those encountered in sewer-construction work, were not adequately addressed. Consequently, OSHA determined that it was necessary to develop a new draft proposed standard.

In 1998, OSHA completed a new draft proposed standard but discovered that there were several issues that needed to be resolved before the draft proposed standard could be finalized. To get feedback from the construction community, OSHA held three stakeholders meetings in October of 2000 across the country. The topics discussed were: (1) Typical confined spaces encountered in construction; (2) whether an early-warning system should be required for spaces in which an engulfment hazard cannot be isolated (such as in some sewer situations); (3) the need for, and cost of, continuous monitoring for atmospheric hazards; (4) how a confined-spaces standard for construction could accommodate the needs of small businesses; and (5) whether an attendant should be permitted to monitor more than one confined space at a time.

In late 2003, OSHA completed the new draft proposed standard and convened a panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA) to solicit comments on it from small business entities. The SBREFA panel conducted two conference-call discussions, which were open to the public, in which the small business entities were invited to express their concerns about the draft proposed standard and submit written comments to the record that covered the issues. The SBREFA panel then submitted its recommendations to the Assistant Secretary in November 2003.

This proposed confined-spaces standard for construction reflects input from stakeholder meetings, ACCSH, and the SBREFA review process. For example, a provision that would have addressed working in hazardous-enclosed spaces (spaces designed for human occupancy but subject to a hazardous atmosphere), which small business entities participating in the SBREFA review process considered burdensome and unnecessary, was eliminated because OSHA believes that existing construction standards (for example, 29 CFR 1926.55) adequately address these hazards. This proposed standard uses a confined-space classification approach that is influenced by ACCSH recommendations. The proposed standard is organized as chronologically as possible to help guide the employer, from its initial encounter with a potential confined space, through the steps necessary to ensure that employees are adequately protected. In addition, it addresses the need for coordination and information exchange at construction sites, which typically have multiple employers.

B. Need for a Rule Regulating Confined Spaces in Construction

Fatality and injury data, OSHA enforcement experience, and advice from the Advisory Committee on Construction Safety and Health (ACCSH) indicate that the existing construction standard for confined and enclosed spaces at 29 CFR 1926.21(b)(6) does not adequately protect construction employees in confined spaces from atmospheric, mechanical, and other hazards. In this regard, the existing construction standard only requires employers to: (1) Instruct their employees about confined-space hazards, and (2) comply with other OSHA construction standards that address confined-space hazards. For situations in which none of these construction standards apply, the employer would have to comply with the general-duty requirement of the Occupational Safety and Health Act of 1970 to ''furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.'' (29 U.S.C. 654.) Therefore, where the existing construction confined-spaces standard applies, it requires only training of employees who work in confined spaces—it does not address how trained employees are to be protected while working in such spaces.

OSHA has preliminarily determined that employees in the construction industry who perform work in confined spaces face a significant risk of death or serious injury, and that this proposed rule would substantially reduce that risk. At present, approximately 20,000 establishments have employees entering at least one confined space as defined by the proposed rule. There are an estimated annual total of 641,000

confined spaces; about half of these confined spaces would be considered permit-required confined spaces under this proposal (Ex. OSHA–2007–0026–0003). OSHA estimates that each year there are 6.44 fatalities and 967 injuries experienced by employees working in confined spaces addressed by this proposed rule. OSHA has preliminary determined that the proposed rule, when implemented properly by employers, would reduce the average number of fatalities and injuries in confined spaces covered by the proposed standard by about 90% (6 fatalities prevented annually and 880 injuries prevented annually). (For further explanation of the significant-risk calculations, see section V.B. (''Summary of the Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis'') of this notice and Ex, OSHA–2007–0026–0003).

III. Summary and Explanation of the Proposed Standard

Section 1926.1201—Introduction

Paragraph (a). This paragraph states the general purpose of the proposed rule. This standard would cover employers who have employees that work in or near a confined space that is subject to a hazard. Appropriate precautions are needed to ensure the safety of these employees. This proposed paragraph also defines a confined space as: a space that is large enough and arranged in such a manner that employees can enter the space, has limited or restricted means of entry/exit and is not designed for continuous employee occupancy.

Spaces with these characteristics are prone to containing hazards that tend to be unseen and unrecognized until it is too late to escape. Consequently, it is necessary to assess these spaces to see if there are actual or potential hazards beforehand, and to implement procedures designed both to protect construction employees from such hazards and to rescue them in the event the protective measures do not work as anticipated.

Paragraph (b). Employers would be required to determine the classification of each confined space that is subject to a hazard. Employers must classify such spaces as one of four types specified by this proposed standard. The classification is based on factors such as the type and level of hazards present in the confined space. If the employer determines that a confined space in its natural state is not subject to a hazard, it would not be classified. (Note that in this proposed rule, the term ''hazard'' includes both existing hazards and hazards that have a reasonable probability of occurring.) The employer would not have to take any further action unless one of the indications specified in proposed § 1926.1207 (Reassessment) occurred, in which case the employer would be required to take certain actions, including a reassessment of the space. The monitoring of conditions within a confined space is an ongoing process and is necessary for the employer to ensure the safety of its employees while working within that space.

Paragraph (b)(1). This proposed paragraph lists the four classifications of confined spaces ((b)(1)(i) through (b)(1)(iv)).

Paragraph (b)(1)(i). A Continuous System-Permit-Required Confined Space (CS-PRCS) is a confined space that is a part of, and contiguous with, a larger confined space (for example, sewers) that the employer cannot isolate from the larger confined space. It is also subject to a potential hazard release from the larger confined space that would overwhelm personal protective equipment and/or hazard controls, resulting in a hazard that is immediately dangerous to life and health. The proposed rule includes the CS-PRCS classification to ensure that the employer recognizes that, as the construction industry has recognized, there are difficulties associated with isolating the hazards of other larger spaces connected to the CS–PRCS. Special precautions are necessary, in addition to the other PRCS requirements, to ensure adequate protection of the employees.

Paragraph (b)(1)(ii). A Permit-Required Confined Space (PRCS) is a confined space that has any one of the following: A hazardous atmosphere that ventilation will not reduce to and maintain at a safe level; inwardly-converging, sloping, or tapering surfaces that could trap or asphyxiate an employee; or an engulfment hazard or other physical hazard.

Paragraph (b)(1)(iii). A Controlled-Atmosphere Confined Space (CACS) is a confined space where ventilation alone will control its atmospheric hazards at safe levels. Note also that a confined space cannot be classified as a CACS if it has a physical hazard (unless that hazard has been isolated). The proposed rule includes the CACS as a separate classification from the PRCS because fewer precautions are needed to ensure the safety of its employees than for PRCSs, but more precautions are needed than for an Isolated-Hazard Confined Space (discussed below under paragraph (b)(1)(iv)) because the atmospheric hazard is controlled but not eliminated. This option is provided to the employer to allow it to provide a level of employee protection specifically tailored to, and commensurate with, the hazards within the confined space. In a space properly classified as a CACS, OSHA believes that the use of the CACS measures, as compared with the PRCS measures, would be as protective and typically more cost effective.

Paragraph (b)(1)(iv). An Isolated-Hazard Confined Space (IHCS) is a confined space in which the employer has isolated all physical and atmospheric hazards. ''Isolated'' means the elimination or removal of a physical or atmospheric hazard by preventing its release into a confined space. Isolation includes, but is not limited to, the following methods: Blanking and blinding; misaligning or removing sections of lines, pipes, or ducts; a double-block-and-bleed system; locking out or tagging out energy sources; machine guarding; and blocking or disconnecting all mechanical linkages. Methods must be implemented to ensure that the hazards remain isolated. Isolation methods provide the highest degree of assurance that the hazard will be kept away from the employees in the space, since it consists of methods that do not depend on the continued, proper operation of machinery (such as ventilation equipment) or personal protective equipment (such as respirators). Consequently, this classification of space presents the lowest hazard level to the employees, and is similar to a ''non-permit space'' described in 29 CFR 1910.146(c)(7) of the general industry standard.

Paragraph (b)(2). This proposed provision gives the employer the option to classify a confined space in any classification, so long as all of the characteristics and requirements for that classification are met. The Agency considered proposing that the employer be required to try to make the space qualify for the lowest possible classification. However, after considering comments from small business entities received through the Small Business Regulatory Enforcement Fairness Act (SBREFA) review, OSHA decided to give employers more flexibility; employers may use any of the classifications, as long as the requirements for the selected classification are met. OSHA believes it is important to allow employers the flexibility to classify confined spaces based on the conditions or circumstances of individual work environments.

The one exception is that a space with the characteristics of a Continuous

System-Permit-Required Confined Space cannot be given a different classification. Where a confined space meets the definition of a CS–PRCS, the employer must classify the space as such and meet all of its requirements. To meet the definition of a CS–PRCS, the employer must have determined that the confined space could not be isolated from its connection to a larger space and its associated hazards. OSHA believes that since the potential hazards of the larger space will always exist, the additional CS–PRCS requirements must be met to address the hazards. Classifying the space to any lower classification would leave the employees exposed to an engulfment or atmospheric hazard that could originate in the connected, larger space (that is, the configuration of CS–PRCSs is such that an employer cannot safely eliminate or isolate the potential hazards so as to meet the criteria for a lower classification).

Paragraph (c). The proposed standard specifies precautions that must be followed if the employees have to enter the space to determine its classification (see paragraph (b) of proposed § 1926.1204). These precautions are necessary because the characteristics and extent of the hazards that may be present would not yet be known at that point.

Paragraph (d). If the contractor makes a determination under proposed § 1926.1204 (Worksite evaluation, information, exchange, and coordination) that the confined space is not subject to any hazards, the confined space would not need to be classified. However, if subsequent to that determination any of the indications specified in proposed § 1926.1207 (Reassessment) were to occur, the contractor would be required to conduct a reassessment as specified in proposed § 1926.1207. This is necessary to ensure that there continue to be no hazards present when employees are in an unclassified confined space.

Section 1926.1202—Scope

The proposed standard provides minimum safety and health requirements and procedures to protect employees who work in or near confined spaces. It addresses how to protect employees from confined-space hazards. The proposed standard includes requirements for training, hazard analysis, classification, entering, working, exiting, and rescue for confined spaces of various hazard levels.

This proposed standard does not replace the more hazard-specific construction standards that are already in place. Rather, this proposed standard is designed to provide additional protections needed to deal with hazards that may arise when employees are working in or near a confined space.

Paragraph (a). This paragraph identifies which employers are covered by the proposed standard. Employers who are engaged in construction work and have confined spaces at their job sites are subject to the provisions of the proposed standard. Further, employers who have confined spaces on their job site and hire subcontractors to operate within those spaces also would have to meet specific requirements in the proposed standard. The note to this paragraph includes a non-exclusive list of potential confined spaces that commonly occur on a construction worksite. This list provides examples for employers who may be unfamiliar with confined spaces in construction.

Paragraph (b). This paragraph explicitly excludes construction work regulated by 29 CFR part 1926 subpart Y (Diving), non-sewer construction work regulated by 29 CFR part 1926 subpart P (Excavation), and non-sewer construction work regulated by 29 CFR part 1926 subpart S (Underground Construction, Caissons, Cofferdams and Compressed Air) from the scope of this proposed standard. Employers operating under one of the three listed exemptions are not required to follow this proposed standard for work within a confined space. Employers who hire contractors to perform work covered by these three standards also are excluded from coverage under this proposed standard. The reason for these exclusions is that the Agency believes that the existing OSHA requirements applicable to these activities are sufficient to address and protect employees from the confined-space hazards in those situations.

Paragraph (c). This provision would require employers, when an activity is covered under both the scope of this proposed standard and the provisions in another OSHA construction standard related to confined-space hazards, to comply with those provisions as well as the applicable provisions in this proposed standard. For example, while subpart D in 29 CFR part 1926 contains requirements for ventilation when working in potentially hazardous atmospheric conditions, it does not address other equipment or workplace conditions that are covered by this proposed standard. Also, some construction standards require the use of specified systems during operations in a confined space, but do not set criteria that those systems must meet; in these cases, the requirements of both the existing construction standard and this proposed standard would apply. For example, 29 CFR part 1926 subpart J (Welding) requires that the employer provide a lifeline when an employee is welding in a confined space entered through a manhole or other small opening. When working in a PRCS, 29 CFR part 1926 subpart J also sets criteria for the use of a lifeline system in the confined space, but does not set criteria for the use of rescue services or provide any other permit-required space procedures to protect the employees. Under those circumstances, the rescue service and entry procedures must meet the requirements of this proposed standard, while the lifeline system would be required to meet the criteria in 29 CFR part 1926 subpart J.

Appendix A of the proposed standard contains a list of existing provisions found in other OSHA construction standards under 29 CFR part 1926 that address work done in confined spaces. This list contains only current construction provisions, and does not preclude the inclusion of future confined-space provisions. The purpose of the information in this appendix is to help employers easily identify other requirements relevant to confined-space hazards that may also have to be met.

Paragraph (d). This proposed provision clarifies that the duties of a controlling contractor specified in paragraph (a) of proposed § 1926.1204 are not exclusive. Proposed § 1926.1204(a) delineates a controlling contractor's duties with respect to the exchange of information concerning confined spaces with subcontractors on multi-employer worksites and does not limit or otherwise affect a controlling contractor's responsibilities under the OSH Act. See OSHA Directive No. CPL 2–00.124 (Dec. 10, 1999).

Section 1926.1203—Definitions

This proposed section lists definitions for key words used in describing the requirements of this proposed standard. Most of the definitions were adopted from the OSHA general industry confined-spaces standard (29 CFR 1910.146) and from the ANSI Z117.1–2003 confined-spaces standard. Many other terms in this proposed standard are defined in other OSHA construction standards, and were included in this proposed section to minimize the need to reference those other standards. While most of the proposed terms are self-explanatory or are consistent with those established in 29 CFR 1910.146 and ANSI 117.1–2003, OSHA believes that it is necessary to provide an expanded discussion for several terms used in this proposed standard. The expanded discussion provides a brief

explanation of the defined terms, justifies any differences between the proposed definitions and those contained in 29 CFR 1910.146 and ANSI 117.1–2003, and addresses comments received during the SBREFA process.

''Continuous System-Permit-Required Confined Space (CS-PRCS)'' is a Permit-Required Confine Space that has all of the following characteristics: Is part of, and contiguous with, a larger confined space (for example, sewers); the employer cannot isolate it from the larger confined space; and is subject to a potential hazard release from the larger confined space that would overwhelm personal protective equipment and/or hazard controls, resulting in a hazard that is immediately dangerous to life and health. This classification of space was mentioned in 29 CFR 1910.146(c)(5)(i), and a sample Permit-Required Space program for sewers was provided in Appendix C of that standard. OSHA believes it is important to define this classification of confined space in a way that emphasizes that it is subject to a potential hazard release, such as an engulfment hazard, that the employer will not be able to control.

''Controlled-Atmosphere Confined Space (CACS)'' is a confined space that has all of the following characteristics: Contains no physical hazards or only isolated physical hazards; and uses ventilation alone to control atmospheric hazards at safe levels. This term was added to designate a distinct type of confined space in which only one type of hazard (atmospheric) is present that requires a specific type of employee protection—active control of the atmospheric hazard at safe levels by ventilation equipment. OSHA believes that the space described by this definition is similar to the space defined by the alternate procedures specified by paragraph (c)(5) of the general industry standard for confined spaces. Both of these spaces involve conditions in which atmospheric hazards are merely controlled by ventilation instead of eliminated completely. Therefore, if the ventilation system stops or malfunctions, the atmospheric hazards could reemerge in the space. Unlike the general industry standard, the proposed standard for construction assigns a name to the space. OSHA believes that naming the space a Controlled-Atmosphere Confined Space will effectively alert employees, especially employees who have little or no experience with these spaces, to the possibility that atmospheric hazards could reemerge in the space if the ventilation system stops or malfunctions.

''Controlling contractor'' is the employer that has overall responsibility for construction at the worksite. In addition, the note to this definition explains that if a host employer has overall responsibility for construction at the worksite, then it is both a host employer and controlling contractor. It is a common practice in the construction industry for there to be a number of contractors working at a construction site at the same time. Also, there often is one contractor that has overall authority of the construction site, including the authority to change worksite conditions and alter work practices with regard to safety. Under this proposed standard, there are specific duties that would apply to the controlling contractor, as distinguished from the host employer and the contractor. Consequently, there is a need to define the term ''controlling contractor.''

For the purposes of this preamble, the term ''employer'' refers to an employer whose employees are exposed to confined-space hazards. Employers whose own employees are exposed to a hazard addressed by this proposed standard would be required to comply with the provisions that identify an obligation on ''the employer.'' In addition, other employers may also have responsibilities with respect to such provisions through operation of OSHA's multi-employer doctrine.

When a proposed provision designates the ''host employer'' as the entity responsible for the requirement, only an employer that meets the proposed definition of a ''host employer'' would be responsible for that requirement. Similarly, when a proposed provision designates the ''controlling contractor'' or the ''contractor'' as the entity responsible, only an employer meeting the proposed definitions of ''controlling contractor'' or ''contractor'' would be responsible for compliance with the provision. Note that an employer who fits the definition for more than one of these roles would be required to comply with the obligations that pertain to each role. The Agency requests public comment on whether this explanation is clear.

''Early-warning system'' is the method used to alert attendants monitoring a CS–PRCS and authorized entrants in a CS–PRCS that an engulfment hazard may be developing. Examples of early-warning systems include, but are not limited to: alarms activated by remote sensors; and lookouts with equipment for immediately communicating with the authorized entrants and attendants. The Agency believes these systems will protect employees from non-isolated engulfment hazards by providing an effective means of warning attendants and authorized entrants that an engulfment hazard may be developing ''upstream'' of the work area, thereby permitting sufficient time for the authorized entrants to safely exit the CS–PRCS. As illustrated by the non-exclusive list of examples of early-warning systems within this definition, employers would have flexibility as to what type of early-warning system to use for continuously monitoring such engulfment hazards. However, as stated in paragraphs (a)(2) and (b)(2) of proposed § 1926.1215, whatever warning system is selected must alert authorized entrants and attendants in sufficient time for the authorized entrants to safely exit the CS–PRCS.

''Hazardous atmosphere'' means an existing or potential atmosphere consisting of at least one of the following: A flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit; an airborne combustible dust at a concentration that meets or exceeds its lower explosive limit; an atmospheric oxygen concentration below 19.5 percent (''oxygen deficient'') or above 23.5 percent (''oxygen enriched''); an airborne concentration of a substance that exceeds the dose or exposure limit specified by an OSHA requirement; and an atmosphere that presents an immediate danger to life or health. These levels duplicate those in the definition of ''hazardous atmosphere'' in the general industry confined-spaces standard. The definition clarifies that the concept of a hazardous atmosphere includes one that has a potential for becoming hazardous, since it is necessary to anticipate the potential occurrence of such hazards to effectively protect employees working in a confined space.

''Host employer'' owns or manages the property on which construction is taking place. As explained in the definition of ''controlling contractor,'' this definition was added to clarify the distinction between a ''host employer,'' a ''contractor,'' and a ''controlling contractor'' as each of these entities would have specific obligations under this proposed standard. (See, also, the discussion under ''controlling contractor'' above.)

''Inspection information'' means information obtained about a space from blueprints, schematics, and/or similar documents, documents regarding previous confined-space entries, or physical inspection/testing. This definition was added in response to SBREFA comments to clarify the types of documents and information that

would be considered relevant to making the hazard assessments required by this proposed standard without entering the space.

''Isolated-Hazard Confined Space (IHCS)'' is a confined space in which the employer has isolated all physical and atmospheric hazards. This classification differs from a ''non-permit space'' in the general industry standard that, by definition, does not include confined spaces that have the potential to contain atmospheric hazards capable of causing death or serious physical harm. The proposed classification of IHCS includes confined spaces where that potential continues to exist. In an IHCS, the potential exists because the atmospheric hazard is only ''isolated,'' which means that its release is only being prevented. The use of the term ''isolated'' in this context is consistent with the definition of ''isolation'' in the current American National Standard Institute (ANSI)/American Society of Safety Engineers (ASSE) standard titled ''Safety requirements for Confined Spaces,'' ANSI/ASSE Z117.1–2003. This ANSI/ASSE standard describes the isolation process in part as follows:

> Methods and means shall be selected and used to prevent flammable, toxic, irritating, or oxygen displacing gases and vapors from entering the space. All hazardous material, high pressure, high temperature and other piping that could reasonably be expected to introduce a hazard shall be isolated by utilizing blinding, disconnection, removal, or double block and bleed as needed to prevent entry of material(s) and hazardous contaminant(s).

''Limited or restricted means for entry and exit'' refers to a condition that has a potential to impede an employee's movement into or out of a space. Such conditions include, but are not limited to poor illumination, slippery floors, inclining surfaces and ladders. This phrase is used to describe one of the physical characteristics of a confined space and was defined to give the phrase greater clarity.

''Permit-Required Confined Space (PRCS)'' is a confined space that has any one of the following characteristics: A hazardous atmosphere; an inwardly converging, sloping, or tapering surfaces that could trap or asphyxiate an employee (for example, a space between walls that narrows towards the base, including, but not limited to, funnels and hoppers); or an engulfment hazard or other physical hazard. This definition is similar to the definition in the general industry standard, but includes more examples of dangerous configurations of confined spaces.

''Physical hazard'' means an existing hazard that can cause death or serious physical harm in or near a confined space, or a hazard that has a reasonable probability of occurring in or near a confined space, and that includes, but is not limited to: Explosives (as defined by paragraph (n) of 29 CFR 1926.914 (definition of ''explosive'')); mechanical, electrical, hydraulic, and pneumatic energy; radiation; temperature extremes; engulfment; noise; and inwardly converging surfaces. ''Physical hazard'' also refers to chemicals that can cause death or serious physical harm through skin or eye contact (rather than through inhalation). This definition was added to help employers better understand the characteristics of this type of hazard.

''Planned conditions'' are the conditions under which authorized entrants can work safely in a PRCS or CS–PRCS, including both hazard levels and methods of employee protection. The Agency considered using ''acceptable entry conditions,'' the term used in the general industry standard, for this concept. However, OSHA is concerned that employers and employees, especially those who are not often engaged in construction work in confined spaces, may think ''acceptable'' means that conditions are safe for entry without the use of personal protective equipment or other protective measures. OSHA believes that the term ''planned conditions'' more accurately expresses the concept that a variety of actions may be needed, including the use of protective measures, for employees to be able to work safely in the confined space.

''Serious physical harm'' means an impairment in which a body part is made functionally useless or is substantially reduced in efficiency. Such impairment may include loss of consciousness or disorientation, and may be permanent or temporary, or chronic or acute. Injuries involving such impairment would usually require treatment by a physician or other licensed health-care professional while an illness resulting in serious physical harm could shorten life or substantially reduce physical or mental efficiency by impairing a normal bodily function or body part. OSHA adapted this definition of ''serious physical harm'' from its Field Inspection Reference Manual, chapter III, section C.2.b(2)(c).

''Simulated Permit-Required Confined Space'' is a confined space or a mock-up of a confined space that has all of the following characteristics: Similar entrance openings, and is similar in size, configuration, and accessibility, to the PRCS the authorized entrants enter but does not need to contain any physical or atmospheric hazards. This definition was included to emphasize that the Simulated PRCSs do not have to contain actual physical or atmospheric hazards to qualify for the training required by this proposed standard. OSHA proposes this clarification to prevent injuries and deaths from occurring during rescue training.

Section 1926.1204—Worksite Evaluation, Information Exchange, and Coordination

Paragraph (a). This paragraph sets forth requirements for exchanging information relevant to construction operations in confined spaces. Controlling contractors and host employers would have to share four pieces of information (listed below) before any employee enters the confined space. This information addresses such issues as: location of confined spaces, hazardous conditions affecting confined spaces, precautions taken to address those hazards, and classifications of the confined spaces. OSHA notes, however, that the proposed standard only places a duty on controlling contractors and host employers to provide any information they already have about the confined spaces specific to their worksite. The Agency makes clear in this proposed paragraph that ''[n]either the controlling contractor nor the host employer is required to obtain the information listed * * *''; their only obligation is to provide their contractors with information they already have about a confined space. OSHA also states in a note to this proposed paragraph that controlling contractors or host employers are not required to enter a confined space to collect the relevant information.

On most construction worksites, there are a number of contractors and subcontractors performing jobs. In the case of confined spaces, sometimes employees of different employers will be performing work within the same confined space. In many instances, employees of a subcontractor will enter a confined space after another subcontractor's employees have completed work within the space. On multi-employer worksites, an employer's actions can affect the health and safety of another employer's employees. It is critical for the safety of all employees on a worksite that contractors and subcontractors communicate with each other. Requiring communication between employers is an efficient way to ensure that each employer learns important information about the confined space hazards present so that all employees are adequately protected. OSHA is proposing these information-sharing

requirements in proposed § 1926.1204 so that construction worksites with confined spaces remain safe places of employment for all employees.

The Agency has clear authority to include these multi-employer provisions in the standard. First, the plain language of the OSH Act and its underlying purpose support OSHA's authority to place requirements on employers that are necessary to protect the employees of others. Second, congressional action subsequent to passage of the OSH Act recognizes this authority. Third, OSHA has consistently interpreted its statutory authority as permitting it to impose obligations on employers that extend beyond their own employees, as evidenced by the numerous standards, including several construction standards, that OSHA has promulgated with multi-employer provisions. Finally, OSHA's authority to place obligations on employers that reach beyond an employer's own employees has been upheld by numerous courts of appeals and the Occupational Safety and Health Review Commission (OSHRC).

The purpose of the Act is to assure so far as possible safe and healthful working conditions for every working man and women in the nation. 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary to establish mandatory occupational safety and health standards. The Act broadly defines an OSHA standard as a rule that ''requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employments and places of employment.'' 29 U.S.C. 652(8). *See Building and Constr. Trades Div., AFL-CIO* v. *Brock,* 838 F.2d 1258, 1278 (DC Cir. 1988). OSHA standards must prescribe measures that are appropriate to protect ''places of employment''; nothing in the statutory language suggests that OSHA may do so only by regulating an employer's interaction with its own employees. On the contrary, the Act's broad language gives OSHA almost ''unlimited discretion'' to devise means to reach the statutory goal. *See United Steelworkers* v. *Marshall,* 647 F.2d 1189, 1230 (DC Cir. 1980), cert. denied, 453 U.S. 913 (1981).

Similarly, Section 5(a)(2) provides that each employer ''shall comply with occupational safety and health standards promulgated under this Act.''[2] Nothing in this language suggests that compliance is required only when necessary to protect the employers' own employees, or that the employer is entitled to endanger other employers' employees at the worksite. Finally, Section 6(b)(7) of the Act authorizes the Secretary to ''prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of *all* hazards to which they are exposed.'' 29 U.S.C. 655(b)(7) (emphasis added). Again, this authority is not limited to labels that would warn the employer's own employees of the hazard. Given the distribution of potentially hazardous products in commerce, employees are predictably exposed to hazardous conditions created by other employers. Requiring employers to include hazard information needed by downstream employees is a necessary and appropriate means to ensure that the employees are apprised of all hazards to which they are exposed.

In short, the statute focuses on workplace conditions to effectuate the OSH Act's congressional mandate, and not on a particular employment relationship. The OSH Act's underlying purpose is broad—to assure safe and healthful working conditions for working men and women—and Congress made clear that it expected the Act to protect all employees. (H. Rep. No. 91–1291, 91st Cong., 2d Sess., p. 14–16 (July 9, 1970)). Numerous references in the legislative history of the Act require employers to provide a safe and healthful ''place of employment'' (*see, e.g.*, S. Rep. No. 91–1282, 91st Cong., 2d Sess., p. 10 (October 6, 1970)). The OSH Act tasks OSHA with promulgating rules that will create safe places of employment, notwithstanding the many varied employment relationships that might exist at a worksite.

Subsequent congressional action has also recognized OSHA's authority to impose responsibilities on employers to protect employees who are not their own. For example, Congress directed OSHA to develop a chemical process safety standard (the PSM standard) requiring employers to ''ensure contractors and contract employees are provided appropriate information and training'' and to ''train and educate employees and contractors in emergency response.'' (29 U.S.C. note) (quoting Pub.L. 101–549, Title III, Section 304, November 15, 1990, 104 Stat. 2576). This is a clear ratification of the Agency's authority to require employers to protect the employees of others. Congress also approved of the Agency's authority when it relied on the provisions of OSHA's Hazard Communication standard in promulgating the Emergency Planning and Community Right-to-Know Act (42 U.S.C. 11001–11050) (EPCRA). OSHA's Hazard Communication standard, among other things, requires a manufacturer of a hazardous chemical to ''inform not only its own employees of the dangers posed by the chemicals, but downstream employers and employees as well.'' *Martin* v. *American Cyanamid Co.,* 5 F.3d 140, 141 (6th Cir. 1993). Congress incorporated provisions of the Hazard Communication standard in EPCRA as a basis for triggering obligations on owners or operators of facilities producing hazardous chemicals to provide local governments with information needed for emergency response. Had Congress not approved of the multi-employer provisions in the Hazard Communication standard, it would not have approved of it as a basis for obligations in the EPCRA.

Furthermore, OSHA has consistently interpreted the OSH Act as authorizing it to impose multi-employer obligations in its standards. In addition to the Hazard Communication standard and PSM standard discussed above, OSHA included multi-employer provisions in its powered platforms standard, which requires that a building owner inform employers that the building installation has been inspected and is safe to use. 29 CFR 1910.66(c)(3). OSHA has also imposed multi-employer obligations in other construction standards. For example, in the construction asbestos standard, OSHA requires building owners/employers to perform initial monitoring for asbestos and to communicate the presence of asbestos or presumed asbestos containing materials to prospective employers whose employees reasonably can be expected to work in exposed areas. 29 CFR 1101(k)(2). In the recently promulgated steel-erection standard, OSHA imposed duties on controlling contractors to ensure that site conditions are safe for steel erection. 29 CFR 1926.752(c). OSHA just recently proposed in updates to its electric-power transmission and distribution construction standard similar multi-employer communication provisions. *See* 70 FR 34947–48. OSHA's inclusion of multi-employer provisions in this proposed rule is fully consistent with its past practice of ensuring the safety and

[2] This language is in marked contrast to the language of Section 5(a)(1) of the Act (known as the ''general duty clause''), which requires each employer to ''furnish *to each of his employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm *to his employees.*'' 29 U.S.C. 654(a)(1) (emphases added). *See Brennan* v. *OSHRC,* 513 F.2d 1032, 1037–38 (2nd. Cir. 1975).

health of all employees at construction worksites.

Finally, OSHA's authority to impose these provisions is confirmed by the decisions of numerous courts of appeals and the Occupational Safety and Health Review Commission holding that an employer's duties and OSHA standards may extend beyond an employer's own employees. *See Universal Constr. Co.* v. *OSHRC,* 182 F.3d 726, 728 (10th Cir. 1999) (following decisions from Second, Sixth, Seventh, Eighth and Ninth Circuits); *Access Equip. Sys.,* 18 BNA OSHC 1718, 1722–24 (No. 95–1449, 1999). But see *Melerine* v. *Avondale Shipyards, Inc.,* 659 F.2d 706 (5th Cir. 1981). The DC Circuit suggested in *Anthony Crane Rental, Inc.* v. *Reich,* 70 F.3d 1298, 1306 (DC Cir. 1995), however, that 29 CFR 1910.12(a)—a rule promulgated by OSHA to adopt Construction Safety Act (CSA) standards as OSHA standards—might limit an employer's obligations under the construction standards in part 1926 to its own employees. The court did not reach the issue, noting that the parties had not briefed it. The proposed confined-spaces in construction standard will be included in part 1926 § 1910.12(a) is consistent with the promulgation of requirements that place obligations on employers necessary to protect the employees of others. The provision states:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

The language of the provision supports OSHA's interpretation that an employer's responsibilities can extend beyond the employer's employees. The first sentence makes the construction standards applicable to every employment and to every ''place of employment'' of every construction employee. This is broad language that does not limit an employer's obligations to its own employees. The second sentence, by providing that each employer must protect the employment and the places of employment of each of his employees, does not limit an employer's obligations to only protecting his or her employees and does not negate the broad reach of the first sentence. The two sentences, read together, require employers to comply with standards at all sites where they are working in order to protect employees who are predictably present at those sites.

The sole purpose of the provision was to ''adopt and extend'' existing Construction Safety Act (CSA) standards applicable under the OSH Act. 29 CFR 1910.11. Under the CSA, standards applied only to employers with Federally funded contracts, and only with respect to employees engaged on those Federal projects. *See* 29 CFR part 1926 Subpart B; *CH2M Hill, Inc.* v. *Herman,* 192 F.3d 711, 718 n.1 (7th Cir. 1999). The function of 29 CFR 1910.12(a) was to adopt the CSA standards as OSHA standards and in so doing to make it clear that neither of those limitations would apply. Thus, OSHA stressed that compliance would broadly extend to *each* construction employer (not just those with Federal contracts) and to *every* construction employee (not just those working on Federal projects). In no way did OSHA intend for the language of 29 CFR 1910.12(a) to restrict its authority to promulgate construction standards that establish obligations extending beyond an employer's own employees.

Other factors confirm that OSHA had no intention in § 1910.12(a) to bar multi-employer responsibilities under the construction standards. OSHA issued the regulation without notice and comment under Section 6(a) of the Act. That section provided authority only to adopt established federal standards, such as the CSA standards, without making any substantive changes. *Usery* v. *Kennecott Copper Corp.,* 577 F.2d 1113 (10th Cir. 1977). The CSA regulations did not limit multi-employer responsibilities; the regulations expressly provided for them. 29 CFR 1926.16. OSHA could not have intended to limit statutory obligations in an action under Section 6(a).

Moreover, concurrently with issuance of § 1910.12(a), OSHA issued its initial Field Operations Manual, which expressly directed issuance of citations to construction employers who created a hazard endangering their own employees or those of another employer. The Agency has also consistently promulgated rules in 29 CFR part 1926 that expressly extend employers' obligations beyond their own employees. The requirements in proposed § 1926.1204 reflect this consistent interpretation and will ensure that *all* employees on construction worksites are protected from the hazards of confined spaces.

The Occupational Safety and Health Review Commission's recent decision in *Secretary of Labor* v. *Summit Contractors* (OSHRC Docket No. 03–1622 (April 27, 2007), has no application to this proposed rule. In *Summit,* a divided Review Commission vacated citations issued to a controlling employer for violations of a construction standard. The two Commissioners who joined in this result issued separate opinions; each read § 1910.12(a) as establishing a limitation on the Agency's authority to hold controlling employers accountable for violations. OSHA believes this view is mistaken, and has appealed the OSHRC decision to the U.S. Court of Appeals (8th Cir. No. 07–2191).

Moreover, *Summit* has no bearing on the duties established under the proposed rule. The *Summit* opinions interpreted OSHA's intent under then existing rules. They did not question OSHA's authority under the Act to establish multi-employer obligations through rulemaking. OSHA is exercising its authority under Section 6(b) to issue this proposed rule, and nothing in § 1910.12(a) limits an employer's compliance obligations under the rule.

Paragraph (a)(1). The host employer and/or controlling contractor would be required to provide information to contractors that it has about the location of each space that it actually knows is a confined space at the worksite. If the host employer or controlling contractor does not have this information, it is not required by this proposed provision to obtain it. For example, if the locations of confined spaces were obtained by the host employer or controlling contractor while its own employees had worked in or near the spaces, or if it obtained the location of a confined space from other contractors who worked in or near the spaces, that information must be shared with the next employer it contracts to work in or near those confined spaces.

Paragraph (a)(2)(i). For each confined space identified in paragraph (a)(1) above, the host employer and controlling contractor would be required to inform the contractor of any hazards in or near the space that the host employer or controlling contractor knows about. These may be known atmospheric or physical hazards. Examples of these include, but are not limited to: atmospheric contaminants; the presence of energized electrical conduits; construction operations performed near the confined space that may result in a ruptured sewer line; or the existence of construction work that may cause the confined space to collapse. If the host employer or controlling contractor does not have this information, it is not required by this proposed provision to obtain it.

Paragraph (a)(2)(ii). The host employer and/or controlling contractor

would be required to provide information that it has to the contractor about the classifications of previously classified confined spaces on the worksite. For example, if the host employer or controlling contractor knows that an employer had previously classified an electrical vault as an Isolated-Hazard Controlled Space (IHCS), the controlling contractor would have to provide that information to the next employer that it contracts to do work in or near that space. However, if the host employer or controlling contractor does not have this information, it is not required by this proposed provision to obtain it.

During the SBREFA process, some small-business representatives expressed the concern that, as a result of having this provision in the draft proposed standard, some controlling contractors would require the contractor to classify all confined spaces as PRCSs, including those that could be classified as IHCSs or CACSs. This proposed provision would not require the contractor to base its classification determination solely on a previous classification that it learned of from a host employer or controlling contractor. The contractor is responsible, under other sections of the proposed standard, for properly classifying the space; the information provided to the contractor under this proposed paragraph may assist the contractor in making the classification. However, this proposed standard would not preclude a controlling contractor from requiring a contractor, for example, to apply a higher level classification to confined spaces than the level required under the proposed standard.

Paragraph (a)(2)(iii). The host employer and controlling contractor would be required to share with all contractors who work inside a confined space the precautions and procedures, if any, it previously implemented to enter that confined space. However, this proposed provision does not require the host employer or controlling contractor to develop entry programs for its contractors. Also, it is not mandatory for a host employer or controlling contractor to provide previously implemented confined-space entry procedures that are not applicable to the space(s) the contractor must enter (that is, entry procedures used for a different space.)

Paragraph (b). The contractor would be required to first determine what spaces are confined spaces and, if so, whether they are subject to any hazards. Provisions (b)(1) through (b)(4) of this proposed section spell out the procedures for making these assessments. The Agency believes that these procedures are necessary to ensure that the spaces are correctly assessed and to ensure that the employees are protected while conducting the assessments.

Paragraph (b)(1). The contractor would be required to consider information provided by the host employer and controlling contractor (if any), and the contractor's own inspection information (see following paragraph), to determine if the space is a confined space and, if so, if there are any physical or atmospheric hazards. OSHA believes that information obtained from the host employer or controlling contractor would be useful to contractors because it often would be based on work previously done safely within the affected space. Except as noted in paragraph (b)(2) of this proposed section, this initial evaluation must be done without entry into the space by the contractor or their employees.

Paragraph (b)(2). In some cases it may not be feasible to make the required determinations about the space and hazards without entering the space. When the contractor can demonstrate that obtaining the information without entering the space is infeasible, employees may enter, but only to inspect for that information. In doing so, an employer must ensure that any employee entering the unclassified space meets the requirements of proposed §§ 1926.1208 through 1926.1214 for Permit-Required Confined Spaces and, if applicable, proposed § 1926.1215 for Continuous System-Permit-Required Confined Spaces.

Entry into the space before identifying its hazards is potentially dangerous; therefore, OSHA believes it is reasonable to require contractors to be able to demonstrate that a proper assessment of the space without entry is infeasible before employees are allowed to enter. This proposal calls for contractors to follow the entry requirements of a PRCS (or, where applicable, a CS–PRCS) in these situations because, with the hazards as yet undetermined, taking these precautions will ensure the safety of the employees.

Paragraph (b)(3). The contractor would have to determine if there are any atmospheric hazards in the confined space. It would be required to comply with proposed § 1926.1205 (Atmospheric testing and monitoring) below to properly perform atmospheric testing and monitoring. In following proposed § 1926.1205, all testing of the internal atmosphere of the confined space must be done without use of mechanical ventilation or changes to the space's natural ventilation. This is to ensure that the natural atmospheric conditions within the space are assessed for hazards that may affect those employees working in the space.

Paragraph (b)(4). Contractors would be required to meet applicable OSHA requirements, including training requirements, for the use of personal and other protective equipment required by paragraph (c)(2) of proposed § 1926.1213. The training would ensure, as applicable, that the employees have the understanding, knowledge, and skills necessary to use the personal and other protective equipment effectively.

Paragraph (c). This proposed paragraph sets forth the information-exchange requirements for contractors who classify a space as a PRCS, CS–PRCS, CACS, or IHCS.

Paragraph (c)(1). Contractors would have to inform the host and controlling contractor of the procedures the contractors will follow for entry into the space. This proposed requirement will enable the host employer and controlling contractor to provide this information to other contractors who enter the space. Such information would help other contractors in planning their safe entry procedures.

Paragraph (c)(2). When contractors classify a space as a PRCS, CS–PRCS, CACS, or IHCS, they would be required, at the conclusion of entry operations, to inform the host employer and controlling contractor employer about any hazards that were present or that developed during the entry operations. This information would be useful to other employers that the host employer and controlling contractor contracts to do work within the space since it would be relevant to their hazard assessments of the space. OSHA believes that the host employer and controlling contractor are in the best position to disseminate this information to other affected employers on the site.

Paragraph (d). The controlling contractor would be required to coordinate confined-space entry operations when multiple contractors will have employees working within the confined space at the same time. The Agency believes that the controlling contractor is in the best position to ensure adequate coordination between contractors whose work (and associated hazards) may affect one another. Note that this proposed paragraph does not specify any particular process by which the controlling contractor would coordinate entry operations. The purpose of this proposed provision is to ensure that employees are protected from hazards that could result from a

lack of coordination between contractors in the space. This paragraph works in concert with the requirements of paragraph (c)(1) of this proposed section, which specifies that contractors must inform the controlling contractor and host employer of their precautions and entry procedures. The controlling contractor can use this information to coordinate the entry operations performed by multiple contractors in or near a confined space to ensure the safety of employees.

Paragraph (e). This proposed paragraph addresses employee participation and notification, and would require the employer to provide its employees who enter a confined space, and their authorized representatives, an opportunity to observe evaluations of the confined space performed under paragraph (b) of this proposed section, reassessments conducted under proposed § 1926.1207 (Reassessment), and any atmospheric testing and monitoring required by this proposed standard. This proposed paragraph does not require employees and their authorized representatives to observe the specified activities; however, it provides employees and their authorized representatives with the option of observing should they choose to do so. OSHA believes that allowing employees and their authorized representatives to participate in this manner will contribute to the successful implementation of safe entry operations by enhancing their awareness of the hazards present in the confined space.

Section 1926.1205—Atmospheric Testing and Monitoring

This proposed section prescribes minimum procedures for atmospheric testing and monitoring that employers would be required to perform to adequately assess the atmospheric conditions which exist within a confined space. Information of this type is vital to the identification of atmospheric hazards within the space, and is also needed to make accurate determinations for later classification of the space. Maintaining safe atmospheric conditions is essential to the safety of all employees working in the space.

Paragraph (a). Employers would be required to test or monitor a confined space for certain atmospheric hazards in a specific order (oxygen deficiency, combustible gases and vapors, and toxic gases and vapors) unless they test or monitor these hazards simultaneously, and for other atmospheric hazards specified in applicable OSHA requirements (such as those in other OSHA standards). Employers must test or monitor for oxygen deficiency, combustible gases and vapors, and toxic gases and vapors because these are well-recognized atmospheric hazards in confined spaces (see discussion of atmospheric hazards in the general industry final rule for confined spaces at 58 FR 4465). Employers must continue to test or monitor the confined-space atmosphere while employees are operating in the space.

The Agency adopted the requirement to test or monitor for oxygen deficiency, combustible gases and vapors, and toxic gases and vapors in this specific order (unless employers test or monitor these atmospheric hazards simultaneously) from the general industry and the ANSI Z117.1–2003 confined-spaces standards. The preamble to the final general industry confined-spaces standard noted that this procedure represents generally accepted safe work practices, and explained the specified order as follows:

> A test for oxygen must be performed first because most combustible gas meters are oxygen dependent and will not provide reliable readings in an oxygen deficient atmosphere. In fact, the Johnson Wax Company (Ex. 14–222) stated that ''there is [a] specific (sensor dependent) oxygen level below which the combustible gas sensor will *not* respond at all [emphasis was supplied in original].'' Combustible gases are tested for next because the threat of fire or explosion is both more immediate and more life threatening, in most cases, than exposure to toxic gases.

(58 FR 4499.) OSHA remains convinced that the priority assigned to testing or monitoring atmospheric hazards by this proposed provision remains valid, and is critical to the health and safety of employees involved in confined-space operations.

Monitoring must be done periodically and as necessary unless other provisions of this proposed standard or other OSHA requirements specify differently. ''As necessary'' refers to the monitoring reasonably required to detect atmospheric hazards. Some factors that may affect frequency are: results of tests allowing entry; regularity of entry (daily, weekly, or monthly); effectiveness of previous monitoring activity; and knowledge of the hazards that affect the confined space. Monitoring must be of a frequency and performed in a manner sufficient to protect employees operating in confined spaces from atmospheric hazards.

Paragraph (b). Employers would have to provide medical facilities that treat employees exposed to certain atmospheric hazards (those hazards that could cause an immediate threat to life and health) with information the employer is required to keep under proposed § 1926.1219 (Records) regarding such hazards; if the exposure involves a chemical hazard described by a Material Safety Data Sheet (MSDS) that the employer must maintain at the job site under 29 CFR 1910.1200 (Hazard Communications), the employer must ensure that the medical facility receives the MSDS as well. The information must be provided to the treating medical facilities as soon as is practical after the exposure. Employers can comply with this proposed provision by having that information accompany the employee to the medical facility or by providing it to the facility as soon as practicable after the employee's arrival there.

The Agency recognizes that such information may already be available to medical facilities from other sources (such as state emergency-planning commissions), and that MSDSs or similar written information may not be available in some instances. However, OSHA believes that it would be reasonable and prudent to require employers to provide MSDSs or other written information to a treating medical facility when such MSDSs or other similar written information already is required to be kept at the worksite; for example, as noted earlier, the Agency's Hazard Communication standard at 29 CFR 1910.1200 may require construction employers to keep MSDSs at the job site. Such information may significantly help the medical facility correctly diagnose and treat the employee.

Section 1926.1206—Classification and Precautions

This proposed section would require an employer to use the information about the space that it obtained under proposed § 1926.1204 (Worksite evaluation, information exchange, and coordination) and classify the confined space(s) in which their employees will be working. The employer must then follow the precautions and safety procedures listed in the applicable section. The classifications are: Continuous System-Permit-Required Confined Space (CS–PRCS); Permit-Required Confined Space (PRCS); Controlled-Atmosphere Confined Space (CACS); and Isolated-Hazard Confined Space (IHCS).

Paragraph (a). This proposed paragraph lists the elements of a Continuous System-Permit-Required Confined Space (CS–PRCS). A ''confined space,'' as defined in proposed § 1926.1203 (Definitions applicable to this subpart), would be classified as a CS–PRCS if it has all the

elements listed in paragraphs (a)(1) through (a)(3) of this proposed section. Such spaces would be protected in accordance with the safety provisions and procedures specified by proposed §§ 1926.1208 through 1926.1215. The Agency believes that employees in this type of space are vulnerable to hazards that can migrate from a larger, contiguous confined space and overwhelm personal protective equipment and/or hazard controls, resulting in a hazard that is immediately dangerous to life and health. For example, employees in one part of a sewer system could be drowned by an unexpected flow of water from upstream in the system. Therefore, a means of warning the employees needs to be in place to protect them.

Paragraph (a)(1). The first element of a CS–PRCS is that the confined space is part of, and contiguous with (connects or contacts), a larger confined space—irrespective of whether the larger space is a CS–PRCS, an Isolated-Hazard Confined Space (IHCS), a Controlled-Atmosphere Confined Space (CACS), or a Permit-Required Confined Space (PRCS). The space to be classified must be contiguous with part of the larger system. For example, if an employer were to perform work in a section of a sewer system, that section would be considered part of and contiguous with a larger space (the entire sewer). As such, it would meet this element.

Paragraph (a)(2). The second element of a CS–PRCS is that the space is not isolated from the larger confined space. In the context of this proposed paragraph, the term ''isolated'' means completely sealed off from the larger space such that passage of the hazards from the larger space is impossible.

Paragraph (a)(3). The third element of a CS–PRCS is that the space is subject to a potential hazard release from the larger confined space that would overwhelm personal protective equipment (PPE) and/or hazard controls used in the space. In this context, ''overwhelm'' means that the PPE and/or hazard controls would not be able to cope with the hazard and would not protect employees, posing an immediate danger to the life and health of any employee working in the space. An example would be where employees are in a confined space that is contiguous with a sewer and the water level in the space is being maintained at a safe level with pumping equipment. However, the pumping equipment could not maintain that safe level if there were a surge of storm water from the sewer.

Paragraph (b). For confined spaces other than CS–PRCSs, the employer would have the flexibility to use a PRCS, CACS or IHCS classification, as long as the applicable classification requirements are met. The elements of each classification are in proposed §§ 1926.1208 (PRCS), 1926.1216 (CACS), and 1926.1217 (IHCS). OSHA had planned on proposing that the employer be required to classify the space to the ''lowest'' classification possible (that is, as an IHCS or, if that was not possible, then as a CACS, and if that was not possible, then as a PRCS). However, one of the recommendations that resulted from the SBREFA review process was that OSHA should consider allowing employers greater flexibility in this regard. The Agency has decided that allowing flexibility in choosing the classification will increase compliance with the standard, and has, therefore, allowed for flexibility in this proposed provision.

Paragraph (c). The employer would be required to meet the accident-prevention and -protection requirements applicable to the confined space as classified. The employer would have to meet those requirements before any employee enters the space. The accident-prevention and -protection requirements for each classification are in proposed §§ 1926.1208 through 1926.1214 (PRCS), 1926.1215 (CS–PRCS), 1926.1216 (CACS), and 1926.1217 (IHCS). The Agency structured the proposed standard in this way so that the accident-prevention and -protection requirements would be tailored specifically to the space classification being used. OSHA believes that this approach will both ensure the protection necessary for the employees and give the employers some flexibility in selecting the classification.

Section 1926.1207—Reassessment

Paragraph (a). This proposed paragraph would require employers to reassess the determinations made in proposed § 1926.1204 (Workplace evaluation, information exchange, and coordination) for a confined space that the contractor had previously determined did not contain any atmospheric or physical hazards when there is an indication that the conditions under which the determinations were made have changed. The Agency believes that this is necessary because conditions around and within confined spaces may change, especially when construction activities are performed around or within it. Consequently, when indications of changes in the previous conditions arise, and to ensure that employees are protected, it is necessary to conduct a reevaluation of the confined space. Such indications include but are not limited to: (1) A change in the configuration or use of, or the type of work conducted or materials used in, the confined space; (2) new information regarding a hazard in or near a confined space; and (3) an employee or authorized representative provides a reasonable basis for believing that a hazard determination is inadequate. OSHA believes that, to ensure the safety of the employees, if any of these three indications occur it is necessary to check to see if new hazards have arisen in the confined space.

Paragraph (b). When an employer has made a determination under proposed § 1926.1204 (Workplace evaluation, information exchange, and coordination) that a confined space was subject to a hazard and the employer implemented protective measures and procedures, the employer would be required to reassess its confined space worksite operations and procedures if there is an indication that those measures may not protect employees working in or near the confined space. This proposed provision lists seven examples of indications that would require the contractor to reassess the confined space in light of the triggering event or new information. These events include, but are not limited to: (1) A change in the configuration or use of, or the type of work conducted or materials used in, the confined space; (2) new information regarding a hazard in or near a confined space; (3) an employee or authorized representative provides a reasonable basis for believing that a hazard determination or protective measure is inadequate; (4) an unauthorized entry into a PRCS; (5) detection of a hazard in or near a PRCS that is not addressed by the entry permit; (6) detection of a hazard level in or near a PRCS that exceeds the planned conditions specified in the entry permit; and (7) the occurrence, during an entry operation, of an injury, fatality or near-miss.

While some specified events, such as the presence of a new hazard in or near the confined space, detection of a hazard not covered by the entry permit, or detection of a hazard that exceeds acceptable levels (see paragraphs (b)(2), (b)(5), and (b)(6) of this proposed section, respectively) may necessitate a full physical and atmospheric retest of the space, full retesting would not be required in all cases. For example, it is unlikely that the unauthorized entry into a space (paragraph (b)(4) of this proposed section) or an accident unrelated to any atmospheric hazard (paragraph (b)(7) of this proposed section) would necessitate a complete review of the atmospheric conditions in the confined space. OSHA recognizes

that while working in a confined space, the environment and/or working conditions may change as a result of unforeseen occurrences. As such, the employer must identify the need for a reassessment of the hazards and working conditions based on changes that may adversely affect safety or health in the confined space.

The indicators specified in paragraphs (b)(1) through (b)(7) of this proposed section are not meant to be a comprehensive list; rather, these indicators are likely or common events that would require a reassessment. The employer also would be required to conduct a reassessment where other, unlisted conditions occur that indicate a need to reassess the effectiveness of hazard controls used in the space.

Paragraph (c). This proposed paragraph specifies the requirements for reassessing a confined space. Prior to performing a reassessment, the contractor must ensure that all employees exit the confined space immediately. The proposed provision also requires the contractor to ensure that no employee reenters the space until the contractor identifies the physical and atmospheric hazards in accordance with paragraph (b) of proposed § 1926.1204; follows the classification procedures specified by proposed § 1926.1206 (Classification and precautions); and meets the accident-prevention and -protection requirements applicable to the space classification selected by the contractor before any employee reenters the space.

The Agency believes this proposed requirement is necessary because once an emergency occurs, the protective systems in place in the PRCS can no longer be relied on to protect the entrants; their safety then depends on their immediately getting out of the PRCS. The Agency also believes that this proposed requirement is necessary to ensure that the: spaces are correctly assessed; employees are protected while conducting a reassessment; and employees receive appropriate protection prior to reentering the confined space.

Section 1926.1208—Permit-Required Confined Spaces

This proposed section would establish (1) the criteria for identifying and classifying a Permit Required Confined Space (PRCS), and (2) the basis for defining the conditions that would enable authorized entrants to work safely in the PRCS (the planned conditions).

Paragraph (a). This proposed paragraph specifies the classification requirements for PRCSs.

Paragraph (a)(1). This proposed paragraph lists several characteristics of PRCSs as defined in proposed § 1926.1203 (Definitions applicable to this subpart): a hazardous atmosphere; inwardly converging, sloping, or tapering surfaces that could trap or asphyxiate an employee; or an engulfment hazard or other physical hazard. The presence of any one of these characteristics in a confined space would require the employer to identify and classify it as a PRCS. For example, a space between walls that narrows towards the base (including but not limited to, funnels and hoppers) would be a PRCS.

Paragraph (a)(2). This proposed paragraph sets forth the requirements regarding physical and atmospheric hazards in PRCSs.

Paragraph (a)(2)(i). In this proposed provision, for each physical hazard identified under paragraph (b) of proposed § 1926.1204, the employer would have to design either an isolation method or use another method of protecting employees from each hazard. The means and methods designed by the employer must meet applicable OSHA requirements. For example, if the confined space contains a physical hazard associated with electrical equipment, the means of isolation or protection must comply with the appropriate OSHA electrical standard (e.g., 29 CFR part 1926 subpart K (Electrical)).

Paragraph (a)(2)(ii). In this proposed provision, for each atmospheric hazard identified under proposed 29 CFR 1926.1205 (Atmospheric testing and monitoring), the employer must isolate or control the atmospheric hazards within the PRCS by either: (1) Ensuring that these hazards are reduced to a safe level [3] in the space without the use of personal protective equipment (PPE) (see, for example, 29 CFR 1926.55, 1926.152, 1926.1100 through .1152); or (2) using PPE to protect the employees from the hazard. For example, for non-explosive atmospheric hazards (such as oxygen deficiency or toxic atmosphere), if the employer does not reduce the hazard in the space to a safe level, the method used to protect the employees must include PPE that is sufficient to protect them in accordance with OSHA requirements applicable to the hazard.

OSHA initially considered requiring employers to isolate all hazards and meet the accident-prevention and -protection requirements of proposed § 1926.1217 (Isolated-hazard confined spaces—classification and accident-prevention and -protection requirements) unless they could demonstrate that isolation of a hazard is infeasible. When employers could demonstrate that they could only isolate physical hazards but not atmospheric hazards, they would have to control the atmospheric hazard and protect their employees in accordance with proposed § 1926.1216 (Controlled-atmosphere confined spaces—classification and accident-prevention and -protection requirements). Only when they could not isolate or control a hazard could employers use personal protective equipment (PPE) to meet the requirements of proposed §§ 1926.1208 through 1926.1214 and 1926.1215 (requirements for PRCSs and Continuous System-PRCSs). However, during the SBREFA process, several Small Entity Representatives (SERs) noted that they and their controlling contractors prefer to classify all confined spaces as PRCSs, thereby providing consistency in training and equipment when working in confined spaces.

OSHA's initial position was consistent with other OSHA standards such as 29 CFR 1926.55 (Gases, Vapors, Fumes, Dusts, and Mists), which require employers to eliminate hazards first using engineering and work-practice controls, and only then with PPE. Nevertheless, the Agency agreed with the comments of the SERs and revised its initial position to allow employers to meet the accident-prevention and -protection requirements of an IHCS or CACS as an option to complying with the PRCS requirements of the proposed standard. OSHA believes this approach to classification of confined spaces will protect employees while allowing employers some flexibility in the methods they choose to manage confined-space hazards. This conclusion is particularly true given the information the Agency received during the SBREFA process when the SERs stated that contractors often prefer to classify all confined spaces as PRCSs so as to provide consistency in training and work practices. The Agency believes that in the construction industry, where there are constantly changing work environments, allowing such an approach may provide additional safety benefits to employees.

Paragraph (b). The two provisions of this proposed paragraph require the employer to define the planned conditions under which authorized entrants can work safely in a PRCS.

Paragraph (b)(1). Under this proposed paragraph, the employer would be required to use the determinations made

[3] "Safe level" is a defined term in proposed 1926.1203 (Definitions applicable to this subpart) of this proposed standard.

under paragraph (a)(2) of this proposed section to define the planned conditions under which the employees can safely work in the PRCS.

Accordingly, the required information would include the hazard levels at which employees can safely work and the procedures and equipment used to protect the employees. For example, when an employer decides to use PPE to protect employees from an atmospheric hazard, the planned conditions would typically include the type of PPE to be used (such as type of respirator) and the levels at which the PPE would protect the employees from the atmospheric hazard.

Paragraph (b)(2). Employers would be required to determine that, in the event the ventilation system stops working, the monitoring procedures will detect an increase in atmospheric hazard levels in sufficient time for the entrants to safely exit the PRCS. As explained for a similar provision in the general industry standard (see 29 CFR 1910.146(c)(5)(i)(B)), for the PRCS to be considered safe, the mechanical ventilation must control the atmospheric hazards at levels that are below the levels at which they are harmful to entrants (that is, at a sufficiently low level that entrants will have time to exit the PRCS safely). In addition, should the forced-air ventilation system cease to function during entry (such as from a power loss), the atmosphere must remain at safe levels until monitoring procedures detect rising atmospheric hazard levels and entrants can safely exit the space or ventilation is restored. The Agency believes that monitoring is the primary method for detecting an increase in atmospheric hazard levels and, therefore, this proposed standard generally requires the use of monitoring to detect ventilation system failure. However, other indicators may be useful in detecting such failures, including changes in noise levels, air flow, and/or pressure; and signs, symptoms, and characteristic effects of exposure to the atmospheric hazard.

In the event the control methods fail, meeting the requirements of this proposed paragraph would provide employees with a safe atmosphere within the PRCS until they evacuate from the confined space, thereby reducing the risk of serious injury and death. Nevertheless, OSHA believes that if the atmospheric hazards would rapidly rise to unsafe levels in the event of a failure in the mechanical-ventilation system, and employees could not exit safely from the PRCS under these conditions, then mechanical ventilation may be an inappropriate method for controlling atmospheric hazards in the PRCS.

Section 1926.1209—PRCS—Initial Tasks

Paragraph (a). One of the keys to protecting employees from PRCS hazards is for both employers and employees to know the location of the PRCSs at the job site, the characteristics of the hazards, and their associated dangers. The provisions in this proposed paragraph are designed to achieve this goal.

Paragraph (a)(1). The contractor would be required to notify its employees that it anticipates will be in or near the PRCS and their authorized representatives, and the controlling contractor, about the location of, and the hazards/dangers posed by the PRCSs located at the job site. The Agency believes that it is important for the contractor to provide the controlling contractor with this information because the controlling contractor is in the best position to convey the contractor's information to other employers at the site. This proposed provision will help facilitate the effective sharing of this important information among other contractors at the site, as well as the employees of these contractors that they anticipate will be in or near the PRCS. It also ensures that the contractor's own employees who will be in or near the PRCSs have this information.

Paragraph (a)(2). The employer would be required to post a danger sign at or near the PRCS entrances, which the Agency believes is necessary to ensure that employees are warned of the presence and danger of a PRCS. If the employer can demonstrate that a sign is infeasible, it would have to use an equally effective means of alerting employees. The Agency believes that employees need this information to understand the seriousness of potential hazards in the PRCS. Compliance with this proposed requirement would ensure that employees who are not involved in PRCS operations would be sufficiently informed so that they would not attempt to enter the spaces. However, OSHA notes that only employees who work in PRCSs would need to know more details about the potential hazards. Therefore, this proposed provision would not require employers to list specific PRCS hazards on each sign. The Agency believes that, when properly warned, employees who are not authorized to enter the space would avoid entering the PRCS, thereby preventing harm that could result from the PRCS hazards.

The sign must convey that entering the space is dangerous and that entry without authorization is prohibited. Language such as ''Danger—Permit-Required Confined Space—Authorized Employees Only'' and ''Danger—Do Not Enter Without a Permit'' would convey this information. Similar language that prevents unauthorized entry also would meet the requirements of the proposed rule.

OSHA considered allowing the use of a posted copy of the entry permit to meet the sign requirement. However, the Agency rejected this idea because the entry permit is not designed to serve as a warning sign. Unlike a sign that reads ''Danger—Permit Required Confined Space—Authorized Employees Only'' or ''Danger—Do Not Enter Without a Permit,'' or similar language, the design and content of an entry permit is unlikely to clearly express to employees (especially those not authorized to enter the PRCS) that entering the space could be dangerous.

When the employer demonstrates that posting a sign at every possible entrance to a PRCS is infeasible, it instead would be permitted to use an equally effective means to warn employees of the presence and danger of the PRCS. Such means must go beyond just generic training in this standard, for example, since generic training would not identify the location of permit spaces at a specific worksite. Therefore, an equally effective means would identify the PRCS locations so that employees at the job site who may work near the PRCSs would be aware of these locations and would understand the importance of not entering them.

Paragraph (b). The employer would be required to decide if any employees would be authorized to enter the PRCS. If no employees will be authorized to enter, entry must be prevented by implementing the three measures specified below in paragraphs (b)(1) through (b)(3) of this proposed section. The Agency believes that these measures would effectively prevent unauthorized entry into PRCSs and so protect employees from encountering PRCS hazards.

Paragraph (b)(1). The employer would be required to use barriers to permanently close the PRCS to prevent access to the PRCS. The use of barriers helps ensure that the PRCS remains inaccessible to employees. A barrier is a physical obstruction that blocks access to the PRCS; for example, a plywood sheet could be installed to cover the entrance, or 2x4s installed in such a manner that some or all of the barrier would have to be removed to easily enter the space.

Paragraph (b)(2). Under this proposed provision the employer would be

required to post danger signs in accordance with paragraph (a)(2) of proposed § 1926.1209. The Agency believes that it is necessary to use such signs in conjunction with the barrier because, without such signs, an employee may not understand that the purpose of the barrier is to keep all employees out of the PRCS. Such signs are particularly important at construction sites, where construction employees are accustomed to removing material to gain access to an area.

Paragraph (b)(3). Employers would be required to inform their employees and the controlling contractor of the location of the closed PRCS and the measures used to prevent entry into the space. The purpose of this proposed paragraph is to ensure that all employees, including employees who are not authorized to enter a PRCS, are informed directly of the locations of the closed PRCSs and the dangers they pose. As a result, employees, including those employees who have no experience working near or within a PRCS, would recognize, and avoid entering, a PRCS.

Paragraph (c). Under this proposed paragraph, if the employer decides that one or more employees will be authorized to enter the PRCS, it would be required to implement specific measures to limit entry into the PRCS to only those employees authorized to enter. Compared to the general industry standard, the provisions in this proposed paragraph provide more specific information to employers about how to limit PRCS access to authorized entrants at construction worksites.

Paragraph (c)(1)(i). OSHA believes that to effectively limit entry into a PRCS, it is necessary to make it physically difficult for non-authorized employees to enter the space since employees may not take note of other types of warnings (such as signs) before entering the space. Therefore, under this proposed provision, employers would be required to use either barriers or high-visibility physical restrictions, such as warning lines with flags, installed across the entrances to the PRCS. High-visibility physical restrictions such as warning lines with flags would be allowed as an option in this proposed provision since these restrictions allow authorized employees to enter the space. Unlike the barriers described above in paragraph (b)(1) of this proposed section, which must prevent any employee from entering the PRCS, the purpose of the barriers required by this paragraph is to warn non-authorized employees not to enter the space while allowing entry into the PRCS by authorized entrants.

This proposed provision serves a different purpose than the barrier required below in paragraph (c) of proposed § 1926.1210. As discussed below, the barrier in paragraph (c) of proposed § 1926.1210 would be designed to protect authorized entrants from external hazards presented by pedestrians and vehicles. In contrast, the barrier or high-visibility physical restriction in this proposed provision is designed to prevent non-authorized entrants from entering the PRCS, while allowing authorized entrants ready access to the PRCS.

Paragraph (c)(1)(ii). Employers would be required to post signs that comply with paragraph (a)(2) of this proposed section at or near the entrances to the PRCS. The sign required by this proposed paragraph would warn employees that it is dangerous to enter the PRCS. The sign would work in conjunction with the physical restrictions specified in paragraph (c)(1)(i) of this proposed section to communicate the presence of hazards within the PRCS.

Paragraph (c)(1)(iii). The employer would have to inform its non-authorized employees and the controlling contractor of the location of, and hazards in, the PRCS and the measures used to prevent unauthorized entry. As with the requirements in paragraphs (a)(1) and (b)(3) of this proposed section, OSHA believes that it is important for the employer to communicate the location and hazards of the PRCS to its non-authorized employees. In addition, the controlling contractor is typically in the best position to disseminate the information about the PRCS to the other affected employers. OSHA believes that inadvertent entry into the PRCS by non-authorized employees is less likely to occur where this information is disseminated.

Paragraph (c)(2). The employer would be required to allow only employees who are ''authorized entrants'' as defined above under proposed § 1926.1203 (Definitions applicable to this subpart) to enter the PRCS. Paragraph (g) of proposed § 1926.1210 would require the employer to designate which employees are authorized entrants and to ensure that these individuals are identified on the current entry permit in accordance with paragraph (a)(2)(ii) of proposed § 1926.1214. Only these individuals may enter the PRCS. The Agency believes that this proposed requirement will help maintain safe PRCS operations, which to a significant extent depend on the entrants knowing about the hazards and proper PRCS procedures. Non-authorized entrants would not typically be trained regarding the hazards and safety procedures required by the applicable sections of this proposed standard. Consequently, their presence could compromise not only their own safety and health, but also the safety and health of other employees in the PRCS.

Paragraph (d). This proposed paragraph establishes an employer's duties to train employees the employer anticipates will be in or near the PRCS.

Paragraph (d)(1). The employer would have to ensure that employees who will be in or near a PRCS acquire the knowledge and skills necessary for the safe performance of their duties as specified by the applicable sections of this proposed standard. The proposed provision specifically identifies ''employees who will be in or near a PRCS'' as entry supervisors, attendants, authorized entrants, and rescue-service employees. The training must also result in the employees understanding the hazards in the PRCS that they will be working in or near, and the methods used to isolate, control, or protect them from these hazards. For example, if an authorized entrant enters the space to isolate an identified hazard or to set up ventilation to control an atmospheric hazard, the employer would be required to ensure that the employee is trained not only in accordance with the PRCS entry requirements, but also to perform the tasks necessary to isolate and control the specific hazards in accordance with other appropriate OSHA requirements applicable to construction. All employees who enter the space thereafter must also be trained to understand how the hazards within the space, if any, have been isolated or controlled. OSHA believes that the training employees receive under this provision will enable them to associate the signs, symptoms and characteristic effects (discussed elsewhere in this preamble) to failure of methods to control or isolate the hazards. Therefore, this training will enable employees to safely perform their requisite duties while working in or near the PRCS, and to respond appropriately if the hazard-protection methods fail.

Paragraph (d)(2). Multiple fatalities could occur when one employee discovers that another employee has been incapacitated inside a confined space and goes into the space to rescue the victim, only to become incapacitated as well. OSHA believes one of the ways the proposed standard would prevent this type of tragic sequence is by having separate requirements for those employees who are specifically authorized to enter the PRCS for rescue and those employees who are not.

Under this proposed paragraph, the employer would be required to train employees the employer anticipates will be in or near the PRCS, and who are not authorized to perform entry rescues, about the dangers of trying to perform a rescue. This training is especially important for authorized entrants, attendants, and supervisors since they are most likely the first to become aware that an employee in the PRCS is incapacitated.

Paragraph (d)(3). This proposed paragraph specifies when the employees, notably entry supervisors, attendants, authorized entrants, and rescue-service employees, would have to be trained under the requirements of paragraphs (d)(1) and (d)(2) of this proposed section. The provisions of this proposed paragraph are designed to ensure that the training would be provided before the employees encounter a PRCS hazard, thereby ensuring that they can respond promptly and appropriately to hazards, and that they are aware of the dangers of attempting entry rescues.

Paragraph (d)(3)(i). The employer would have to ensure that specified employees (that is, entry supervisors, attendants, authorized entrants, and rescue-service employees) receive the training required above in paragraphs (d)(1) and (d)(2) of this proposed section prior to the beginning of PRCS entry operations (that is, when an authorized entrant enters the PRCS). This proposed requirement ensures that employees receive adequate training regarding PRCS hazards before authorized entrants are exposed to these hazards.

Paragraph (d)(3)(ii). Under this proposed provision, if employees receive a change in assigned tasks and these changes affect the planned conditions for the PRCS, then the employer must train these employees before they enter the PRCS on the newly assigned tasks, including how to maintain the conditions of the PRCS classification when performing the tasks. For example, an employee's assignment changes so that he/she must maintain the proper functioning of ventilation equipment in the PRCS or perform atmospheric monitoring; before reentering the space, the employee must be trained to perform such tasks and to understand their significance to safe PRCS entry operations. This additional training only applies when employees have not received previous training on these newly assigned tasks. This proposed provision would ensure that employees have the knowledge and skills necessary to perform their newly assigned tasks safely within a PRCS, thereby preventing errors that could result in substantial harm to themselves and/or other employees.

Paragraph (d)(3)(iii). The employer would be required to ensure that authorized entrants exit the PRCS when a new hazard is introduced or occurs in the PRCS for which the authorized entrants have not previously received training. The employer then would have to ensure that all untrained employees the employer anticipates will be in or near the space to complete training that provides the necessary skills and knowledge regarding the new hazard before the space is reentered.

An example would be authorized entrants working in a PRCS who, in the course of their work, discover a previously unknown gas line; none of the authorized entrants has been trained on the hazards associated with working in a PRCS that has a gas line. This proposed provision would require that the employees exit the PRCS (not just the area near the gas line) until they receive the required training.

Paragraph (d)(4). The employer would have to ensure that employees that the employer anticipates will be in or near the PRCS can demonstrate proficiency in the duties required by this proposed standard, including any new or revised PRCS procedures. This proposed provision would ensure that employees would not enter a PRCS without being able to apply the knowledge and procedures addressed in their training. In other words, the employer must determine that, for each employee, the training has been effective—that it has resulted in the employee understanding the information sufficiently so that he/she can apply it and be proficient in the required duties.

Paragraph (d)(5). The employer would be required to maintain training records for each employee. The training records would have to meet several requirements specified by this proposed paragraph. As explained in the following paragraph, the Agency believes that maintaining such records is necessary to ensure that employees that need to be trained in PRCS hazards have received the appropriate training.

Paragraphs (d)(5)(i) and (d)(5)(ii). The training records would have to show that the employee accomplished the training requirements specified in paragraphs (d)(1) through (d)(4) of this proposed section when required. This documentation can take any form that reasonably demonstrates the employee's completion of the training. Examples include attachment of test scores, a photocopied card certifying completion of a class, or any other reasonable means. The records would also have to contain the employee's name, names of the trainers, and dates of the training. These records may be stored electronically.

OSHA recognizes that the turnover rate for employees on construction sites is higher than in many other industries, and that employees are also likely to work at several different worksites based on the type of work that needs to be performed. For example, an employer could designate an employee to be an authorized entrant in several different confined spaces at the same worksite, which may require the employee to perform different assigned tasks under various planned conditions. In this situation, OSHA believes that this documentation is necessary to keep track of whether the employee has been effectively trained to perform the various tasks under the planned conditions. Compliance with this provision would provide employers with an administrative tool that they can use to confirm which employees will be able to perform the duties required by this proposed standard. By providing an easily accessible reference for determining employee training status, this provision would ensure a safer workplace within the PRCS.

Paragraph (d)(6). The provisions of this proposed paragraph would require that an employer ensure that employees be retrained when specified circumstances occur.

Paragraph (d)(6)(i). Retraining would be required when the employer has reason to believe that the employee has deviated from the PRCS entry procedures in proposed §§ 1926.1209 through 1926.1214. By retraining employees who deviate from entry procedures, the employer can better ensure the safety of all employees in a PRCS. OSHA believes that even one employee can adversely affect the safety of others in a confined space if he/she deviates from correct entry procedures.

Paragraph (d)(6)(ii). Retraining would also be required when the employer finds indications that the employee does not have adequate knowledge and skills regarding PRCS entry procedures. OSHA believes that employees in a PRCS with inadequate knowledge or skills regarding these procedures could endanger their lives and also the lives of other employees in the space.

Paragraph (e). Before any employees enter a PRCS, the employer would be required to complete arrangements for the rescue of these employees in accordance with proposed § 1926.1213 (PRCS—rescue criteria). The Agency believes that this proposed provision is necessary to ensure that rescue and emergency services will actually be readily available if they are needed.

Note that, in paragraph (e)(2)(iv) of proposed § 1926.1210, the entry supervisor is specifically required to verify that this arrangement has been made before authorizing a PRCS entry.

Paragraph (f). The employer would have to develop procedures for safely terminating entry operations under both planned and emergency conditions. For example, if ventilation equipment is being used to help control an atmospheric hazard, safe termination procedures under planned conditions or emergency conditions would include sequencing shut-down operations so that the ventilation was not turned off until the end of the termination process (that is, after employees exit the PRCS).

Section 1926.1210—PRCS—Preparing for Entry

Once the initial tasks under proposed § 1926.1209 (PRCS—initial tasks) have been completed, the employer would then have to meet several requirements under this proposed section before allowing an employee to enter a PRCS.

Paragraph (a). Before any authorized entrant enters a PRCS, the employer would be required to prepare an entry permit that meets the requirements of proposed § 1926.1214 (PRCS—entry permits), and then post this entry permit where the authorized entrants enter the PRCS. OSHA believes that making the permit available to all authorized entrants is necessary because they need to know, and be able to refer back to, the information that is in the permit to work safely in the PRCS.

Paragraph (b). This proposed paragraph would require, prior to removing an entrance cover, that employers eliminate any condition that makes it unsafe to remove the entrance cover. For example, conditions such as heat and pressure within the PRCS may pose a danger to employees removing an entrance cover. In such cases, the cover may be blown off in the process of its removal, or superheated steam may suddenly escape and burn the employee. Another example would be where a sealed cover is removed and toxic gases are released.

To protect employees from these hazards inside the PRCS, the employer would be required to make a hazard assessment before any cover is removed. Removal of the cover to the PRCS would not be permitted until the employer identifies any hazardous conditions related to the cover's removal and then eliminates those hazards.

Paragraph (c). The purpose of this proposed paragraph is to protect employees in and around the PRCS from being struck by individuals or objects outside the PRCS that may fall into the space, or that could injure the employees when they are near the PRCS. When necessary to achieve this purpose, this proposed provision requires employers to promptly: use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects, and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR Part 1926 subpart G (Signs, Signals, and Barricades).

Paragraph (d). Employers would be required to ensure that a safe method of entering and exiting a PRCS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements (such as 29 CFR Part 1926 subpart X (Stairways and Ladders)). For example, where the employees are working in an underground vault, the employer would be required to provide and ensure the use of a safe means of entry into and exit from an underground vault, and, if applicable, ensure that the method complies with OSHA standards.

This proposed paragraph also would require that if a hoisting system is used, it must be designed and manufactured for personnel hoisting. This proposed provision also allows for the use of job-made hoisting systems if these systems are approved for personnel hoisting by a registered professional engineer prior to use in PRCS entry operations.

However, commercial hoisting systems not designed and manufactured specifically for personnel hoisting would not be permissible under this proposed provision because OSHA believes they cannot be used safely for this purpose. This proposed requirement would eliminate further injuries and deaths of employees that could occur from the use of a hoisting system that was not designed specifically for personnel hoisting. The provision would give the employer flexibility in its choice of personnel hoisting systems by allowing a registered professional engineer to approve a job-made system. OSHA believes that either option would ensure that the personnel hoisting system will meet the design specifications needed for employees to safely access the PRCS.

This proposed provision would ensure that authorized entrants always have a safe and effective means of entering and exiting the space, including escaping from it in an emergency. These means include systems that are designed and manufactured for personnel hoisting and job-made hoisting systems approved by a registered professional engineer, even when these systems are not covered by an OSHA standard.

Paragraph (e). The provisions under this proposed paragraph delineate the requirements for an entry supervisor. These proposed requirements focus overall coordination of PRCS entry operations on the entry supervisor, and provide that person with authority to terminate PRCS entry operations and to cancel the entry permit. By centralizing these duties in a single individual who is highly knowledgeable regarding PRCS entry operations, these proposed requirements would substantially enhance the safety of affected employees, especially authorized entrants.

Paragraph (e)(1). The employer would be required to assign at least one entry supervisor for each worksite where there is a PRCS. OSHA believes that many of the accidents that occur in confined spaces are the result of an employer's failure to implement confined-space entry procedures. To help prevent such accidents, the Agency believes that it is necessary for the employer to not only establish safe procedures for PRCS entry, but to also ensure that these protective procedures are implemented. Therefore, to ensure that the protective entry procedures are implemented, this proposed paragraph requires the employer to assign an entry supervisor for the PRCS who would coordinate procedures for entering the PRCS. Accordingly, the entry supervisor has specific duties that must be fulfilled to ensure a safe workplace for those employees the employer anticipates will be in or near the PRCS. The employer would be required to ensure that the assigned individual meets the qualifications and performs the duties specified in paragraph (e)(2) of this proposed section.

Paragraph (e)(2)(i). The employer would be required to ensure that the entry supervisor knows the physical and atmospheric hazards in the PRCS. It is essential for the entry supervisor to know this information since it forms the basis for the PRCS procedures that would be used to protect the affected employees.

Paragraph (e)(2)(ii). The employer would be required to ensure that the entry supervisor knows how the hazards enter the body (for example, by skin contact or inhalation), as well as the signs, symptoms, and characteristic effects (including behavioral effects) of exposure to these hazards. As an individual with the authority to order the evacuation of the PRCS and cancel the entry permit, it is essential that the entry supervisor recognize hazardous conditions and telltale indications

(signs, symptoms, and characteristic effects) that a hazard is affecting employees in or near the PRCS operations. By meeting the knowledge requirements of this proposed paragraph, the entry supervisor would be better prepared to identify emergency situations by observing employees involved in entry operations.

Paragraph (e)(2)(iii). The employer would have to ensure that the entry supervisor verifies (by checking appropriate entries in the permit) the completion of atmospheric testing specified in the entry permit, that the conditions in the PRCS are within the planned conditions as defined in accordance with paragraph (b) of proposed 1926.1208 and as listed in the entry permit, and that any other procedures and equipment specified in the entry permit are in place. These preliminary checks are necessary to ensure that the conditions in the space are within the planned conditions—hazard levels are as planned, and protective measures are already in place, working properly, and are effective—before entry operations commence.

Paragraph (e)(2)(iv). The employer would be required to ensure that the entry supervisor verifies that the entry rescue service (selected in accordance with paragraph (e) of proposed §§ 1926.1209 and proposed 1926.1213) is available to perform their rescue duties and that the means for timely summoning the entry rescue service is operating properly. Since the employer would be required to assign authority for safe permit entry operations to the entry supervisor, it is reasonable and consistent with the rescue provisions to specify that the entry supervisor verify that the entry rescue service is available and the means of summoning it in a timely manner is functioning properly.

Paragraph (e)(2)(v). After the entry supervisor makes the verifications required by paragraphs (e)(2)(iii) and (e)(2)(iv) of this proposed section, the employer would be required to ensure that the entry supervisor signs the entry permit to authorize employees to enter the PRCS. OSHA believes that it is important for all employees the employer anticipates will be in or near the PRCS to be able to know who the persons are who have authority and responsibility with respect to maintaining safe conditions during entry operations. If an employee discovers an unsafe condition or symptoms caused by an unsafe condition, it is important for the employee to be able to notify a person (such as the entry supervisor) with the authority and responsibility for correcting the hazard and for evacuating the PRCS. In addition, the signature requirement underscores to the employer and the entry supervisor the importance of their determination that the prerequisites for safe entry listed in the permit have been met.

Paragraph (e)(2)(vi). The employer would be required to ensure that the entry supervisor terminates PRCS entry operations in accordance with paragraph (b) of proposed § 1926.1212 (Supervisor requirements) of this proposed standard. For an explanation of this proposed requirement, see the discussion under paragraph (b) of proposed § 1926.1212 of this preamble.

Paragraph (f). The provisions of this proposed paragraph specify the requirements for attendants. These proposed requirements would help to ensure the safety of employees in or near the PRCS.

Paragraph (f)(1). The employer would be required to station an attendant outside the PRCS for the duration of the entry operation. The rationale for assigning attendants to a PRCS is similar to the rationale for assigning entry supervisors to these confined spaces (see paragraph (e)(1) of this proposed section). Although an attendant does not have the overall responsibility for employee safety and health assigned to the entry supervisor, the attendant is a crucial link in the communication chain between the entry supervisor, rescue operations, and the authorized entrants.

It is extremely important that the attendants understand their duties, stay in contact with the entrants, and remain alert to conditions inside and outside the PRCS. The attendant may be in the best position to warn the entrants of hazardous conditions developing outside the space and impending danger within the space, and to recognize physical and behavioral changes in the entrants that would indicate that conditions within the space may be deteriorating. In cases where the entrant becomes incapacitated, the attendant often is an entrant's only contact with individuals outside the confined space. Without the attendant, many emergencies in the space would not be detected and help would not be summoned until it is too late.

One of the main duties of the attendant is to recognize hazardous conditions that are occurring inside the PRCS and to communicate this information to rescue personnel in emergency situations. If the attendant was inside the space, the attendant could become incapacitated if an emergency occurred and rendered unable to perform the very duties that are necessary to protect the other employees. The attendant would often be the first (and sometimes only) person to recognize unacceptable conditions or signs of hazardous conditions within the space. Therefore, it is imperative that the attendant remain outside of the PRCS to monitor the space and to contact and help coordinate rescue personnel during times of emergency.

Paragraph (f)(2). The employer would be required to ensure that the attendant knows the hazards associated with the PRCS, how these hazards enter the body, and the signs, symptoms, and characteristic effects that can result from those hazards. Knowing this information is crucial for the attendants to perform their duties because they must be able to recognize when there are indications that the planned conditions in the PRCS are not being met—that something is wrong with the system of employee protection. Because attendants would be able to easily communicate with entrants and entry supervisors, their recognition of deviations from the planned conditions and of the signs, symptoms and characteristic effects that might indicate exposure to a hazard will help enable a timely evacuation of the PRCS.

Paragraph (f)(2)(i). The employer would be required to ensure that attendants know the physical and atmospheric hazards in the PRCS. OSHA believes that knowing the hazards within the space includes being able to both recognize and understand them.

Paragraph (f)(2)(ii). The employer would be required to ensure that attendants know how the hazards may potentially enter the body (for example, skin contact and inhalation), the signs and symptoms of coming into contact with a hazard, and characteristic effects (including behavioral effects) of the hazards. OSHA believes this proposed requirement is necessary because the attendant is likely to be in a position to quickly recognize deteriorating conditions within the space and communicate the need for an immediate evacuation. For instance, subtle behavioral changes/effects detected in an entrant's speech or deviations in established communication procedures could alert the attendant that it is necessary for the entrant to evacuate the space or to be rescued.

Paragraph (f)(3). Under this proposed provision, the employer would be permitted to assign a single attendant to monitor more than one PRCS only when the requirements in this proposed paragraph are met. OSHA acknowledges that, although it is best to have one attendant outside each PRCS, there may be situations when one attendant can

effectively monitor multiple PRCSs. The ability to monitor multiple PRCS sites allows employers maximum flexibility in providing for the safety of employees where site-specific factors permit the attendant to do so. For instance, in some circumstances a single attendant equipped with modern technologies such as automated monitor/alarm systems and audio-video equipment may be able to monitor multiple sites and react to emergency conditions as effectively as a single attendant at each space.

Paragraph (f)(3)(i). The employer would be required to ensure that attendants are able to completely and accurately perform all duties assigned to them under paragraph (f) of proposed § 1926.1211 (Attendant duties). The attendants must be able to perform these duties at each individual PRCS without compromising the performance of their duties at any other PRCS site they are responsible for monitoring. Therefore, OSHA believes that to effectively monitor multiple PRCSs without compromising the safety of the entrants in any one of the PRCSs, employers must meet the requirements of paragraph (f) of proposed § 1926.1211 for each PRCS.

Paragraph (f)(3)(ii). The employer would be required to provide the equipment and procedures needed by an attendant to respond to an emergency affecting any of the PRCSs he/she is assigned to monitor. Examples of such equipment include electronic equipment (for example, electronic audio and video tools) that enables the attendant to detect what is occurring inside the multiple PRCSs without the attendant having to simultaneously be physically present at each PRCS entrance. If an employer chooses to require an attendant to monitor multiple PRCSs, the employer would have to provide all of the equipment necessary for the attendant to fulfill the required duties. OSHA believes that it is unrealistic to expect an attendant to be able to adequately perform those duties without the equipment necessary to accomplish the tasks assigned in paragraph (f) of proposed § 1926.1211.

Paragraph (g). The provisions of this proposed paragraph address requirements regarding authorized entrants. OSHA believes that these employees face the greatest danger from the PRCS because they will be working in or near the hazards that pose serious safety and/or health risks. To ensure safe PRCS entry operations it is necessary for employers to limit PRCS entry to those employees who have the requisite knowledge about the hazards.

Paragraph (g)(1). The employer would be required to designate which employees are authorized to enter a specific PRCS. For example, when there is a worksite with five separate PRCSs where employees will be performing construction activities, the employer would be required to designate the specific employees who are authorized to enter specific PRCSs. Only those employees whom the employer designates as authorized (and are documented in the entry permit) are allowed to enter the designated PRCS.

Paragraph (g)(2). This proposed paragraph would require the employer to ensure that the authorized entrants know about the hazards associated with the PRCS they will be entering, and the characteristics associated with each particular hazard. This knowledge would afford authorized entrants with the information they need to protect themselves from these hazards.

Paragraph (g)(2)(i). The employer would be required to ensure that the authorized entrants know the physical and atmospheric hazards in PRCSs they are authorized to enter. This proposed requirement is similar to requirements described above for entry supervisors and attendants in §§ 1926.1210(e) (Entry supervisor) and (f) (Attendant) of this proposed section.

Paragraph (g)(2)(ii). The employer would be required to ensure that authorized entrants know how the hazards may enter the body (skin contact, inhalation), as well as signs and symptoms, and characteristic effects (including behavioral effects) that the hazards may cause. This proposed provision is similar to paragraphs (e)(2)(ii) and (f)(2)(ii) of this proposed section, which specify knowledge requirements for entry supervisors and attendants. It is particularly important for the authorized entrants to have this knowledge, since it may help them avoid PRCS hazards. For example, if an accident occurs in which an employee's protective equipment is cut, a hazardous chemical gets on his/her skin, and the employee knows that the chemical can enter the body through skin contact, the likelihood that the employee will immediately seek help is enhanced. Another example is if an authorized entrant sees unusual behavior in another authorized entrant and knows that the behavior is a symptom of exposure to a hazard, the authorized entrant will more likely recognize that an emergency is occurring and take appropriate action.

Paragraph (h). This proposed paragraph sets forth the criteria for assigning simultaneous roles to authorized entrants, attendants, and entry supervisors.

Paragraph (h)(1). The employer would be required to ensure that employees do not serve as authorized entrants and attendants simultaneously. OSHA believes that the roles of authorized entrant and attendant are fundamentally incompatible since, under paragraph (f)(1) of proposed § 1926.1210, the attendant must be stationed outside the space for the duration of the entry operation (as explained in the discussion of paragraph (f)(1) of proposed § 1926.1210). In addition, the Agency believes that trying to perform both roles simultaneously would be too distracting to perform either position effectively.

Paragraph (h)(2) and (h)(3). An employer would be permitted to have an attendant or authorized entrant serve simultaneously as an entry supervisor only if the employer ensures that the person meets all the requirements under this proposed standard applicable to that person's assigned roles. These provisions would, in effect, require employers to first assess the type and extent of the assigned tasks associated with each role and determine that the roles do not interfere with each other.

Paragraph (i). OSHA is reserving this paragraph because it is difficult for readers to have to distinguish if the letter (i) is being used as a letter or as a roman numeral.

Paragraph (j). The employer would be required to provide, and ensure the use of, equipment necessary to maintain safe conditions in a PRCS. OSHA believes that providing such equipment, and using it correctly, would prevent injuries and fatalities in PRCSs. Accordingly, the purpose of this proposed paragraph is to ensure the availability and proper use of whatever equipment is necessary to reduce the dangers posed by PRCSs.

Paragraph (j)(1). The employer would be required to provide communication equipment necessary for compliance with paragraphs (f)(5), (g)(2), and (h)(2) of proposed § 1926.1211 (requirements for entrant-to-attendant communication and rescue-service summoning requirements, respectively). Such equipment may be of a variety of types (for example, cell phones, two-way hand-held radios), so long as it is effective. If there is weak or unpredictable signal strength where the device is used, the device would not meet the requirements of the proposed standard. Properly operating communication equipment is essential in relaying information to persons of authority regarding potentially dangerous changes in the PRCS

conditions. Such information is necessary to monitor the hazards within the space and to provide guidance on methods appropriate for protecting or removing employees from those hazards.

Paragraph (j)(2). The employer would be required to provide lighting equipment to illuminate PRCSs that provides the illumination levels specified by 29 CFR 1926.56 (Illumination). OSHA believes that this proposed requirement would assist employees in conducting safe PRCS operations, including safe escape from a PRCS if necessary.

Paragraph (j)(3). The employer would be required to provide railings, covers, or barriers as required in paragraphs (b) and (c) of proposed § 1926.1209 and paragraph (c) of proposed § 1926.1210. OSHA believes that this proposed requirement is necessary to keep unauthorized employees from entering the PRCS and to help protect employees inside the PRCS from being struck by objects and individuals falling into the PRCSs. When providing this equipment, employers must ensure that it complies with the requirements of other applicable OSHA standards (for example, guardrails must meet the requirements of 29 CFR 1926.502(b) (Guardrail systems), covers must conform to 29 CFR 1926.502(i) (Covers)).

Paragraph (j)(4). The employer would be required to provide and ensure the use of equipment, such as ladders, needed for safe entry into and exit from the PRCS. In doing so, employers must ensure that this equipment, including its use by employees, complies with the requirements of the applicable OSHA standards (for example, 29 CFR Part 1926 subpart X for ladders and stairways, 29 CFR Part 1926 subpart L for scaffolds). This equipment is critical under emergency-egress conditions to ensure that employees exit a PRCS in a timely and safe manner.

Paragraph (j)(5). The employer would be required to provide rescue and emergency equipment that complies with proposed § 1926.1213 (PRCS—rescue criteria), unless an entry rescue service provides its own rescue and emergency equipment. This proposed paragraph would ensure that the proper equipment is provided for rescuing authorized entrants in the event of an emergency in a PRCS.

Paragraph (j)(6). The employer would be required to provide any other equipment necessary for the safe rescue of employees working in or near a PRCS. OSHA believes this proposed requirement would address hazards that are unique to a PRCS rescue, thereby ensuring that employees receive adequate protection from these hazards under emergency conditions. Accordingly, the employer would have to identify this additional equipment, if any, after conducting an assessment of the PRCS as required by the applicable sections of this proposed standard.

Paragraph (k). The employer would be required to document in the entry permit determinations made and actions taken pursuant to the paragraphs (b) through (j) of this proposed section. OSHA believes that proper implementation of these complex and critical safe-entry procedures depends on adequate documentation. Therefore, this proposed provision requires employers to document relevant information about the PRCS in the permit that it obtains while preparing for entry operations; this information pertains to the isolation of hazards, planned conditions, and other information required for safe PRCS entry. For example, the actions an employer takes to remove a pressurized or extremely heavy manhole cover (a physical hazard) as required by paragraph (b) of this proposed section is the type of information that employers would have to include in the entry permit. In contrast, this provision would not require employers to document all the information specified in paragraphs (b) through (j) of this proposed section, ''only determinations made'' and ''actions taken''; for example, employers would not have to document on the entry permit whether an entry supervisor meets the requirements specified in paragraph (e)(2) of this proposed section (Entry supervisor requirements) before assigning the applicable duties, nor would they have to document information already required under paragraph (a) of proposed § 1926.1214. (See the sample entry permit in Appendix B of this proposed standard for an example of the type of information that may be required under this proposed provision.)

The information provided in the entry permit under this proposed paragraph would help the entry supervisor ensure that all required safety steps are complete before authorizing entry into the PRCS. Furthermore, including this information in the entry permit provides a ready reference for questions that may arise from authorized entrants and their authorized representative about whether conditions in or around the PRCS deviate from planned conditions and, if so, for the entrants to initiate an evacuation of the PRCS.

Section 1926.1211—PRCS—During Entry

This proposed section details the requirements that would apply while any employee is in a PRCS. The proposed requirements address the duties of entry supervisors, attendants, and authorized entrants, as well as hazard monitoring and rescue.

Paragraph (a). The employer would be required to ensure that physical and atmospheric hazards in the PRCS remain isolated or controlled, or that the employees remain protected from them, in accordance with the determinations made under proposed § 1926.1208 (Permit-required confined spaces), while any employee is in the PRCS. If the employer cannot maintain isolation or control of the physical and atmospheric hazards, or protect employees from these hazards, within the parameters established under proposed § 1926.1208, then the employer would be required to terminate the entry.

Paragraph (b). The employer would be required to monitor atmospheric hazards in accordance with the requirements specified in proposed § 1926.1205 (Atmospheric testing and monitoring) while employees are in the PRCS. Monitoring must be continuous unless the employer can demonstrate that the equipment is not commercially available or periodic monitoring is sufficient. In contrast to many general industry PRCSs, in the typical PRCS construction setting, it is often difficult for the employer to predict with reasonable certainty the levels of hazardous atmospheres. In many instances the employer will have little or no past experience with the particular PRCS, and will lack reliable historical data on hazard levels. Also, the PRCS may be altered as construction work progresses in ways that may cause unexpected increases in hazard levels. For example, changes to the wall of a PRCS may allow hazardous gasses to enter the space at higher levels than before the wall was altered.

In addition, construction equipment in the space may not operate as expected and may discharge hazardous gasses at a higher rate than anticipated. In short, construction work tends to follow a less predictable course than work covered by the general industry standard and, thus, requires atmospheric monitoring more frequently. Because of this high level of unpredictability, OSHA believes that continuous monitoring will normally be needed to ensure that affected employees, especially the entrants, are protected. This proposed provision

would enable deteriorating conditions to be recognized quickly and new atmospheric hazards identified in time to take the actions required to protect the employees.

The Agency recognizes, however, that in some PRCSs, especially when the same PRCS has been repeatedly entered and monitored and found to have a stable atmosphere (such as a remote location that is not proximate to potential sources of atmospheric hazards), the employer may be able to show that periodic monitoring will be sufficient to ensure that the conditions in the PRCS remain within planned conditions. However, when periodic monitoring is used, it must be of sufficient frequency to ensure that atmospheric hazards are being controlled as planned and that new hazards would be detected in time to protect the employees. In some cases, continuous monitoring may not be possible; for example, continuous monitoring typically is not available when the atmospheric hazard is a particulate. Therefore, when the employer can show that periodic monitoring is adequate, or demonstrate that the technology for continuous monitoring is not available, OSHA would permit the employer to use effective periodic monitoring instead of continuous monitoring.

Paragraph (c). This proposed paragraph specifies that the employer must document the procedures used, and the monitoring results obtained, under paragraphs (a) and (b) of this proposed section by entering this information in the entry permit in accordance with paragraph (a) of proposed § 1926.1214 (Contents). OSHA believes that it is important that the entry supervisor have before him/her readily available evidence that pre-entry conditions have been checked and the results of the tests noted. Additionally, the authorized entrants will be able to check the permit to confirm that testing has been done and that safe conditions exist. The entrants and attendants would have this information readily available to facilitate identifying when current conditions in or near the confined space begin to deviate from pre-entry conditions and take appropriate precautions.

Paragraph (d). This proposed paragraph specifies the duties of the entry supervisor that the employer would have to ensure are met while employees are in the PRCS.

Paragraph (d)(1). The entry supervisor would have the duty of ensuring that entry conditions are being properly monitored and that they remain consistent with the planned conditions specified in the entry permit. By requiring the employer to have an individual on site with this authority, the likelihood that the required monitoring and adherence to planned conditions will be met, which is critical to the successful implementation of safe PRCS procedures, would be enhanced.

Paragraph (d)(2). The employer would be required to ensure that the entry supervisor removes individuals who are not authorized entrants who enter or attempt to enter a PRCS. Unauthorized entrants lack the safety training necessary to work in the PRCS, and their presence was not planned for in developing the entry permit. Their presence not only poses a danger to themselves, but may also endanger the authorized entrants in the space.

Paragraph (d)(3). The provisions of this proposed paragraph identify the conditions under which employers are to ensure that an entry supervisor evacuates authorized entrants from a PRCS as quickly as possible. For example, the employer would be required to ensure that the entry supervisor orders authorized entrants to exit the PRCS when the entry supervisor detects (such as by seeing a reading on a gas monitor) or learns of (such as by hearing a warning from an employee) one of the conditions listed in paragraph (d)(3)(i) of this proposed section. OSHA believes that each of these conditions represents potential precursors to serious safety hazards that threaten the health and well being of employees working in and near the PRCS.

Paragraph (d)(3)(i)(A). The employer would be required to ensure that the entry supervisor orders authorized entrants to exit the PRCS when the entry supervisor detects or learns of an unplanned condition (for example, a new hazard or a hazard level that exceeds the planned level) in or near the PRCS. Employees need to be removed from the PRCS as quickly as possible in such cases because the safety procedures delineated in the permit are designed to work in the context of conditions in the space staying within the planned parameters.

Paragraph (d)(3)(i)(B). The employer would be required to ensure that the entry supervisor orders the PRCS evacuated if he/she detects or learns of a sign, symptom, unusual behavior, or other effect of a hazard in authorized entrants. OSHA believes that these effects may indicate that conditions within the PRCS are deviating from the conditions specified in the entry permit. Such indications may result from a new hazard, a hazard level that exceeds planned levels, or from personal protective equipment that is not working as planned. In such circumstances, removal from the space is necessary to protect the employees.

Paragraph (d)(3)(i)(C). The employer would be required to ensure that the entry supervisor orders authorized entrants to exit the PRCS when an evacuation alarm, if used, indicates an emergency. These alarms may be atmospheric or engulfment-hazard monitor alarms or alarms manually activated by an authorized entrant or other employee. This proposed provision would provide protection to entrants by removing them from a PRCS in the event of a warning of impending danger.

Paragraph (d)(3)(i)(D). The employer would be required to ensure that the entry supervisor orders the authorized entrants to exit the space when a situation outside the PRCS occurs that could endanger the entrants. OSHA recognizes that the work environment on construction sites often involves multiple tasks occurring simultaneously, often by different contractors. Sometimes conditions or activities outside the PRCS can pose a hazard for employees inside the PRCS. Some examples are equipment or materials blocking a PRCS entrance, dangerous approaching storms, and exhaust from vehicles or generators. Another example that would trigger this proposed requirement would be a spilling of a toxic chemical outside the PRCS where there is a possibility that the chemical or its gasses could migrate into the PRCS.

Paragraph (d)(3)(ii). The employer would be required to ensure that the entry supervisor orders the authorized entrants to exit the space if the entry supervisor can no longer perform effectively and safely all of the duties specified by paragraph (e)(2) of proposed § 1926.1210 (Entry supervisor requirements), and no new entry supervisor was immediately available to serve as a replacement. OSHA believes this proposed requirement is necessary because of the importance of the entry supervisor in implementing safe entry procedures.

Paragraph (d)(4). Under this proposed paragraph, employers must ensure that the entry supervisor cancels the entry permit under the three specified circumstances. Nothing in this proposed standard precludes an entry supervisor from being given authority to cancel permits for additional reasons not specified by this proposed paragraph. However, under this proposed provision, if any of these three circumstances occurs, then the employer must ensure that the entry supervisor cancels the entry permit.

If an evacuation is required under paragraph (d)(3) of proposed § 1926.1211 (Evacuation), or any of the conditions that require a reassessment under paragraph (b) of proposed § 1926.1207 occurs, the entry supervisor would be required to cancel the entry permit. This proposed requirement is necessary because if either of these circumstances arises, safe operations cannot be assured until the entry conditions and entry procedures are reassessed. It also is necessary to cancel the entry permit once the entry operations covered by the entry permit have been completed because, at the completion of those operations, conditions in the space may have changed. Safe re-entry would, therefore, necessitate a new permit.

Paragraph (e). In the event that supervisor duties are transferred from one entry supervisor to another entry supervisor, the employer would be required to ensure that the new entry supervisor meets the requirements specified for entry supervisors before assuming these duties. OSHA recognizes that entry supervisors will need to be replaced occasionally for various reasons (for example, shift changes, lunch breaks, and regular rotations to other tasks at the job site). This proposed requirement is necessary to ensure that the new entry supervisor has the requisite knowledge and authority to assume this role.

Paragraph (e)(1). The employer would be required to ensure that a new entry supervisor meets the requirements specified in paragraph (e)(2) of proposed § 1926.1210 (Entry supervisor requirements). In such cases, it is imperative that the replacement supervisor have the requisite knowledge and authority for serving as the entry supervisor.

Paragraph (e)(2). The employer would be required to ensure that the new entry supervisor reviews the entry permit and verifies that entry conditions are consistent with the planned conditions specified in the entry permit. OSHA believes that it is important for a new entry supervisor to review the entry permit and determine whether the planned entry conditions have been maintained, just as it was important for the original entry supervisor to do so upon initial entry into the space. Furthermore, by reviewing the permit the new entry supervisor will become familiar with the current entry conditions and check for consistency with the planned entry conditions specified in the permit. By ensuring that each entry supervisor verifies entry conditions immediately upon taking responsibility for the PRCS, the overall continuity of safety can be better maintained.

Paragraph (e)(3). The employer would be required to ensure that the new entry supervisor also signs the entry permit. The purpose of this proposed requirement is to distinguish the current entry supervisor on the job site from the individual he/she has replaced. Because the entry supervisor may need to be summoned in time of emergency, it is a benefit to have information about the conditions of the PRCS, and the persons responsible for safe entry into the space, available in one place. In addition, the signature requirement underscores to the employer and the entry supervisor the importance of his/her determination that the prerequisites for safe entry listed in the permit are being met.

Paragraph (f). The provisions of this proposed paragraph list the duties an attendant must perform to maintain a safe work environment in the PRCS while any authorized entrant is in a PRCS.

Paragraph (f)(1). The employer would be required to ensure that each attendant continuously maintains an accurate count of the authorized entrants who are in the PRCS. A continuously accurate count is necessary because, in the event of an evacuation, it would be needed to ascertain if all of the entrants have exited the space.

Paragraph (f)(2). The employer would be required to ensure that the attendant has the means to accurately identify authorized entrants who are in the PRCS; paragraph (a)(2)(ii) of proposed § 1926.1214 (Personnel, equipment, and procedures) provides information regarding methods that employers may use to meet this proposed requirement. The Agency believes that this proposed requirement is necessary because in some instances, in the event of an evacuation in which not all authorized entrants exit the space, having the names of the authorized entrants can help in determining the location of the employees who remain in the PRCS, thereby assisting in their rescue.

Paragraph (f)(3). The employer would be required to ensure that an attendant remains at a location outside of the PRCS that allows the attendant to fully perform the duties and responsibilities specified in this proposed section, and does so until properly relieved by another attendant. Accordingly, the attendant would be prohibited from entering the PRCS while performing attendant duties. The reasons for prohibiting the attendant from entering the space were explained above with respect to paragraph (f) of proposed § 1926.1210 (Attendant). The attendant also is prohibited from entering for rescue purposes unless all of the following occur: He/she is relieved of his/her assignment as an attendant and replaced by another attendant, and has been trained and equipped to perform an entry rescue in accordance with proposed § 1926.1213 (PRCS—rescue criteria).

Note that, under this proposed provision, an attendant must remain outside the PRCS and therefore is prohibited from simultaneously serving as an attendant and authorized entrant. This prohibition is needed because the two functions are incompatible. The attendant must be outside the space at all times so that, if an unsafe condition arises in the space, the attendant will not be affected by that condition. As the key link in arranging for the rescue of the entrants, it is critical that the attendant not be affected by those conditions.

Paragraph (f)(4). The employer would be required to ensure that an attendant monitors entry conditions to determine if they are consistent with the entry permit. Given the speed with which some PRCS hazards can incapacitate and kill authorized entrants, it is essential that the attendant recognize any changes in entry conditions that would indicate that the PRCS must be evacuated. OSHA believes that the earlier the attendant detects changes in entry conditions, the more probable that self-rescue of the entrants can be achieved in lieu of performing other rescue procedures. Monitoring the conditions within the PRCS is a critical element in such a system.

Paragraph (f)(5). The employer would be required to ensure that the attendant communicates with authorized entrants as necessary to monitor their status and to alert them of the need to evacuate the PRCS as specified below in paragraph (g)(2) of proposed § 1926.1211. OSHA believes that an authorized entrant's communication with the attendant provides information that the attendant needs to determine if the entry can be allowed to continue. For example, subtle behavioral changes detected in the entrant's speech or deviation from set communication procedures could alert the attendant that it is necessary to evacuate or rescue the entrant. In addition, if the need arises, the attendant must communicate an order to evacuate to the entrants since the entrants may not know that there is an emergency.

Paragraph (f)(6). The employer would be required to ensure that the attendant monitors activities inside and outside the PRCS to determine if the PRCS remains safe for authorized entrants.

This proposed requirement is similar to paragraph (f)(4) of proposed § 1926.1211, except the focus is on activities that may adversely influence conditions in the PRCS. As explained below regarding paragraph (f)(12)(i)(D) of proposed § 1926.1211, activities outside the space may pose dangers to the authorized entrants in the PRCS. Typically, the authorized entrants will not be able to see or hear what is going on outside the PRCS, and will be preoccupied with their tasks in the space. Also, the authorized entrants may not be aware of adverse effects of activities that are taking place inside the space. Consequently, the attendant needs to have a high level of awareness about how activities occurring inside and outside the space may affect the authorized entrants.

Paragraph (f)(7). The employer would be required to ensure that the attendant informs the employer when a non-entry or entry rescue begins, or when an authorized entrant may need medical aid or assistance in escaping from the PRCS. Initiation of a rescue, or a belief by the attendant that there may be a need for medical assistance or assistance in escaping the PRCS, signals a serious incident in which additional help may be needed. That information needs to be conveyed to the employer so that arrangements for such additional help, if necessary, can be facilitated. It also informs the employer that the PRCS may need to be reassessed before additional work can take place inside the space.

Paragraph (f)(8). This proposed provision would require employers to ensure that the attendant performs non-entry rescues as specified below by paragraph (h)(1) of this proposed section and by paragraph (a) of proposed § 1926.1213 (Non-entry rescue criteria). When properly executed, the attendant's performance of non-entry rescue can be the fastest and most effective means of successfully rescuing an entrant, while preventing injuries and deaths that may result from improperly executed entry rescue operations.

Paragraph (f)(9). The employer would be required to prohibit the attendant from entering the PRCS for rescue purposes unless the employer provides the appropriate training and equipment specified below in paragraph (c) of proposed § 1926.1213 (Protecting and training rescue-service employees), and ensures that another attendant properly relieves the attendant prior to performing the entry rescue. As discussed above in paragraph (f)(3) of proposed § 1926.1211, the attendant must remain outside of the PRCS during a rescue operation until relieved by another attendant. Only when the relieved attendant is equipped and trained to perform a rescue in accordance with this proposed standard would that person be permitted to enter the PRCS for a rescue.

OSHA believes that these requirements are necessary to prevent multiple fatalities occurring when an untrained and unequipped attendant discovers that a co-worker has been incapacitated inside a PRCS and enters the PRCS to rescue the victim, only to also become incapacitated. Proper training and equipment, as well as an attendant outside the space, are prerequisites for safely rescuing, and rendering appropriate medical assistance to, the injured or incapacitated authorized entrant.

Paragraph (f)(10). The employer would be required to prohibit the attendant from performing any task that would interfere with the primary duty of monitoring and protecting the authorized entrants. The Agency believes that authorized entrants will be endangered if the attendant is distracted from these duties. If an attendant performs a task that diverts his/her attention from the attendant duties, an emergency condition inside or outside the space could go undetected until it is too late. OSHA also recognizes that some tasks, particularly those that enhance the attendant's knowledge of conditions in the permit space, can be performed safely by the attendant. For example, passing tools to authorized entrants and remote monitoring of the atmosphere of the PRCS are among the types of duties that would be permitted, provided that the attendant does not enter the PRCS. Activities requiring close and/or prolonged concentration, or those requiring that the attendant be away from his/her post outside the PRCS, would likely interfere with attendant duties and, thus, could generally not be assigned to or performed by an attendant.

Paragraph (f)(11). The employer would be required to ensure that an attendant warns any individual who is not an authorized entrant and approaches the PRCS to stay away from the PRCS. If a person enters the space who is not an authorized entrant, the attendant must tell the individual to exit the space immediately and inform the entrants and entry supervisor of the unauthorized entry. OSHA recognizes that there are individuals who may mistakenly believe that they are supposed to work on a task in the space or who may simply wander by or into the space unaware of the dangers of the PRCS. Paragraph (a)(1) of proposed § 1926.1209 would require the employer to notify the controlling contractor and the employees the employer anticipates will be working in or near the PRCS, and their authorized representatives, about the location of and dangers posed by the space. However, if someone other than an authorized entrant happens to approach the PRCS, OSHA believes it is necessary to have the attendant make that individual aware that he/she must stay away from the PRCS.

Because an attendant may not have supervisory authority, or because the errant individual may work for another contractor at a multi-employer construction site, an attendant may not have the authority to stop unauthorized individuals from entering the PRCS or require them to exit once they are inside. Therefore, the proposed provision would require the attendant to notify the entry supervisor, along with the authorized entrants, of this situation.

Paragraph (f)(12). The employer would be required to ensure that the attendant orders the authorized entrants to exit the space as quickly as possible when any of the conditions listed in provisions (f)(12)(i) or (f)(12)(ii) of this proposed paragraph exist. This responsibility mirrors the requirements for entry supervisors specified in paragraph (d)(3) of proposed § 1926.1211 (Evacuation).

Paragraph (g). Under the provisions of this proposed paragraph, the employer must ensure that authorized entrants perform specific duties that will ensure their safety during entry operations, or during evacuation or rescue from the PRCS. These duties include using retrieval equipment properly, communicating regularly with the attendant for monitoring purposes, informing the attendant of the effects of a hazard, and knowing the conditions requiring evacuation from the PRCS.

Paragraph (g)(1). The employer would be required to ensure that the authorized entrant properly uses the retrieval equipment as required in paragraphs (a)(1) through (a)(3) of proposed § 1926.1213. OSHA believes that proper use of such equipment is essential for preventing a rescue attempt itself from harming the incapacitated authorized entrant. An example of how many employers meet this obligation is through the implementation of safe work practices, and effective enforcement of those practices.

Paragraph (g)(2). The employer would be required to ensure that the authorized entrant communicates with the attendant as necessary to help the attendant effectively monitor the authorized entrant's status and, if necessary, so that the entrant can be told

to evacuate the PRCS according to paragraph (f)(5) of this proposed section. OSHA believes that the authorized entrant's communication with the attendant provides information that the attendant needs to know to determine whether there is a need to evacuate the PRCS.

Paragraph (g)(3). The employer would be required to ensure that each authorized entrant informs the attendant of any sign, symptom, unusual behavior, or other effect of a hazard. In some instances, a properly trained authorized entrant may be able to recognize and report his/her own symptoms, such as headache, dizziness, or slurred speech, and take the required action. In other cases, the authorized entrant, once the effects begin, will be unable to recognize or report them. In cases in which other, unimpaired, authorized entrants are in the PRCS, this proposed provision would require employers to ensure that these authorized entrants are properly trained to recognize signs, symptoms, and other hazard-exposure effects in other authorized entrants, and report these effects to the attendant.

Paragraph (g)(4). Under this proposed paragraph, employers would be required to ensure that authorized entrants evacuate the space as quickly as possible when any of the conditions described below in proposed paragraphs (g)(4)(i) and (g)(4)(ii) are present.

Paragraph (g)(4)(i). The employer would be required to ensure that each authorized entrant exits the PRCS as quickly as possible when the entry supervisor or the attendant orders the authorized entrant to evacuate the space. (Entry supervisors and attendants would have authority to order authorized entrants to evacuate the PRCS under paragraphs (d)(3) and (f)(12) of this proposed section, respectively.) It is essential that the authorized entrants understand the urgency of compliance with the command to evacuate, particularly because the attendant or entry supervisor may be aware of a hazard that the authorized entrant does not detect on his/her own. Even when there is disagreement between the entry supervisor and attendant as to whether to evacuate, the authorized entrant would be required under this proposed provision to evacuate if either the entry supervisor or the attendant orders the entrants to do so. OSHA believes that this proposed provision is necessary because emergencies within a confined space are time-sensitive, and the entry supervisor and attendant may have differing information as to the types of the hazards within the PRCS.

Paragraph (g)(4)(ii). This proposed provision lists the three conditions under which an employer would be required to ensure that an authorized entrant evacuates the PRCS. These conditions mirror the conditions under which an entry supervisor or attendant must order the entrants to exit the space specified above by paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) and (f)(12)(i)(A) through (f)(12)(i)(C) of this proposed section. OSHA discussed the rationale for these conditions previously in this preamble under paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this proposed section.

Paragraph (h). The provisions of this proposed paragraph specify the requirements for non-entry and entry rescue.

Paragraph (h)(1). This proposed paragraph sets forth the requirements for non-entry rescue.

Paragraph (h)(1)(i). According to this proposed provision, the employer must make available procedures and equipment for non-entry rescue that meet the requirements of paragraph (a) of proposed § 1926.1213 during the period when authorized entrants are in the PRCS. OSHA believes that compliance with the rescue requirements in paragraph (a) of proposed § 1926.1213 would enable an employer to extricate authorized entrants in a timely manner from PRCSs when uncontrolled hazards arise, thereby preventing the adverse consequences of exposure to these hazards.

The Agency recognizes that an employer who complies fully with this proposed standard may never need to rescue an authorized entrant. However, even with full compliance, problems could arise during entry operations resulting in a situation where employees are unprotected. Such extraordinary circumstances could subject an employee to hazards within the PRCS without warning, and leave the employee incapacitated. OSHA believes it is necessary to require employers to provide this critical non-entry rescue function for employees who work in PRCSs.

Paragraph (h)(1)(ii). This proposed paragraph would require that, unless the conditions specified in paragraph (h)(1)(iii) of this proposed section are present, the employer must initiate a non-entry rescue if there is either a need to evacuate the PRCS pursuant to paragraphs (d)(3), (f)(12), or (g)(4) of proposed § 1926.1211 and the employee is unable to evacuate without assistance; or a reasonable probability exists that an employee may need immediate medical aid and is unable to exit the PRCS without assistance. In many cases entry rescue would take longer than non-entry rescue. This provision is necessary to ensure that the authorized entrants are rescued as soon as possible to maximize their chance of survival and limiting their injuries, as well as minimizing risk of injury to the rescue-service employees.

Paragraph (h)(1)(iii). This proposed provision would prohibit the initiation of a non-entry rescue if doing so would present a greater hazard to the employee than sole reliance on entry rescue (for example, where the configuration of the space would cause the retrieval lines to not work or result in greater injury to the employee than injury from waiting for entry rescue). This proposed provision acknowledges that there are specific situations where non-entry rescue would not be appropriate; it is aimed at preventing additional injuries or fatalities to an authorized entrant caused by use of non-entry equipment and methods that are incompatible with the conditions of the PRCS.

Paragraph (h)(2). This proposed paragraph specifies the following four situations in which employers would have to immediately summon an entry rescue service: (1) A non-entry rescue is initiated; (2) there is a need to evacuate pursuant to paragraphs (d)(3), (f)(12), or (g)(4) of proposed § 1926.1211, and the employee is unable to evacuate without assistance; (3) there is a reasonable probability that an employee may need immediate medical aid and is unable to exit the PRCS without assistance; or (4) if a non-entry rescue is prohibited as specified in paragraph (h)(1)(iii) of this proposed section.

In the first situation, a non-entry rescue may not be successful—that is, for unforeseen reasons, the attendant may not be able to get the authorized entrant out quickly, or at all. To prevent such a situation from resulting in injury or death, it is necessary that an entry rescue service already be in the process of responding to the emergency. Summoning the entry rescue service at the same time that the non-entry rescue is initiated minimizes the likelihood of additional injuries or death.

If an employer fails to initiate a non-entry rescue as required by paragraph (h)(1)(ii)(A) and (h)(1)(ii)(B) of this proposed section, under the second and third situations, they must still summon an entry rescue service when: there is a need to evacuate the PRCS pursuant to paragraphs (d)(3), (f)(12), or (g)(4) of proposed § 1926.1211, and the employee is unable to evacuate without assistance; or a reasonable probability exists that an employee may need immediate medical aid and is unable to

exit the PRCS without assistance. This proposed provision emphasizes an employer's continuing responsibility to ensure that employees are rescued from a PRCS when necessary.

In the event that an authorized entrant needs to be rescued but the employer is precluded from initiating a non-entry rescue under paragraph (h)(1)(iii) of this proposed section, the fourth situation would require the employer to summon the entry rescue service because it is the only means of rescuing the authorized entrant.

Section 1926.1212—PRCS—Terminating Entry

This proposed section specifies what, at a minimum, needs to be done at the completion of work within a PRCS to ensure a safe termination of entry.

Paragraph (a). The requirements described in this proposed paragraph cover procedures for terminating entry into a PRCS under both planned and emergency conditions. Before entry, an employer must have in place procedures for safely terminating entry into the PRCS. Paragraph (f) of proposed § 1926.1209 (Safe termination procedures) requires that this procedure be developed before entry into the PRCS. The employer must implement these procedures when warranted by either planned or emergency conditions. The safe termination of entry operations includes preventing any further entry into the PRCS by employees (except for entry rescue services), and, when required, the safe evacuation of employees in the affected PRCS. This proposed provision is necessary to ensure that employees are not harmed in the process of terminating the entry. For example, it may be necessary for certain construction operations and tools near an entrance/exit to be stopped and secured before employees begin to exit.

Paragraph (b). This proposed provision specifies that the employer must ensure that a PRCS entry supervisor terminates the entry and cancels the permit when the entry operation covered by the permit has been completed in the designated PRCS, upon expiration of the entry permit, completion of entry operations covered by the permit, any of the indications that require a reassessment under paragraph (b) of proposed § 1926.1207, or evacuation required under paragraph (d)(3) of proposed § 1926.12ll, whichever occurs first. When the time limit specified by the entry permit expires, even when work remains to be performed in the PRCS, the entry supervisor must terminate entry, cancel the permit, and re-issue a new permit in accordance with paragraph (a) of proposed § 1926.1210 (Entry permit) before allowing further work in the PRCS. In addition, the employer must keep all cancelled entry permits in accordance with the requirements proposed below in paragraph (b) of proposed § 1926.1219 (Retaining entry permits). Requiring the entry supervisor to terminate the entry permit under the specified conditions ensures that the employees will exit the space in accordance with planned conditions or to avoid encountering hazards arising from unplanned conditions within the PRCS.

This proposed paragraph also contains a note stating that no employees can reenter the space until the employer: identifies the physical and atmospheric hazards in accordance with paragraph (b) of proposed § 1926.1204; follows the classification procedures specified by proposed § 1926.1206 (Classification and precautions); and meets the accident-prevention and -protection requirements applicable to the space classification selected by the employer. This note serves to remind employers that it is necessary to ensure that the spaces are correctly assessed and that employees receive appropriate protection prior to reentering the space.

Section 1926.1213—PRCS—Rescue Criteria

Paragraph (a). This proposed paragraph would require the employer to ensure that the training, equipment, and procedures specified for a safe non-entry rescue are fulfilled. OSHA believes that meeting these criteria would decrease the risk that an incapacitated entrant would sustain an injury or be killed as a result of the rescue.

Paragraph (a)(1). This proposed paragraph would require the employer to ensure that attendants and other employees designated to perform non-entry rescue acquire the knowledge and skills necessary for the safe performance of non-entry rescue. This proposed requirement is necessary to ensure that these employees perform non-entry rescue safely and effectively.

Paragraph (a)(2). This proposed paragraph lists minimum criteria for a retrieval system that OSHA believes are essential for ensuring the safe non-entry retrieval of employees during an emergency. The criteria are listed below in proposed paragraphs (a)(2)(i) through (a)(2)(iv).

Paragraph (a)(2)(i). The retrieval system would be required to be available as soon as needed by the attendant or other rescue service. This proposed requirement is an important element of a preplanned rescue since it would eliminate further risk of injury and death resulting from time consumed in locating a retrieval system and bringing it to the PRCS.

Paragraph (a)(2)(ii). The retrieval system used would have to be designed and manufactured for personnel retrieval. This proposed provision also allows for the use of job-made hoisting systems if these systems are approved for personnel hoisting by a registered professional engineer prior to use in PRCS entry operations. However, commercial hoisting systems not designed and manufactured specifically for personnel hoisting would not be permissible under this proposed provision because OSHA believes they cannot be used safely for this purpose. This proposed requirement would eliminate further injuries and deaths of employees which could occur from the use of retrieval equipment that was not designed specifically for personnel retrieval. The provision would give the employer flexibility in its choice of retrieval system by allowing a registered professional engineer to approve a job-made system. OSHA believes that either option would ensure that the retrieval system will meet the design specifications needed to operate safely during a non-entry rescue as required by this proposed standard.

Paragraph (a)(2)(iii). The employer would be required to provide a retrieval system that the attendant or other rescue service can operate effectively. This proposed provision would eliminate employee injuries and deaths by ensuring that the retrieval system is usable and effective. For example, this proposed provision would prohibit a system that requires too much strength or stamina to operate, such as a hand-cranked winch with insufficient gearing. The system must also be effective; for example, if a particular system pulled at such a slow a rate that an entrant could not be retrieved in time to prevent further injury, it would violate this proposed provision.

Paragraph (a)(2)(iv). The employer would be required to ensure that the retrieval system includes the use of a chest or full-body harness and a retrieval line. OSHA believes that it is necessary for such a device to be used as part of the retrieval system to prevent employees from suffering further injuries during a rescue that result from unequal distribution of force on the body. This proposed requirement would be consistent with the requirements specified for fall-protection systems in 29 CFR 1926.502 (Fall protection systems criteria and practices) of 29 CFR

Part 1926 subpart M (Fall Protection). OSHA believes that when an employee must be suspended, even during a rescue, a chest or full-body harness is needed to prevent further injury to the employee.

Paragraph (a)(2)(iv)(A). The employer would be required to have one end of the retrieval line attached to the chest or full-body harness in a manner that allows the attendant or other rescue service to remove the entrant from the PRCS without causing further injury. This proposed provision is similar to paragraph (k)(3)(i) of the general industry standard for confined spaces in that the proposed provision allows some flexibility in how the retrieval line must be connected to the chest or full-body harness of the employee in need of rescue. OSHA believes that requiring the retrieval line to be attached at the center of the entrant's back near shoulder level, or above an entrant's head, is too limiting. For example, extracting an employer from the confined space head first during a horizontal retrieval could cause more injuries to the employee. Accordingly, this proposed provision does not limit the methods utilized by the employer to safely rescue employees who perform construction work in various PRCS configurations. Therefore, OSHA proposes a performance-based provision that it believes would maintain the level of required employee protection while allowing employers flexibility in choosing effective retrieval systems.

Paragraph (a)(2)(iv)(B). The employer would be required to have the other end of the retrieval line attached to a mechanical retrieval device or fixed anchor point outside the PRCS in a manner that allows rescue to begin as soon as the attendant or other rescue service detects or learns of the need for rescue. Movable equipment (for example, earth-moving equipment), that is sufficiently heavy to serve as an anchor point, may be used for this purpose only if effectively locked out or tagged out. This proposed provision would minimize the elapsed time between an attendant determining that a rescue is needed and commencing the PRCS rescue operation by requiring the essential parts of the retrieval system to already be in place and attached. This proposed requirement would eliminate further injury or death due to the delay resulting from locating and attaching retrieval system parts and equipment. While the provision would allow the use of suitably heavy moveable equipment (such as earthmoving equipment) to serve as an anchor point, it would require that such equipment be effectively locked out or tagged out to ensure that the equipment is not moved while serving as an anchor point.

Paragraph (a)(3). For retrievals involving vertical distances over five feet (1.52 m), a mechanical retrieval device would be required to be provided and used. This device must not be used for entry into the PRCS unless it is designed for that purpose. OSHA believes that securing the line to an anchor point or using a simple pulley for this purpose could endanger the authorized entrant because most attendants do not have sufficient strength and stamina to lift a disabled entrant over a vertical distance of more than five feet. Therefore, the proposed requirement would ensure that the attendant or other rescue personnel be assisted by a mechanical device so that the entrant can be successfully extracted. The Agency considered that there will often be difficulties in setting up such equipment due to the general lack of room to position the equipment above the entry point of a PRCS, as well as the need to keep that entry clear for the attendant to observe the authorized entrants while they are working. Nevertheless, OSHA believes that the mechanical device is critical for entrant rescues involving these vertical spaces. However, powered winches, overhead cranes, fork trucks, and similar devices are not appropriate for this purpose because they may harm attendants (for example, impale them, damage limbs).

Paragraph (a)(4). This proposed paragraph would clarify the types of equipment that are unsuitable and prohibited for use in a PRCS retrieval system. OSHA believes that by providing this information, injuries and deaths that result from the use of unsuitable retrieval equipment during rescue operations would be reduced. Descriptions of unsuitable retrieval equipment are provided below in paragraphs (a)(4)(i) through (a)(4)(iii).

Paragraph (a)(4)(i). The use of equipment that increases the overall risk of entry or impedes rescue of an authorized entrant would be prohibited. This proposed provision would eliminate injuries and deaths that would occur when such equipment is used for rescue.

Paragraph (a)(4)(ii). The use of retrieval lines that have a reasonable probability of becoming entangled with the retrieval lines used by other authorized entrants, or due to the internal configuration of the PRCS, would be prohibited. The Agency believes that there are situations where the retrieval lines of two or more employees can get entangled, such as where the employees' work necessitates them moving around each other. There are also a variety of situations where the configuration of the PRCS would inhibit a non-entry rescue and cause further serious injury to authorized entrants in need of rescue. For example, the PRCS may have objects or equipment protruding from its walls or sharp corners that may damage rescue equipment or inhibit the use of certain types of non-entry rescue equipment.

Paragraph (a)(4)(iii). Wristlets or ankle straps would be prohibited from being used as attachment points for retrieval lines, unless the employer can demonstrate that: the use of a harness is infeasible or creates a greater hazard for safe rescue than wristlets or ankle straps; and wristlets or ankle straps are the safest alternative available. The Agency believes that this proposed requirement is necessary due to an increased risk of an employee being injured during a rescue when the retrieval lines are attached to wristlets or ankle straps as compared with being attached to a harness.

Paragraph (a)(5). The employer would be required to ensure that the employees designated to perform non-entry rescue (including attendants, if applicable) have access to the PRCS the authorized entrant will enter or to a Simulated PRCS, to develop appropriate rescue plans and practice rescue operations prior to beginning entry operations. OSHA believes a rescue service needs to know the location, configuration, and other relevant aspects of a PRCS to develop and practice effective rescue procedures.

Paragraph (b). The employer would be required to ensure that specified minimum requirements must be met by the entry rescue service so that it can effectively perform entry rescues. The provision also specifies information the employer would be required to provide to the entry rescue service before an entry rescue is made. In short, the employer must make sure that, whichever rescue service is used, it has the necessary rescue capabilities.

Paragraph (b)(1). This proposed paragraph contains requirements that would ensure that the entry rescue service can effectively perform entry-rescue tasks in the PRCS. OSHA notes that during the rulemaking for the general industry confined-spaces standard, a question was raised as to whether an entry rescue service is limited to off-site rescue teams. The Agency made clear in that rulemaking that an employer could use an onsite team as long as all the criteria outlined in the standard were met. That rationale is equally applicable to this proposed rule. Consequently, the term ''rescue service'' in this proposed standard does

not exclude the use of an onsite entry rescue service.

Paragraph (b)(1)(i). Under this proposed provision, in evaluating the entry rescue service, the employer would be required to determine that the entry rescue service can respond to a rescue summons in a timely manner. The provision defines timeliness as a function of how quickly an entry rescue service needs to reach an employee to prevent further serious physical harm that may result from hazards in the PRCS while waiting to be rescued.

Paragraph (b)(1)(ii). Prior to using an entry rescue service for entry-rescue purposes, an employer would be required to provide the entry rescue service with access to the PRCS the authorized entrants will enter, or to a Simulated PRCS that is representative of the particular PRCS. OSHA believes that this proposed provision will allow the entry rescue service to become familiar with the configuration and features of the PRCS to which the employer may summon it to perform rescue operations, and thereby develop appropriate rescue plans and practice rescue operations. Access to the PRCS or a Simulated PRCS during planning and practice increases the probability that rescue operations will proceed more efficiently and effectively, thereby reducing the probability of serious injury or death to authorized entrants during an actual entry-rescue operation. Practicing rescues in a PRCS or Simulated PRCS also highlights deficiencies in rescue procedures, and allows for revisions of those procedures before they could adversely affect the safety of rescue-service employees and employees in need of rescue during an actual rescue operation.

Paragraph (b)(2). Prior to the entry rescue service entering a PRCS for any purpose, the employer would be required to inform the entry rescue service of any physical and atmospheric hazards it is likely to confront in the PRCS, as well as any other relevant information known by the employer. This proposed provision would provide the entry rescue service with available information about hazards and conditions within the confined space so as to protect the rescue-service employees who enter the confined space for training, entry operations, or any other purpose.

Paragraph (c). This proposed paragraph would require employers who use their own employees as a rescue service to provide those employees with the training and equipment needed to safely perform entry-rescue operations. OSHA believes that by meeting these minimum training and equipment requirements, the employer will eliminate employee injuries and deaths that could result from a lack of proficiency in the implementation of rescue procedures and the use of related rescue equipment. These training and equipment requirements are described below in paragraphs (c)(1) through (c)(6)(ii)

Paragraph (c)(1). The employer would be required to provide its rescue-service employees with the personal protective equipment (PPE) and rescue equipment necessary for them to enter and safely perform PRCS rescue operations. OSHA believes the provisions in the proposed paragraph will help the employer prevent injuries and deaths that could occur without the appropriate PPE and equipment needed to safely perform PRCS entry rescues.

Paragraph (c)(2). The employer would be required to train its rescue-service employees in the proper use of the PPE and rescue equipment required in paragraph (c)(1) of this proposed section. Training regarding the proper use of rescue equipment would include the care and inspection of breathing and ventilation gear, as well as emergency-evacuation equipment, and the use of two-way radios and fire-fighting equipment. OSHA believes that requiring employee proficiency in the use of necessary PPE and rescue equipment will help the employer eliminate injuries and deaths caused by the improper use of such equipment.

Paragraph (c)(3). An employer would be required to train the members of its rescue service to perform any rescue duties assigned to them. This proposed provision would ensure that rescue-service employees can perform their assigned duties proficiently and safely under hazardous PRCS conditions. Lack of such training would endanger both the rescue-service employees, as well as others affected by the PRCS rescue operations.

Paragraph (c)(4). The employer would be required to train its rescue-service employees in basic first-aid and in cardiopulmonary resuscitation (CPR). The Agency believes this proposed requirement is necessary because of the hazards and resultant injuries that may occur in PRCSs. This proposed requirement also would improve the probability that the injured employees would survive until higher levels of medical attention become available.

Paragraph (c)(5). Employers would be required to ensure that at least one of the rescue-service employees who participates in the onsite rescue operations holds current certification in first-aid, including CPR. OSHA believes that, in combination with the requirement in paragraph (c)(4) of this proposed section, there would be sufficient first-aid and CPR capability at a rescue scene. This proposed provision is identical to paragraph (k)(1)(iv) of the general industry confined-spaces standard, and also meets the requirements for first-aid services specified by 29 CFR 1926.50(c).

Paragraph (c)(6). Under this proposed paragraph, employers would be required to ensure that the rescue-service employees practice rescue operations at least once prior to the beginning of entry operations and at least once every 12 months thereafter. OSHA believes this training requirement for entry rescue-service employees is necessary to maintain proficiency in entry-rescue procedures and rescue equipment use. This training would also ensure that the entry rescue-service employees are trained on all revisions to entry-rescue procedures and are cognizant of any other new information regarding entry rescue.

In a related requirement, proposed § 1926.1213(b) specifies that employers must ensure that an entry rescue service can effectively perform an entry rescue in the PRCS that authorized entrants will enter. Confirming that the entry rescue service meets this requirement prior to any authorized entrants entering the PRCS provides a means of verifying that an entry rescue service can effectively perform a rescue at the employer's worksite.

Paragraph (c)(6)(i). Employers would be required to ensure that rescue-service employees practice the removal of dummies, mannequins, or people from a PRCS or from a Simulated PRCS in compliance with the requirements of this proposed standard. By definition, Simulated PRCSs must also, with respect to size, configuration, entrance openings, and accessibility, conform to the types of PRCSs from which actual rescues would be performed. When any PRCS used for practice contains hazards, even if no other work/tasks are performed within the PRCS, the employer must ensure that the PRCS requirements of this proposed standard are met before any rescue-service employees enter the PRCS. The Agency believes that this type of practice is necessary to ensure that the entry rescue service will have the capability to perform an actual rescue in a PRCS.

Paragraph (c)(6)(ii). Employers would be required to ensure that the same PPE, retrieval, and rescue equipment that will be used to perform an actual rescue is used for practicing rescues. This proposed requirement would ensure that rescue-service employees' training is directly applicable to an actual PRCS

rescue operation, thereby minimizing confusion and errors that could lead to injuries and deaths when performing actual rescue operations.

Paragraph (d). This proposed paragraph would exempt an employer from providing the practice required above in paragraph (c)(6) of this proposed section when the rescue-service employees, within the previous 12 months, properly performed a rescue operation in a similar or the same PRCS the authorized entrants will enter. OSHA believes the effective performance of such previous PRCS entry rescues would be at least the equivalent of the practice required under paragraph (c)(6) of this proposed section. In contrast, the unsatisfactory performance of a rescue operation during the preceding 12-month period (for example, rescue team members improperly used rescue equipment) would indicate the need for further practice, and would not meet the requirements of this proposed exemption.

Section 1926.1214—PRCS—Entry Permits

Paragraph (a). The provisions of this proposed paragraph specify the required contents of entry permits. Entry permits provide key information about hazards in the PRCS, the methods used to protect employees from those hazards, and specify who is authorized to perform work within the PRCS, their duties, and the extent of their authority with respect to safety in and around the PRCS. OSHA believes the use of this administrative tool would be essential to the employer in its efforts to ensure that work within a PRCS will be completed safely. Making the information on this document accessible to employers and employees affected by the hazards in and around the PRCS also allows them to maintain an elevated awareness of the conditions within the PRCS, as well as the equipment and procedures necessary for safe PRCS entry operations.

Paragraph (a)(1). This proposed provision lists the general-information requirements for entry permits.

Paragraph (a)(1)(i). The employer would be required to ensure that the entry permit contains the identification of the PRCS to be entered; the location of the PRCS could serve as its identification. This information would be needed to ensure that the correct permit is used for the PRCS.

Paragraph (a)(1)(ii). Employers would be required to list in the entry permit the purpose of the PRCS entry, including the tasks or jobs authorized entrants are to perform in the PRCS. This information is needed to confirm that the performance of each specific construction activity has been considered in the hazard assessment of the PRCS. The performance of construction activities within the PRCS that have not been evaluated for their effect on the conditions within the space could result in serious injury or death.

Paragraph (a)(1)(iii). The employer would be required to provide in the entry permit the effective date and the authorized duration of the permit. The effective date is the date on which authorized entrants may enter the PRCS as specified by other provisions of this proposed standard. The duration of the permit may not exceed the time required to complete the tasks or jobs identified above in paragraph (a)(1)(ii) of this proposed section, including the time necessary to set up and dismantle any tools or equipment required to perform the tasks or jobs. The employer need not list duration in terms of time, but instead may describe it in terms of the completion of tasks identified in the permit. For instance, the employer could describe the duration as ''welding and repair of water main'' or ''upgrading equipment in an electrical vault.'' One purpose of this provision is to ensure that employees engaged in PRCS operations are informed of the period during which conditions in the PRCS must meet planned conditions as specified in the entry permit. A second purpose is to place some reasonable limit on the duration of the permit, since a permit of unlimited duration is not likely to account for changed PRCS conditions.

Paragraph (a)(2). The employer would be required to specify in the entry permit the planned conditions necessary for safe entry into the PRCS. This proposed requirement would ensure that the authorized entrants, attendants, and entry supervisors have key information that can be readily referenced to confirm that the planned conditions within the PRCS are maintained.

Paragraph (a)(2)(i). The employer would be required to document information on entry permits regarding the physical and atmospheric hazards, methods of isolating, eliminating, and/or controlling these hazards, as well as hazard monitoring and testing results, and the levels at which hazards are to be maintained.

Paragraph (a)(2)(i)(A). Employers would be required to identify the physical and atmospheric hazards in the PRCS in the entry permit. This list, which must be consistent with proposed § 1926.1206 (Classification and precautions) and paragraph (a) of proposed § 1926.1208 (Permit-required confined spaces), must include all hazards, regardless of whether the employer protects the authorized entrants from the hazards by isolation, control, or personal protective equipment.

Paragraph (a)(2)(i)(B). Employers would be required to state the methods used to isolate or control hazards, or used to protect authorized entrants from the hazards within the PRCS. This information must be consistent with the requirements specified in paragraph (a) of proposed § 1926.1208 (Permit-required confined spaces) and proposed § 1926.1210 (PRCS—preparing for entry), and must include the methods used to isolate or control the hazards, the type of personal protective equipment provided, the methods used to monitor each hazard (including the use of early-warning systems, if required by proposed § 1926.1215 (Continuous-system PRCS)), and how frequently each hazard is to be monitored. (Note that under paragraph (b) of proposed § 1926.1211, monitoring of atmospheric hazards is required to be continuous unless the employer demonstrates that periodic monitoring is sufficient.) The permit need only refer to the procedures used to meet the requirements of this proposed paragraph in sufficient detail to enable employees to determine what measures are to be taken and how to perform those measures.

Paragraph (a)(2)(i)(C). Employers would be required to state in the entry permit the atmospheric-testing and -monitoring results obtained in paragraph (b) of proposed § 1926.1204, paragraph (a) of proposed § 1926.1211, paragraph (b) of proposed § 1926.1211, and paragraph (a)(1) of proposed § 1926.1215. In addition, the employer must include the type and brand of the equipment used to perform atmospheric testing or monitoring; the names and signatures or initials of those individuals who performed the testing and monitoring; and the date and time (or time period for continuous monitoring) they performed each test and conducted monitoring.

Entering the testing and monitoring results in the permit enables the entry supervisor, attendants, and authorized entrants to determine readily whether planned conditions exist with regard to atmospheric hazards in the PRCS. This information could also be used to identify atmospheric conditions within the PRCS that need to be monitored frequently because atmospheric conditions tend to rise rapidly to hazardous levels. Providing information on the type and brand of equipment

used for atmospheric testing and monitoring would enable the entry supervisor to determine whether testing and monitoring are being conducted correctly, that is, according to the equipment manufacturer's instructions. Listing the names of those who performed the testing and monitoring would identify a point of contact to which entry supervisors and attendants can direct questions they may have regarding the results and procedures. The date and time (or, for continuous monitoring, a time period) would provide a basis for detecting dangerous trends in atmospheric conditions that may indicate that more frequent observation of the atmospheric data is necessary.

Paragraph (a)(2)(i)(D). Employers would be required to list the conditions under which authorized entrants can work safely in the PRCS, including hazard levels and methods of employee protection, consistent with the requirements specified in paragraph (b) of proposed § 1926.1208 (Planned conditions). The list would include the levels which oxygen, flammable gases and vapors, and other hazardous substances must meet before and during PRCS entry. Additional information regarding PRCS conditions would include, for example, the methods used to maintain a water hazard at safe levels. This proposed provision also requires employers, when applicable, to provide the ventilation-malfunction determinations made in paragraph (b)(2) of proposed § 1926.1208. Providing these determinations would inform employees (for example, entry supervisors, attendants, and authorized entrants) regarding the time required for the entrants to evacuate the PRCS should the ventilation system fail. Compliance with these proposed provisions would allow authorized entrants, attendants, and entry supervisors to reference the planned conditions stated in the permit and respond quickly to any deviations in these conditions, including ventilation-system failure.

Paragraph (a)(2)(ii). The provisions of this proposed paragraph would require the employer to ensure that entry permits identify the: authorized entrants, attendants, and entry supervisor; methods used to maintain contact between authorized entrants and attendants; the rescue service and the methods, including communication equipment and telephone numbers, for summoning this service; and other equipment required to perform PRCS entry operations.

Paragraph (a)(2)(ii)(A). Employers would be required to identify by name or other effective identifier (such as initials or an identification number) the authorized entrants currently in the PRCS. This proposed requirement can be met by referring in the entry permit to a system such as a roster or tracking system used to keep track of who is currently in the PRCS. The availability of this information would enable the attendant or entry supervisor to quickly and accurately account for entrants who might still be in the PRCS when an emergency occurs. A second purpose is to provide assurance that all authorized entrants have exited the PRCS at the end of entry operations.

OSHA believes that, as long as the system accurately tracks who is in the PRCS at any given moment, and as long as the attendant has immediate access to the system, the attendant will be able to confirm the complete evacuation of a space. Additionally, the rescue service will be able to account for all employees working inside the PRCS in the event of an emergency. A tracking system that lists the names of the employees who the employer designates as authorized entrants, but does not accurately account for the number of employees inside the PRCS at all times, would not meet the requirements of this proposed paragraph. Merely maintaining a list of authorized entrants, who may or may not be on the job site or inside the PRCS, would not help the employer determine how many authorized entrants are left inside the PRCS should an evacuation be necessary. Accordingly, OSHA believes that it is extremely important for the employer to be able to confirm that all authorized entrants have exited the PRCS during an evacuation. However, a tracking system that only keeps count of the number of authorized entrants inside the PRCS, without providing their names or other identifiers, also is not acceptable; knowing the name or other identifier of each entrant makes it easier for the rescuers to determine where the entrant is assigned to work in the PRCS, and thereby determine the entrant's probable location.

Paragraph (a)(2)(ii)(B). The employer would be required to list the names of the current attendants in the entry permit. This proposed requirement would facilitate identifying attendants quickly and easily, thereby expediting communications with them, which is necessary for the performance of safe PRCS entry operations and for the performance of specified duties during emergency situations. Without this proposed requirement, valuable time could be wasted attempting to find the attendant responsible for protecting authorized entrants during an emergency.

Paragraph (a)(2)(ii)(C). The employer would be required to ensure that the entry permit contains the name of the current entry supervisor and the entry supervisor who originally authorized entry into the PRCS. In addition, this proposed paragraph would require the signature or initials of both of these individuals. In the event that the original entry supervisor and the current entry supervisor are the same individual, his/her name must appear twice in the entry permit: once as the original entry supervisor, and again as the current supervisor. These proposed requirements serve the same purpose described above for attendants in paragraph (a)(2)(ii)(B) of this proposed section. It is unnecessary to list the names of individuals who could assume entry-supervisor responsibilities or the names of individuals who have assumed these responsibilities between the original and current supervisors. Therefore, the names of the current entry supervisor and the original entry supervisor, with no other entry supervisor names, are the only names required to be in the permit.

Paragraph (a)(2)(ii)(D). Employers would be required to ensure that the entry permit contains a list of the communication methods used to maintain contact between attendants and authorized entrants during entry operations. OSHA notes that establishing a routine for maintaining contact between attendants and authorized entrants would help attendants detect problems within the PRCS. The Agency has not prescribed any particular means or procedure for communication because OSHA anticipates that the procedures chosen will need to vary according to the circumstances of the particular workplaces. However, the means of communication chosen must enable the attendants and the entrants to maintain effective and continuous contact.

Paragraph (a)(2)(ii)(E). This proposed paragraph would require that employers list in the entry permit the rescue service that is to be summoned in an emergency, and the methods (including the communication equipment to use and the telephone numbers to call) for summoning this service. Identification of the rescue service and the methods for summoning it would enable attendants to summon the rescue service immediately in case of emergency. Including the other pertinent information, such as communication equipment and emergency telephone numbers, in the entry permit would

allow attendants to avoid errors and delays in contacting the rescue service.

Paragraph (a)(2)(ii)(F). Under this proposed paragraph, employers are to ensure that the permit contains a list of equipment to be provided for PRCS operations as determined under paragraph (j) of proposed § 1926.1210 (Equipment) and proposed § 1926.1218 (Equipment). This equipment would typically include, for example, personal protective equipment, testing equipment, communications equipment, alarm systems, rescue equipment, and other equipment that the employer would provide to ensure compliance with paragraph (j) of proposed § 1926.1210 above. This proposed requirement provides employees with a ready reference to the equipment required for safe entry operations.

Paragraph (a)(3). The two provisions of this proposed paragraph specify additional safety-related information to include in the entry permit. This information is necessary to ensure that employees involved in entry operations are aware of the hazards and procedures associated with the PRCS.

Paragraph (a)(3)(i). Employers would be required to identify in the entry permit any other active permits issued to perform work in the PRCS (for example, hot-work permits). If the employer identifies additional permits, these additional permits may be, but are not required to be, attached to the entry permit to provide information about the activity covered by the permit to employees involved in the entry operations so they can take appropriate precautions.

Paragraph (a)(3)(ii). Employers would be required to list in the entry permit other safety-related information not required under paragraphs (a)(1), (a)(2), and (a)(3)(i) of this proposed section, including any problems encountered. Examples of such information may include: problems encountered in the PRCS; problems that an attendant, entry supervisor, or authorized entrant believes may be relevant to the safety of the entrants working in the space; or any other information that may be relevant to employee safety under these conditions.

Paragraph (b). According to the two provisions of this proposed paragraph, employers must review, at least annually, PRCS entries made during the previous 12 months. The employer must use the information described in these two provisions to perform this review. The purpose of this review is to evaluate the effectiveness of protection provided to employees involved in PRCS entries during this period. This proposed requirement would help ensure that future PRCS entries are completed in a similar way if the entries were successful, or are improved if any problems or concerns are discovered.

Paragraph (b)(1). To accomplish the entry-permit review, this proposed provision would require employers to use cancelled entry permits retained according to paragraph (b) of proposed § 1926.1219 (Retaining entry permits) below. This proposed requirement would be an important tool for identifying deficiencies in entry procedures used during the review period.

Paragraph (b)(2). Employers would be required to review any other information retained from previous entry operations. Employers would obtain this information from sources other than cancelled permits. For instance, any near-miss information would be helpful to determine what actions may be necessary to eliminate or reduce hazard exposure during PRCS entries.

These proposed provisions are necessary to ensure that employers use effective methods for protecting employees against the hazards in the PRCS. In this regard, many construction employers may not do PRCS work regularly, and it is important to use available information, including information from previous PRCS entries, to determine the effectiveness of the protection afforded to employees by previous practices before they begin new PRCS operations.

Paragraph (c). Employers would be required to retain entry permits in accordance with paragraph (b) of proposed § 1926.1219 (Retaining entry permits). (See paragraph (b) of proposed 1926.1219 for an explanation of this proposed requirement.)

Paragraph (d). Employers would be required to cancel entry permits in accordance with paragraph (d)(4) of proposed § 1926.1211 (Entry permit cancellation). (See paragraph (d)(4) of proposed § 1926.1211 above for an explanation of this proposed paragraph.)

Section 1926.1215—Continuous System—PRCS

The provisions of this proposed section cover the requirements for Continuous System-Permit-Required Confined Spaces (CS–PRCSs). Because these spaces are a special type of PRCS, employers would be required to meet these proposed provisions, as well as the requirements for PRCS entry prescribed by proposed §§ 1926.1208 through 1926.1214. One example of this type of system is a sewer in which a storm at another location could send water or hazardous materials to the CS–PRCS where employees are working. Accordingly, the following proposed paragraphs would provide employees with protection from the unique hazards associated with CS–PRCSs.

Paragraph (a). Under this proposed paragraph employers would be required to both meet the requirements in proposed §§ 1926.1208 through 1926.1214 and the additional requirements listed in this proposed section.

Paragraph (a)(1). Employers would be required to monitor CS–PRCSs continuously for atmospheric hazards. These spaces, relative to PRCSs, have an enhanced risk of unexpected changes in hazard levels because of atmospheric hazards that could migrate uncontrolled from other areas of the CS–PRCS. By monitoring the space continuously, employers would detect rising levels of a hazardous atmosphere or the introduction of a new atmospheric hazard before it is too late to warn the authorized entrants and evacuate them from the space (see discussion of proposed paragraph (b)(1) below). Employers may use periodic monitoring for this purpose if they can demonstrate that equipment for continuously monitoring a hazard is not commercially available; for example, continuous monitoring may not be available when the atmospheric hazard is a particulate. In such a case, the employer must be able to demonstrate that the periodic monitoring is of sufficient frequency to ensure that the atmospheric hazard is being controlled at safe levels as planned.

Paragraph (a)(2). Employers would be required to monitor continuously for non-isolated engulfment hazards using an early-warning system. (See the definition of ''early-warning system'' at proposed § 1926.1203 (Definitions applicable to this subpart).) Employers have flexibility in determining what type of early-warning system to use based on information they receive about the space and its hazards, as well as the employer's previous experience with CS–PRCSs. In some instances, the early-warning system can be as simple as posting lookouts with communication equipment at distances far enough upstream from the CS–PRCS to effectively communicate a warning to authorized entrants regarding any engulfment hazards. Another method would be to position detection and monitoring devices in areas connected to the CS–PRCS that will warn entrants effectively of an engulfment hazard in sufficient time for them to exit the space successfully.

Paragraph (b). This proposed paragraph specifies requirements for

additional equipment for a CS–PRCS. This equipment addresses migrating engulfment and atmospheric hazards that are present in CS–PRCSs. For example, these hazards can result when runoff from a heavy storm upstream in a sewer flows downstream into the area in which employees are working. Another example is when hazardous material is used in one part of a sewer and the hazardous atmospheres formed by the material migrate to the area in which the employees are working, causing serious harm. OSHA believes that migrating hazards, especially from distant areas, are common in CS–PRCSs. Accordingly, these requirements are necessary to protect authorized entrants from the additional hazards associated with CS–PRCSs, including engulfment and atmospheric hazards.

Paragraph (b)(1). The employer would be required to provide the equipment necessary to monitor atmospheric hazards in CS–PRCSs. The primary reason OSHA believes this proposed requirement is necessary is because of the increased potential for a hazardous atmosphere to migrate unpredictably into the work area after the employer assesses a CS–PRCS and work has begun. Because these work areas are susceptible to being suddenly affected by hazards from elsewhere in the system, OSHA believes that effective monitoring is the only way to ensure that such hazards will be detected before it is too late to warn and evacuate the entrants. An additional reason for including this proposed requirement is that construction crews often have limited or no experience working in a particular CS–PRCS. As a result, unlike many general industry settings, there may be little or no historical monitoring data available to help accurately predict probable peak hazard levels.

Paragraph (b)(2). The employer would be required to provide an early-warning system to monitor for non-isolated engulfment hazards. The employer has flexibility in determining what type of system to use based on information it has received about the CS–PRCS and its hazards, and based on the employer's experience with working within CS–PRCSs of this type. The system can be as simple as posting observers with communication equipment at distances far enough upstream from the work area to timely communicate a warning to the entrants working downstream. Another method would be to use detection/monitoring devices upstream that will trigger alarms at the entrants' work area in sufficient time for them to safely avoid upstream engulfment hazards moving in their direction.

Section 1926.1216—Controlled-Atmosphere Confined Spaces—Requirements for Classification and Accident Prevention and Protection

Paragraph (a). The provisions of this proposed paragraph would require employers to meet specific criteria to classify the space as a Controlled-Atmosphere Confined Space (CACS), and to protect employees from CACS hazards by implementing specific accident-prevention and -protection methods. When employers have determined that the atmospheric hazards can be controlled and the physical hazards can be isolated or eliminated, the proposed standard provides this alternative classification option, the CACS, which may be more efficient and less costly to implement than complying with the requirements for a PRCS. Note that when employers can identify and implement both the isolation methods for physical hazards and the control methods for atmospheric hazards without entering the space, they would not be required to comply with the PRCS requirements during that identification/implementation process. Also, the Agency considers the provisions proposed for CACS entry to be minimum safety requirements, and the employer may elect to comply with proposed PRCS requirements.

Paragraph (a)(1). Using the physical-hazard information obtained under paragraph (b) of proposed § 1926.1204, the employer would be required by this proposed provision to determine and implement methods for isolating physical hazards found in the CACS. By isolating the physical hazards, employers would provide employees with reliable and effective protection from such hazards.

Paragraph (a)(2)(i). Employers would be required to test for atmospheric hazards in the CACS using the methods specified above in proposed § 1926.1205 (Atmospheric testing and monitoring), and to use ventilation equipment to verify that ventilation alone is sufficient to control the atmospheric hazards at safe levels. Additionally, ventilation must consist of continuous forced-air mechanical systems that meet the requirements of 29 CFR 1926.57 (Ventilation). Because the atmospheric hazard is controlled at safe levels but the hazard is still present to some degree, it is vital that the employer confirm that the ventilation system alone is maintaining the safe atmospheric-hazard level (with no other protective measure in use for protecting entrants from the atmospheric hazard).

Paragraph (a)(2)(ii). Employers would be required to determine that, in the event the ventilation system stops working, the monitoring procedures will detect an increase in atmospheric hazard levels in sufficient time for the entrants to safely exit the CACS. As explained for a similar provision in the general industry standard (see 29 CFR 1910.146(c)(5)(i)(B)), for the CACS to be considered safe, the mechanical ventilation must control the atmospheric hazards at levels that are sufficiently below the levels at which they are harmful to entrants so that, should the forced-air ventilation system cease to function during entry (such as from a power loss), the atmosphere will remain at safe levels until monitoring procedures detect rising atmospheric hazard levels and entrants can safely exit the space or ventilation is restored. The Agency believes that monitoring is the primary method for detecting an increase in atmospheric hazard levels and, therefore, requires the use of monitoring to detect ventilation system failure. However, other indicators may be useful in detecting such failures, including changes in noise levels, air flow, and/or pressure; and signs, symptoms, and characteristic effects of exposure to the atmospheric hazard.

In the event the atmospheric hazard-control methods fail, meeting the requirements of this proposed paragraph would provide employees with a safe atmosphere within the CACS until they evacuate the confined space, thereby reducing the risk of serious injury and death. By ensuring that employees evacuate safely from the CACS under these conditions, this proposed provision makes it unnecessary for employers to arrange for a rescue service as required for PRCSs under paragraph (e) of proposed § 1926.1209. Nevertheless, OSHA believes that if the atmospheric hazards rapidly rise to unsafe levels without mechanical ventilation, then mechanical ventilation may be an inappropriate method for controlling atmospheric hazards, and the space should be classified as a PRCS.

Paragraph (a)(3). Employers would be required to verify in writing that they isolated all physical hazards, and controlled atmospheric hazards with ventilation alone, in the CACS as required by paragraphs (a)(1) and (a)(2) of this proposed section; in addition, employers would have to make this documentation available to all employees who are entering the space, and to their authorized representatives. The provision specifies that the verification document must contain the: Location of the CACS, identity of the

physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated and name and signature/initials of the individual who completed the isolation work, the identity and safe levels of the atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-testing results, date and time of atmospheric testing and the name and signature/initials of the individual who completed the atmospheric testing, the determinations made under paragraph (a)(2)(ii) of this proposed section, name and signature/initials of the person who completed this document, and date and time the document was completed.

The information on the verification document establishes a baseline to determine whether conditions specified in this document remain constant throughout subsequent entry operations. Also, making the document available to employees who enter the space and their authorized representatives would help ensure that the conditions established during initial CACS entry remain constant. It would do this by providing a readily available reference document for employees working in or near the CACS so they have the information necessary to detect developing hazards while they are engaged in CACS entry operations.

Paragraph (b). The provisions proposed under this paragraph list the requirements for notifying and warning employees of the locations of CACSs and their dangers, and training employees regarding CACS safety.

Paragraph (b)(1)(i). This proposed provision would require the employer to inform employees who the employer anticipates will be working in or near a CACS, and their authorized representatives, about the location of, and the dangers posed by, the CACS at the job site. In fulfilling this proposed requirement, the employer must first identify the employees it anticipates will be working in or near the CACS, including employees who: perform work in a CACS; deliver materials, supplies, and tools in or near a CACS; and may detect, and act to save, an incapacitated entrant during an emergency. Secondly, the employer must select an effective method to relay this information to the employees; these methods may range from tool-box talks to formal training. This proposed provision ensures that employees who may be in or near CACSs know the location of, and the dangers associated with, these spaces. This information would help prevent entry into a CACS by employees not authorized to do so, and would ensure that employees who perform work in CACSs can recognize these dangers and exit the CACS when the dangers materialize.

Paragraph (b)(1)(ii). Employers would be required to post danger signs near the outside of the entrance of the CACS that read, ''Danger—Controlled-Atmosphere Confined Space—Authorized Employees Only,'' or similar language. When the employer can demonstrate that a danger sign is infeasible, the employer must use an equally effective means of warning employees of the dangers. This proposed requirement would augment the employee protection afforded under paragraph (b)(1)(i) of this proposed section, especially by preventing non-authorized employees from entering a CACS.

Paragraph (b)(2). The requirements of this proposed paragraph define the training responsibilities of employers with regards to CACS entry.

Paragraph (b)(2)(i). Employers would be required to provide employees who enter a CACS with the knowledge and skills necessary to safely perform CACS entry operations. The training must ensure that these employees understand the hazards in the CACS that they will enter and the methods used to isolate or control these hazards. For employees who enter CACSs, this proposed paragraph would ensure that they know the characteristics of the hazards and the adverse effects the hazards have on the human body, and that they have the ability to recognize when the methods used to control or isolate identified hazards are not effective. OSHA believes that this training will aid the employees in understanding the importance of performing assigned tasks related to the maintenance of safe entry conditions and recognizing how hazards associated with the performance of construction activities affect conditions within the CACS. Without this information, employees are more likely to perform tasks that may compromise the safe conditions within the CACS and injure themselves or other employees. This proposed paragraph also provides the employees with information about the identified hazards which could indicate that an evacuation and reassessment is necessary to prevent injury to anyone in or around the CACS.

Paragraph (b)(2)(ii). Under this proposed provision, the employer is required to train the employees that the employer anticipates will be in or near the CACS and who are not authorized to perform entry rescues about the dangers of such rescues. For instance, when an employee works outside a CACS but is not trained to perform rescue operations, the employer must train that employee about the dangers associated with attempting such a rescue. OSHA believes that employees who are unaware of the dangers associated with attempting a rescue in a confined space are likely to suffer injury or death from trying to rescue an incapacitated employee in a CACS. Therefore, OSHA believes that it is imperative that these employees have knowledge of such dangers to prevent them from attempting rescues and being injured or killed as a result.

Paragraph (b)(2)(iii). The requirements of this proposed paragraph specify when an employer must provide employees with CACS-related training.

Paragraph (b)(2)(iii)(A). Employers would be required to train employees to perform their tasks safely before their initial entry into a CACS, thereby ensuring that these employees have the requisite knowledge and skills to safely perform entry operations within the CACS. OSHA believes that it is essential that employees understand their responsibilities regarding safe operations within the CACS, and that they be able to recognize the signs of ineffective isolation and control methods, before work within the space has commenced. Without this prior knowledge of how the performance of assigned tasks affects conditions within the CACS, an employee may endanger himself/herself or other employees who are in and around the CACS.

Paragraph (b)(2)(iii)(B). Under this proposed provision, if an employee the employer anticipates will be in or near a CACS receives a change in assigned tasks and these changes affect the control of hazardous atmospheres and/or the isolation of physical hazards (that is, the conditions necessary for a CACS classification), then the employer must train these employees on the newly assigned tasks before they enter the CACS, including how to maintain the conditions of the CACS classification when performing the tasks. For example, an employee's assignment changes so that he/she must maintain the proper functioning of ventilation equipment in the CACS or perform atmospheric monitoring; before reentering the space, the employee must be trained to perform such tasks and to understand their significance to safe CACS operations. This additional training only applies when employees have not received previous training on these newly assigned tasks. This proposed provision would ensure that employees have the knowledge and skills necessary to perform their newly assigned tasks safely within a CACS, thereby preventing errors that could result in substantial harm to themselves and/or other employees.

Paragraph (b)(2)(iii)(C). This proposed provision would require employers to ensure that employees exit a CACS when a hazard arises in the space for which they have received no previous training. Training on the new hazard must be completed before the employee may reenter and resume work in the CACS. For example, when a process or material introduced into the space discharges hazardous fumes or vapors into the atmosphere of the CACS, employees who have not had training on such hazards must exit the CACS and receive the requisite training even if the hazard levels are being controlled within safe limits by the mechanical ventilation. In another example, employers would have to follow the same procedure when a power line is exposed inadvertently within the space. OSHA believes this proposed paragraph would protect employees from injury or death by requiring the employer to remove them from the CACS until they have the requisite knowledge and skills regarding the hazard.

Paragraph (b)(2)(iv). Employers would be required to ensure that employees can demonstrate proficiency in the CACS-related duties required by this proposed standard, including any new and revised procedures. For example, the employer may wish to include a testing component in its training. OSHA believes this proposed requirement is necessary to ensure that the overall objectives of required training have been accomplished and the employee understands and is able to apply what he/she has learned.

Paragraph (b)(2)(v). The two provisions of this proposed paragraph list the information that employers must include on training records maintained in accordance with paragraph (c) of proposed § 1926.1219 below. OSHA believes that documentation of employee training is an essential administrative tool for ensuring that employees have received the requisite training. It is particularly important that an employer be able to verify training for employees working in a CACS because a heightened level of employee awareness is needed when an atmospheric hazard is being controlled rather than isolated. As discussed during the SBREFA process, the construction industry is characterized by high employee turnover rates and a tendency among employees to perform short-term tasks at multiple worksites. Therefore, without this documentation, it may be difficult for an employer to keep track of which employees have had the required training. This documentation would aid the employer in ensuring that no untrained employees are assigned to do work within a CACS, thereby preventing risk of injury and death to themselves and other employees. The dangers associated with untrained employees have been discussed in previous paragraphs of this proposed section.

Paragraph (b)(2)(v)(A). Employers would be required to ensure that the training records show that an employee accomplished the training specified in paragraph (b)(2) of this proposed section before entering a CACS. This information would allow employers to verify that an employee received the necessary training before the employee encounters CACS hazards.

Paragraph (b)(2)(v)(B). Employers would be required to include in the training records the employee's name, names of the trainers, and dates of the training. OSHA believes that this information is necessary to identify the specific training received by each employee so that employers select only employees with appropriate knowledge and skills to enter a CACS. Having the names of the trainers on the training record serves to corroborate the record, and also provides a reference should the employer have any questions about the training received by an employee. Including the date in the record allows an assessment of whether the employee may need updated or refresher training before entering the CACS. Finally, this documentation would assist employers in determining whether the training program in general meets the needs of the employees and results in safe and effective CACS entry operations.

Paragraph (c). The requirements of this proposed paragraph address general preparation for CACS entry.

Paragraph (c)(1). This proposed paragraph would require, prior to removing an entrance cover, that employers eliminate any condition that makes it unsafe to remove the entrance cover. The employer would be required to evaluate the hazards that may be associated with removing the cover, and then take whatever measures are necessary to ensure that these hazards are eliminated. For instance, if high-pressure exists inside the CACS, the employer would have to determine and implement measures to address that hazard so that the cover could be removed safely.

Paragraph (c)(2). The purpose of this proposed paragraph is to protect employees in and around the CACS from being struck by individuals or objects outside the CACS that may fall into the space, or that could injure the employees when they are near the CACS. When necessary to achieve this purpose, this proposed provision requires employers to promptly: Use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects, and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR Part 1926 subpart G (Signs, Signals, and Barricades).

Paragraph (c)(3). Employers would be required to ensure that a safe method of entering and exiting a CACS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements (such as 29 CFR Part 1926 subpart X (Stairways and Ladders)). For example, where the employees are working in an underground vault, the employer would be required to provide and ensure the use of a safe means of entry into and exit from an underground vault, and, if applicable, ensure that the method complies with OSHA standards.

The proposed paragraph also would require that if a hoisting system is used, it must be designed and manufactured for personnel hoisting. This proposed provision specifies an exception to this requirement that allows for the use of job-made hoisting systems if these systems are approved for personnel hoisting by a registered professional engineer prior to use in CACS entry operations. However, commercial hoisting systems not designed and manufactured specifically for personnel hoisting would not be permissible under this proposed provision because OSHA believes they cannot be used safely for this purpose. This proposed requirement would eliminate further injuries and deaths of employees which could occur from the use of a hoisting system that was not designed specifically for personnel hoisting. The provision would give the employer flexibility in its choice of personnel hoisting systems by allowing a registered professional engineer to approve a job-made system. OSHA believes that either option would ensure that the personnel hoisting system will meet the design specifications needed for employees to safely access the CACS.

This proposed provision would ensure that authorized entrants always have a safe and effective means of entering and exiting the space, including escaping from it in an emergency. These means include systems that are designed and manufactured for personnel hoisting and job-made hoisting systems approved by a registered professional engineer, even when these systems are not covered by an OSHA standard.

Paragraph (d). The requirements of this proposed paragraph would ensure that employers achieve conditions in a CACS before entry that are consistent with the determinations made, and the isolation and control methods implemented, during the classification of the space under paragraph (a) of this proposed section.

Paragraph (d)(1). The employer would be required to ensure that the physical hazards identified above under paragraph (b)(1)(ii) of proposed § 1926.1204 remain isolated as required by paragraph (a)(1) of proposed § 1926.1216 above. Because there may be a gap in time between when the employer isolates the hazard and when entry begins, the Agency believes that it is necessary to require that the employer ensure immediately before entry that the physical hazards remain isolated.

Paragraph (d)(2). Employers would be required to test for atmospheric hazards using the methods specified above in proposed § 1926.1205 (Atmospheric testing and monitoring) to ensure that the ventilation system is controlling the atmospheric hazards at safe levels. This requirement would ensure that, when the employees enter a CACS, the atmosphere is safe to breathe.

Paragraph (d)(3). The employer would be required to control the atmosphere at safe levels using only ventilation, and must provide ventilation using a forced-air mechanical system that complies with 29 CFR 1926.57 (Ventilation). OSHA believes that use of mechanical ventilation that meets the criteria of 29 CFR 1926.57 to control atmospheric hazards at safe levels is a reliable means of ensuring a safe atmosphere. The use of mechanical ventilation is necessary because of the inherent variability of natural ventilation.

Paragraph (d)(4). Employers would be required to verify in writing that the physical hazards are isolated and the ventilation system is properly controlling the atmospheric hazards. This written verification must contain: the location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity and safe level of atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-testing results, date and time of atmospheric testing and the name and signature/initials of the individual who completed the atmospheric testing, name and signature/initials of the individual who completed this document, and the date and time the document was completed. Employers would be required to make this documentation available for review by each employee entering the space and to that employee's authorized representative. This document shall be maintained until the work in the CACS has been completed (see the proposed recordkeeping requirements under paragraph (d) of proposed § 1926.1219). These proposed procedures would ensure that: conditions in the CACS are safe for employee entry; the employer, employees, and OSHA can direct questions regarding the information to the individual who completed the document; and the information is available for assessment purposes (for example, to evaluate the effectiveness of the ventilation system).

The information required by this proposed paragraph duplicates much of the information required to classify a CACS as specified above in paragraph (a)(3) of this proposed section. However, the information required by this proposed paragraph addresses conditions in the CACS just prior to beginning entry operations. OSHA believes that documenting these conditions is necessary because employers would use this information to compare these conditions to the baseline conditions documented in proposed paragraph (a)(3), thereby alerting them to differences that may indicate poor hazard control or isolation. To lessen the paperwork burden of this proposed requirement, employers do not have to document CACS information that remains fixed, and only need to document information that is likely to vary from the information used to classify the CACS (see the sample verification document in proposed Appendix B). Therefore, employers do not need to document the location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, identity and safe level of atmospheric hazards, and methods for controlling the atmospheric hazards, but must document the date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, atmospheric-testing results, the date and time of atmospheric testing and the name and signature/initials of the individual who completed the atmospheric testing, the name and signature/initials of the individual who completed the verification document, and the date and time the document was completed.

Paragraph (e). The provisions of this proposed paragraph establish the minimum safety requirements that employers must follow after employees enter a CACS.

Paragraph (e)(1). This proposed provision would require the employer to ensure that physical hazards identified above under paragraph (b) of proposed § 1926.1204 remain isolated during entry. This proposed provision would provide employers and employees with assurance that the physical hazards, if any, within the CACS continue to be isolated.

Paragraph (e)(2). The employer would be required to monitor atmospheric hazards as specified in proposed § 1926.1205 (Atmospheric testing and monitoring) to ensure that forced-air mechanical ventilation alone effectively controls atmospheric hazards at safe levels. This proposed paragraph specifies that employers are to use continuous monitoring unless they can demonstrate that the equipment for continuously monitoring a hazard is not commercially available or periodic monitoring is sufficient. For example, when an employer demonstrates that atmospheric-testing results in the past for the CACS have consistently indicated that the change in atmospheric levels occurs slowly and predictably, periodic monitoring may be permissible. The Agency believes that this proposed requirement for continuous monitoring is necessary for the same reasons discussed with respect to paragraph (b) of proposed § 1926.1211 (Monitoring).

Paragraph (e)(3). The employer would be required to complete a written verification of the determinations made under paragraphs (e)(1) and (e)(2) of this proposed section. The employer would also be required to ensure that this written verification contains: The location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity and safe level of atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-monitoring results, date and time of atmospheric monitoring and the name and signature/initials of the individual who completed the atmospheric monitoring, name and signature/initials of the individual who completed this document, and the date and time the document was completed. Lastly, the employer must make the document available to each employee entering the space and to the employee's authorized representative.

The information in this verification document would serve as a reference to help employees recognize developing

hazards (for example, increases in atmospheric hazards) during entry operations, so that entrants would know to exit the CACS. Also, after completing an entry operation, employers could use the information to evaluate the effectiveness of methods used to isolate physical hazards and control atmospheric hazards, or to determine the cause of an accident; in either case, the information would assist the employer in identifying the necessary corrective action. Making the documentation available to employees and their authorized representatives would help ensure that employees have the reference information necessary to recognize when hazards are developing while engaged in entry operations.

To lessen the paperwork burden of this proposed requirement, employers do not have to document CACS information that remains fixed, and only need to document information that is likely to vary from the information used to classify the CACS (see the sample verification document in proposed Appendix B). Therefore, employers do not need to document the location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, identity and safe level of atmospheric hazards, and methods for controlling the atmospheric hazards, but must document the date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, the results of atmospheric monitoring, the date and time of atmospheric monitoring and the name and signature/initials of the individual who completed the atmospheric monitoring, the name and signature/initials of the individual who completed the verification document, and the date and time the document was completed.

Paragraph (f). This proposed paragraph specifies requirements employers must follow when an emergency occurs during entry operations, including the presence of a non-isolated physical hazard or an atmospheric hazard at unsafe levels.

Paragraph (f)(1). Under this proposed provision, when an emergency requires evacuation from a CACS, employers would be required to ensure that employees exit the space immediately. The Agency believes this proposed requirement is necessary because once an emergency occurs, the protective systems in place in the CACS can no longer be relied on to protect the entrants; their safety then depends on their immediately getting out of the CACS.

Paragraph (f)(2). This proposed paragraph requires employers to identify the physical and atmospheric hazards in accordance with paragraph (b) of proposed § 1926.1204. Under paragraph (b)(2) of proposed § 1926.1204, employers must reclassify the space as a PRCS when it is necessary for the entrant to enter the space to obtain the required information. The Agency believes that this proposed requirement is necessary to ensure that the spaces are correctly assessed, and to ensure that the employees are protected while conducting the assessments.

Paragraph (f)(3). This proposed provision requires an employer to use the information about the confined space that it obtained above under paragraph (f)(2) of this proposed section, and reclassify the evacuated space as either a CS–PRCS, PRCS, CACS, or IHCS. The employer must then follow the precautions and safety procedures listed for the space classification in the applicable sections of this proposed standard. The employees cannot reenter the space to perform their assigned tasks until the employer determines that the conditions within the confined space meet the classification and prevention/protection requirements specified for the space. This requirement would ensure that employees receive appropriate protection prior to reentering the confined space.

Section 1926.1217—Isolated-Hazard Confined Spaces—Requirements for Classification and Accident Prevention and Protection

Paragraph (a). The provisions of this proposed paragraph specify the requirements for classifying a confined space as an Isolated-Hazard Confined Space (IHCS). When an employer isolates or eliminates all atmospheric and physical hazards in a space, the space would qualify for the IHCS classification. Employers applying that classification would be required to comply with these proposed provisions before an employee enters the space. The Agency believes that, in some instances, employers will meet IHCS classification requirements instead of classifying a space as a PRCS or CACS; the IHCS classification will sometimes be more efficient and less costly to implement than the PRCS or CACS requirements.

Paragraph (a)(1). The employer would be required to isolate each physical hazard in the space identified under paragraph (b) of proposed § 1926.1204. The definition of the terms ''isolate'' or ''isolation'' provided in paragraph (b) of proposed § 1926.1203 (Definitions applicable to this subpart) is ''the elimination or removal of a physical or atmospheric hazard by preventing its release into a confined space. Isolation includes, but is not limited to, the following methods: Blanking and blinding; misaligning or removing sections of lines, pipes, or ducts; a double-block-and bleed system; locking out or tagging out energy sources; machine guarding; and blocking or disconnecting all mechanical linkages.'' In some situations, employers may perform isolation by de-energizing machinery or systems using appropriate lockout-tagout procedures (for example, 29 CFR 1926.417 (Lockout and tagging of circuits)).

While the proposed provision would allow employers flexibility in the methods and procedures they use to identify and isolate physical hazards, it would not relieve them from conducting a thorough assessment of the space and identifying hazards that include, but are not limited to: Existing or potential liquids, solid materials, and electricity associated with processes; the use of equipment, ductwork, and conduits with exposed valves or that terminate in the confined space; exposed and energized electrical conduits; connected rooms and reservoirs that present engulfment hazards; and any other recognized hazards covered by OSHA construction standards. OSHA believes that isolating all the physical hazards within the space protects employees while working in the IHCS.

Paragraph (a)(2). This proposed provision would require employers to isolate the atmospheric hazards identified in the space as specified in paragraph (b) of proposed § 1926.1204. In doing so, the employer must make a determination regarding atmospheric hazards, and adopt an appropriate method of isolating these hazards that would prevent their release into the confined space. Properly identifying and implementing an isolation method increases the likelihood that employees will be safe while working within the IHCS because all atmospheric hazards will have been isolated or eliminated.

Paragraph (a)(3). The employer would be required to isolate the atmospheric and physical hazards without entering the space. However, when the employer demonstrates that it is infeasible to isolate the hazards without entering the space, it may only enter the space if it complies with the requirements for PRCSs in proposed §§ 1926.1208 through 1926.1214 or, when applicable, the requirements for CS–PRCSs in proposed § 1926.1215. Even when the employer is able to isolate some of the hazards without entering the space, the space would remain a PRCS until the

employer isolates every physical and atmospheric hazard in the space. By maintaining the PRCS classification for these spaces until the employer completes hazard isolation, this proposed provision would protect employees from any atmospheric and/or physical hazards during the isolation process.

Paragraph (a)(4). Employers would be required to verify in writing that all of the physical and atmospheric hazards in the space have been isolated as required by paragraphs (a)(1) and (a)(2) of this proposed section, and to make this documentation available to each employee who is entering the space, and to their authorized representatives. The proposal specifies that the verification document must contain the: Location of the IHCS, identity of the physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated and name and signature/initials of the individual who completed the isolation work, the identity of atmospheric hazards, methods for isolating the atmospheric hazards, the date and time the atmospheric hazards were isolated and the name and signature/initials of the individual who completed the isolation work, name and signature/initials of the individual who completed this document, and the date and time the document was completed.

OSHA believes the information on the verification document would ensure that employers confirm the effectiveness of protective measures implemented prior to IHCS entry. This proposed provision is necessary as an administrative tool to ensure that employees are protected from physical or atmospheric hazards upon initial entry into an IHCS, and that the space remains safe during entry operations. The testing results would also serve as a baseline against which employers and employees could compare current conditions within the IHCS during entry operations. The proposed requirement to make the documentation available to employees and their authorized representatives would ensure that entrants have the information necessary to detect developing hazards while they are working in the space. OSHA believes that when employers and employees have access to these verification documents, deficiencies in isolation methods can be readily identified, which would reduce the probability that employees will be injured by hazards within the IHCS.

Paragraph (b). The provisions of this proposed paragraph list the minimum IHCS training requirements. The employer would be required to ensure that employees performing this work meet these proposed training requirements before they enter an IHCS, thereby expediting recognition of hazardous conditions and development of appropriate responses.

A note to this proposed paragraph states that employers do not need to document the IHCS training requirements, unlike the training provisions proposed for PRCSs, CS–PRCSs, and CACSs, which do require documentation. However, in contrast to PRCSs, CS–PRCSs, and CACSs, IHCSs contain no hazards or contain isolated hazards. The Agency believes that IHCS conditions afford employees optimum protection because the likelihood of employee exposure to a hazard during entry operations is extremely low. In addition, the training requirements proposed for IHCSs, which are informational only, are similar to the training provisions currently specified for confined and enclosed spaces by 29 CFR 1926.21(b)(6), which does not require training documentation. OSHA concludes that requiring employers to document this minimal training requirement would discourage them from classifying confined spaces as IHCSs, thereby denying employees the safety and health benefits associated with this classification.

Paragraph (b)(1). Employers would be required to ensure that employees who enter IHCSs acquire the knowledge and skills necessary to recognize the signs, symptoms, and characteristic effects associated with exposure to the hazards identified under paragraphs (a)(1) and (a)(2) of this proposed section, and to understand the methods used to isolate these hazards. OSHA believes that this training is necessary to prevent accidents caused by an employee's inexperience with working in an IHCS. This training would allow employees to detect failures in the methods used to isolate IHCS hazards, and to recognize the physical and behavioral effects that result from these failures.

Paragraph (b)(2). Employers would be required to train employees the employer anticipates will be in or near the IHCS, and who are not authorized to perform entry rescues, about the dangers of attempting such rescues. This requirement would deter untrained employees from attempting entry rescues, thereby preventing them from being incapacitated, injured, or killed from the hazards in the space.

Paragraph (c). The requirements of this proposed paragraph address general preparation for IHCS entry.

Paragraph (c)(1). This proposed paragraph would require, prior to removing an entrance cover, that employers eliminate any condition that makes it unsafe to remove the entrance cover. The employer would be required to evaluate the hazards that may be associated with removing the cover, and then take whatever measures are necessary to ensure that these hazards are eliminated. For instance, if high-pressure exists inside the IHCS, the employer would have to determine and implement measures to address that hazard so that the cover could be removed safely.

Paragraph (c)(2). The purpose of this proposed paragraph is to protect employees in and around the IHCS from being struck by individuals or objects outside the IHCS that may fall into the space, or that could injure the employees when they are near the IHCS. When necessary to achieve this purpose, this proposed provision requires employers to promptly: Use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects, and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR Part 1926 subpart G (Signs, Signals, and Barricades).

Paragraph (c)(3). Employers would be required to ensure that a safe method of entering and exiting an IHCS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements (such as 29 CFR Part 1926 subpart X (Stairways and Ladders)). For example, where the employees are working in an underground vault, the employer would be required to provide and ensure the use of a safe means of entry into and exit from an underground vault, and, if applicable, ensure that the method complies with OSHA standards.

The proposed paragraph also would require that if a hoisting system is used, it must be designed and manufactured for personnel hoisting. This proposed provision specifies an exception to this requirement that allows for the use of job-made hoisting systems if these systems are approved for personnel hoisting by a registered professional engineer prior to use in IHCS entry operations. However, commercial hoisting systems not designed and manufactured specifically for personnel hoisting would not be permissible under this proposed provision because OSHA believes they cannot be used safely for this purpose. This proposed requirement would eliminate further injuries and deaths of employees which could occur from the use of a hoisting system that was not designed specifically for personnel hoisting. The

provision would give the employer flexibility in its choice of personnel hoisting systems by allowing a registered professional engineer to approve a job-made system. OSHA believes that either option would ensure that the personnel hoisting system will meet the design specifications needed for employees to safely access the IHCS.

This proposed provision would ensure that employees always have a safe and effective means of entering and exiting the space, including escaping from it in an emergency. These means include systems that are designed and manufactured for personnel hoisting and job-made hoisting systems approved by a registered professional engineer, even when these systems are not covered by an OSHA standard.

Paragraph (d). The three provisions of this proposed paragraph address the requirements that employers would be required to follow prior to having employees enter an IHCS.

Paragraph (d)(1). Employers would be required to ensure that the physical hazards identified in paragraph (a)(1) of this proposed section remain isolated. This proposed requirement would ensure that employees are safe from exposure to physical hazards after entering an IHCS.

Paragraph (d)(2). Employers would be required to confirm, through testing, that the atmospheric hazards identified in paragraph (a)(2) of this proposed section are isolated. In conducting this testing, employers must comply with the requirements of paragraph (a) of proposed § 1926.1205. This proposed provision would protect employees from atmospheric hazards during initial entry into an IHCS.

Paragraph (d)(3). Employers would be required to verify in writing the determinations made and the actions taken under paragraphs (d)(1) and (d)(2) of this proposed section. The information provided in this documentation must include the: Location of the IHCS, identity of the physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity of the atmospheric hazards, methods for isolating the atmospheric hazards, date and time the atmospheric hazards were isolated, date and time of determining that atmospheric hazards remain isolated and the name and signature/initials of the individual who made this determination, name and signature/initials of the individual who completed this document, and date and time the document was completed. In addition, the document shall be made available by posting or other methods to employees entering the IHCS and to the employee's authorized representative.

This proposed requirement would provide assurance that the IHCS is safe to enter, as well as information that could be used to detect a developing hazard (for example, indication of an atmospheric contaminant during subsequent entry operations). Therefore, this information would provide employees with protection against physical or atmospheric hazards while entering an IHCS. Other employers, including subcontractors, may benefit from this information since it would be relevant to (though not a substitute for) their own hazard assessment of the space.

This information nearly duplicates the information specified above in paragraph (a)(4) of this proposed section. To lessen the paperwork burden of this proposed requirement, employers do not have to document IHCS information that remains fixed, and only need to document information that is likely to vary from the information used to classify the IHCS (see the sample verification document in proposed Appendix B). Therefore, employers do not need to document the location of the IHCS, identity of the physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated, identity of atmospheric hazards, methods for isolating the atmospheric hazards, and date and time the atmospheric hazards were isolated, but must document the date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, the date and time of determining that atmospheric hazards remain isolated and the name and signature/initials of the individual who made this determination, name and signature/initials of the individual who completed the verification document and the date and time the document was completed.

Paragraph (e). This proposed paragraph contains two provisions regarding IHCSs during entry operations. Employers would be prohibited from having employees continue to engage in entry operations unless these proposed provisions are met.

Paragraph (e)(1). Employers would be required to ensure that the physical and atmospheric hazards identified in paragraphs (a)(1) and (a)(2) of this proposed section remain isolated during entry operations. For example, following the requirements of paragraph (a) of proposed § 1926.1205 would allow an employer to determine the effectiveness of methods used to isolate atmospheric contaminants; for some physical hazards, employers may perform periodic inspections of blocking, blanking, and lockout-tagout methods to ensure their continuing effectiveness. By requiring employers to ensure that physical and atmospheric hazards remain isolated, this proposed provision would prevent physical and atmospheric hazards from entering an IHCS occupied by employees.

Paragraph (e)(2). This proposed paragraph specifies requirements employers must follow when an emergency occurs during entry operations, including the presence of a non-isolated physical hazard or an atmospheric hazard.

Paragraph (e)(2)(i). Under this proposed provision, when an emergency requires evacuation from an IHCS, employers would be required to ensure that employees exit the space immediately. The Agency believes this proposed requirement is necessary because once an emergency occurs, the protective systems in place in the IHCS can no longer be relied on to protect the entrants; their safety then depends on their immediately getting out of the IHCS. This provision would ensure that employees minimize their exposure to physical or atmospheric hazards.

Note that this proposed provision does not require employers engaged in IHCS operations to have a rescue service available during emergencies. OSHA believes that, unlike PRCSs and CS–PRCSs, IHCSs contain no hazards or contain isolated hazards. The Agency believes that IHCS conditions afford employees optimum protection because the likelihood of employee exposure to a hazard during entry operations is extremely low. OSHA believes that requiring employers to have entry rescue services available during IHCSs entry operations would discourage them from classifying confined spaces as IHCSs, thereby denying employees the safety and health benefits associated with this classification. Nevertheless, employers must be able to rescue employees during IHCS operations when required to do so by other OSHA standards. For instance, if employers use fall-arrest systems in IHCSs, then 29 CFR 1926.502(d)(20) requires that they promptly rescue employees who experience an arrested fall, or assure that the employees are able to rescue themselves.

Paragraph (e)(2)(ii). This proposed paragraph requires employers to identify the physical and atmospheric

hazards in accordance with paragraph (b) of proposed § 1926.1204. Under paragraph (b)(2) of proposed § 1926.1204, employers must reclassify the space as a PRCS when it is necessary for the entrant to enter the space to obtain the required information. When doing so, employers must comply with the accident-prevention and protection requirements specified for PRCSs by proposed §§ 1926.1208 through 1926.1214 (and, if applicable, proposed § 1926.1215 for CS–PRCSs). The Agency believes that this proposed requirement is necessary to ensure that the spaces are correctly assessed and to ensure that the employees are protected while conducting the assessments.

Paragraph (e)(2)(iii). This proposed provision requires an employer to use the information about the confined space that it obtained under paragraph (e)(2)(ii) of this proposed section, and reclassify the evacuated space as either a CS–PRCS, PRCS, CACS, or IHCS. The employer must then follow the precautions and safety procedures listed for the space classification in the applicable sections of this proposed standard. The employees cannot reenter the space to perform their assigned tasks until the employer determines that the conditions within the confined space meet the classification and prevention/protection requirements specified for the space. This requirement would ensure that employees receive appropriate protection prior to reentering the confined space.

Section 1926.1218—Equipment

Paragraph (a). The provisions of this proposed paragraph specify the equipment employers would have to provide for confined-space operations. These proposed provisions also require employers to properly maintain, calibrate, and use the equipment required by this proposed standard.

Paragraph (a)(1). The employer would be required to provide and ensure the use of the atmospheric-testing and -monitoring equipment needed to comply with this proposed standard. OSHA believes that this equipment is essential for protecting employees from atmospheric hazards.

Paragraph (a)(2). The employer would be required to provide forced-air mechanical ventilation equipment when needed to meet the requirements of this proposed standard. For example, the employer would be required to provide such equipment if it is needed to meet the requirements of paragraphs (a)(2) and (d)(3) of proposed § 1926.1216 (for control of atmospheric hazards such as dusts, fumes, mists, vapors, or gases). Forced-air mechanical-ventilation equipment, when used appropriately under proposed § 1926.1216 (Controlled-atmosphere confined spaces—requirements for classification and accident prevention and protection), would protect employees from the atmospheric hazards. The employer would also be required to provide it where it is used to help establish planned conditions for entry operations under proposed §§ 1926.1208 through 1926.1214 (PRCSs) or proposed § 1926.1215 (CS–PRCSs). In those instances, use of the equipment would be a significant factor in protecting the employees.

Paragraph (a)(3). The employer would be required to provide personal protective equipment (PPE), including respirators, when needed to comply with this proposed standard. When employees use respirators, the respirator requirements in 29 CFR 1926.103 (Respiratory protection) must be met.[4] For example, failure to use the appropriate filters in a respirator can render its use ineffective, and would be a violation of 29 CFR 1926.103. OSHA believes that when the appropriate PPE is provided, maintained, and used in accordance with OSHA standards that address the identified hazard, the employees will be protected from serious injury or death. (Note: The issue of employer payment for PPE is the subject of a separate rulemaking (see 64 FR 15402). The Agency has indicated that it will complete that rulemaking in the near future.)

Paragraph (a)(4). The employer would be required to provide any equipment not already mentioned that is necessary for safe confined-space operations. OSHA believes this proposed requirement would ensure that the appropriate equipment is available at the job site so employees receive adequate protection from hazards present during confined-space operations. Accordingly, the employer would have to identify this additional equipment after conducting an assessment of the confined space as required by the applicable sections of this proposed standard, and then provide and ensure the use of it.

Paragraph (b). This proposed paragraph specifies requirements for equipment, including maintenance, calibration, and use, needed to comply with this standard. OSHA believes the use of improperly maintained or calibrated equipment could severely compromise the testing and monitoring of conditions within the space and result in employee injury or death. For example, if a gas monitor is not properly calibrated, it may fail to indicate a dangerous hazard level, leading employees to incorrectly believe that it is safe to enter the space.

Under this proposed provision, employers also must ensure that employees use equipment properly to meet the requirements of this proposed standard. For instance, the cords of electrical equipment must not be used to suspend or lower other equipment into a confined space, or the exhaust from powered equipment shall not be used to provide heat for employees inside a confined space. Meeting the requirements of this provision would ensure that employees would not be injured or killed due to the unsafe use of equipment while performing work in and around confined spaces.

Paragraph (b)(1). Under proposed paragraph (b)(1), the employer would be required to ensure that equipment used to meet requirements of this standard complies with other applicable OSHA requirements with regard to maintenance, calibration, and use. Accordingly, the employer must adhere to other OSHA standards that provide criteria for equipment such that the equipment will not injure or kill employees who must use it. For example, ventilation systems and any fall protection used must meet the requirements of appropriate OSHA standards.

Paragraph (b)(2). This proposed provision would provide employers with alternatives in case no applicable OSHA standard is available to regulate the maintenance, calibration, and use of equipment required by this proposed standard.

Paragraph (b)(2)(i). This proposed provision would require employers to use manufacturers' instructions as the principal alternative when an OSHA standard is not available. Equipment manufacturers are most familiar with the components, configuration, and safe and healthful operation of their equipment; this information places them in the best position to specify the proper maintenance, calibration, and use of this equipment when an appropriate OSHA standard is not available.

Paragraph (b)(2)(ii). If neither an OSHA standard nor manufacturers' instructions are available to maintain, calibrate, and use equipment, this proposed provision would require employers to follow the recommendations of a qualified individual. As required by 29 CFR 1926.32(m), a properly qualified individual would possess the

[4] 29 CFR 1926.103 cross-references OSHA's Respiratory Protection Standard at 29 CFR 1910.134.

recognized training, education, professional standing, experience and/or demonstrated ability necessary to make decisions that will ensure the proper maintenance, calibration, and use of equipment used in confined spaces. In making these recommendations, a qualified individual may refer to other available sources such as national standards and industry-recognized safe work practices. The Agency believes that the recommendations of a qualified individual, in absence of applicable OSHA standards and manufacturers' instructions, would assure that equipment required by this proposed standard functions as it is designed to do, thereby providing safe working conditions for employees in confined spaces.

Section 1926.1219—Records

Paragraph (a). This proposed provision would require that the employer either maintain a copy of this standard at the job sites where there is a confined space or maintain a copy of a written confined-space program at the sites that incorporates the standard's requirements. This proposed standard was drafted and organized to direct employers through the steps necessary to protect their employees from confined-space hazards, especially employers who are unfamiliar with confined-space work and may not initially recognize the potential dangers of working within a confined space.

OSHA believes that when an employer has a copy of the construction confined-spaces standard at the job site, along with the documentation required for each section, there is no need to also have a written program. However, if an employer instead prefers to maintain a copy of a written confined-space program at the job site, the proposed provision gives such employers that option so long as that program incorporates the requirements of the proposed standard applicable to the employer's work at the site. For example, if an employer works within chemical tanks that are not CS–PRCSs, and prefers to treat them as PRCSs (rather than meeting CACS or IHCS requirements), such an employer may opt to maintain a written program at that site that addresses the requirements for PRCSs but does not address CACS and IHCS requirements. Whichever option the employer chooses, the Agency believes that it is necessary for a written copy of this standard or the written confined-space program be available at the site as a reference for employees who are involved with implementing safe entry procedures.

Paragraph (b). The employer would be required to retain for at least one year entry permits for all PRCS work performed by their employees. The one-year time period would begin on cancellation of the entry permit for any reason (for example, evacuation of the space or completion of the work specified by the permit). Employers that perform PRCS work must retain entry permits to conduct the required 12-month review specified by paragraph (b)(1) of proposed § 1926.1214.

The note to this paragraph states that, when an entry permit meets the definition of an ''employee exposure record'' as defined by 29 CFR 1910.1020(c)(5), employers must retain the applicable entry permits for the period specified in 29 CFR 1910.1020(d) (Preservation of records). (The provisions of 29 CFR 1910.1020 (Access to employee exposure and medical records) are made applicable to construction operations by 29 CFR 1926.33.) OSHA believes that requiring employers to maintain these exposure records will give healthcare providers, in the event of an emergency, access to information about the substances and exposure levels the employee may have experienced while working within a confined space. This information is needed to enable medical care to be effectively administered to injured employees.

Paragraph (c). Employers would be required to maintain training records in accordance with proposed §§ 1926.1209(d)(5) (PRCSs) and 1926.1216(b)(2)(v) (CACSs). OSHA believes that employee training records are an important administrative tool for tracking which employees have received required training. Accordingly, these training records need only be maintained during the time in which the employee continues to be employed by his/her employer. Requiring employers to maintain employee training records for a longer period is especially burdensome to construction employers because of the high employee turnover rates they typically experience.

This proposed paragraph requires employers to maintain employee training documents only for employees who work in PRCSs and CACSs, not for employees who work in IHCSs. The proposed paragraph did not include training records for employees who work in IHCSs because, unlike PRCSs and CACSs in which hazards are still present during confined-space operations, IHCSs either contain no hazards or employers isolate any hazards that are identified. Therefore, employees who perform work in an IHCS are not exposed to any physical or atmospheric hazards related to conditions within the IHCS, and OSHA believes that requiring construction employers to maintain employee training records when they are not required by other OSHA standards would subject them to an unnecessary burden.

Paragraph (d). This paragraph would require documents mandated in paragraphs (a)(3), (d)(4), and (e)(3) of proposed § 1926.1216 (CACSs) and paragraphs (a)(4) and (c)(3) of proposed § 1926.1217 (IHCSs) to be maintained by the employer until the work in the confined space is completed. OSHA believes these documents are important administrative tools for employers who perform work in these types of confined spaces. Employees who work within or around these types of confined spaces will be able to better recognize deficiencies in isolation and control methods, or changes in the conditions within the confined space, when they can reference these documents.

The Agency recognizes, however, that confined spaces that are classified as CACSs or IHCSs typically involve more predictable and less complex hazard-protection scenarios than those usually associated with CS–PRCSs and PRCSs. Therefore, unlike PRCS entry permits, the Agency believes that it is not necessary for employers to maintain the CACS and IHCS verification documents for review and evaluation after the work is completed. Similar to the note to paragraph (b) of this proposed section, the note in this proposed paragraph requires that these documents be maintained for longer periods if they constitute exposure records under 29 CFR 1910.1020 (Access to employee exposure and medical records).

Paragraph (e). Employers would be required to make all documents required to be retained under this proposed standard available to the Secretary of Labor upon request. The request from the Secretary or the Secretary's designee (for example, OSHA) may be either oral or written. Unless another provision of this proposed standard requires a document to be maintained at the worksite, these documents may be kept off site as long as they can be readily produced by the employer. These documents pertain to the determinations made and actions taken regarding hazards. They provide valuable information to those inspecting the worksite in determining whether elements of this proposed standard have been met.

IV. Issues for Comment

OSHA requests comments from the public on any issues related to this

proposed standard. However, OSHA is specifically requesting the public to comment on, and provide additional information regarding, the issues listed below. Please provide a detailed rationale for each response made to these issues.

1. *Comparison to subpart P.* In a recent regulatory review of 29 CFR part 1926 subpart P (Excavations), a commenter stated that the Agency should clarify that trenches are not confined spaces, while another commenter recommended that, for ease of use, OSHA combine the excavation standards in subpart P and this proposed standard for confined spaces into a single standard (Ex. 2–7, OSHA Docket No. S–204A). In addition, another commenter noted that 29 CFR 1926.651(g)(1)(iii) of subpart P states that the lower flammable limit (LFL) is 20 percent for an atmosphere containing a flammable gas, while the definition of ''hazardous atmosphere'' in paragraph (b) of the general industry confined-spaces standard specifies an LFL of 10 percent for a flammable gas, vapor, or mist (Ex. 2–4, OSHA Docket No. S–204A). This proposed standard for confined spaces in construction adopts an LFL of 10 percent in its definition of ''hazardous atmosphere,'' which is the same LFL as in the general industry standard and in the ANSI Z117.1–2003 industry consensus confined-spaces standard. The commenter requested that OSHA make these LFL requirements similar.

In section III (''Summary and Explanation of the Proposed Standard'') of this proposal, the Agency notes that paragraph (b) of proposed § 1926.1202 clearly states that excavations covered by subpart P are not confined spaces covered by this proposed standard. OSHA believes that subpart P provides sufficient protection from confined-space hazards during excavation work. However, the Agency would be interested in comments on this proposed exception, as well as on the recommendation to combine the excavation standard and this proposed standard into a single standard. Additionally, OSHA requests comment on the advisability of reconciling the difference in LFLs between the excavation standard in subpart P and this proposed standard, including which LFL (that is, 10 percent or 20 percent) should be adopted.

2. Equipment necessary for a single attendant to monitor multiple PRCSs. Paragraph (f)(3)(ii) of proposed § 1926.1210 requires employers to provide the equipment needed by an attendant to respond to an emergency affecting any of the PRCSs the attendant is monitoring. In the preamble discussion of this proposed provision, OSHA states that this equipment may include electronic equipment, such as electronic audio and video tools, and that it is unrealistic to expect a single attendant to monitor multiple PRCSs and to accomplish the other tasks assigned to him/her in paragraph (f) of proposed § 1926.1211 without the assistance provided by this electronic equipment. OSHA is requesting public comment on what means (other than electronic equipment) are available that employers could use that would allow an attendant to effectively monitor multiple PRCSs and to accomplish other assigned tasks, while simultaneously providing employees with the same level of protection they would receive when an attendant monitors only a single PRCS.

3. *Mechanical device for vertical retrieval during rescue.* Paragraph (a)(3) of proposed § 1926.1213 would require that employers use a mechanical device for retrieving employees from a PRCS when such retrieval involves vertical distances over five feet (1.52 m). In the preamble discussion of this proposed paragraph, OSHA noted that securing the retrieval line to an anchor point or using a simple pulley for this purpose could endanger the authorized entrant because most attendants do not have sufficient strength and stamina to lift a disabled entrant over a vertical distance of more than five feet. However, the Agency also noted in this discussion that it recognizes that using the required mechanical devices may present problems to employers because some PRCSs may lack room to position the equipment above the entry point, or employers may need to keep the entry clear for the attendant to observe the authorized entrants while they are working. Therefore, OSHA is requesting commenters to provide information on other alternatives (other than using anchor points and/or simple pulleys) that employers could use for this purpose that would not occlude the PRCS entrance, or would be less obtrusive than the mechanical devices required by this proposed provision.

4. *Timely response to a rescue summons.* Paragraph (b)(1)(i) of proposed § 1926.1213 specifies that the employer must ensure that the rescue service can respond to a rescue summons in a timely manner, and defines the term ''timeliness'' as a function of how quickly a rescue service needs to reach an employee to prevent further serious physical harm that may result from hazards in the PRCS while waiting to be rescued. OSHA is soliciting comments on this definition, especially whether it is adequate as proposed, should remain performance based as proposed but revised in some fashion, or should specify an exact time for the rescue service to respond to the summons (for example, three minutes).

5. *Maintaining CACS and IHCS verification documents.* The requirements of paragraph (d) of proposed § 1926.1219 (Records) states that employers need only maintain CACS and IHCS verification documents until they complete the work in the confined space. In justifying this requirement, OSHA notes that CACSs or IHCSs typically involve more predictable and less complex hazard-protection conditions than PRCSs; consequently, the need to review and evaluate CACS and IHCS verification documents is less than for PRCS entry permits, which employers must maintain for at least one year to evaluate the safety and efficacy of entry operations. Therefore, the Agency believes that it is not necessary for employers to maintain the CACS and IHCS verification documents for review and evaluation after the work is completed. OSHA is seeking comment on whether CACS and IHCS entry operations warrant maintaining the verification documents for a longer period than specified by this proposed provision. If so, the Agency is requesting commenters to identify these conditions and recommend how long the period should be.

6. *Rescue Service Preparation and Changes in Confined-Space Configuration.* The requirements of proposed § 1926.1213(b)(1) states that employers ''must ensure that the entry rescue service can effectively perform entry-rescue tasks in the PRCSs the authorized entrant(s) will enter.'' In addition, proposed § 1926.1213(b)(1)(ii) requires employers to ensure that the entry rescue-service: ''Prior to beginning operations, has access to the PRCS the authorized entrants will enter or to a Simulated PRCS so the entry rescue service can develop appropriate rescue plans and practice rescue operations.'' OSHA estimates that the majority of construction employers who perform work within confined spaces will rely upon public-sector emergency services to perform rescue services. Accordingly, the Agency is seeking comments from the public regarding any difficulties employers have experienced with public-sector emergency services being unable to perform entry rescues in confined spaces that rapidly change in configuration during the construction process. For example, have instances occurred when public-sector emergency services were unable to perform entry

rescues because the configuration of a space changed during the performance of construction activities, and the size and type of the rescue service's equipment was unsuitable for the reconfigured space? Is it feasible for employers to plan for changes in the configuration of confined spaces, and to communicate this information to public-sector emergency services so that the rescue services can properly train and equip themselves to perform entry rescues in the changing spaces?

V. Procedural Determinations

A. Legal Authority

The purpose of the Occupational Safety and Health Act of 1970, (''the Act''; 29 U.S.C. 651 *et seq.*), is ''to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources.'' (29 U.S.C. 651(b).) To achieve this purpose, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. (29 U.S.C. 655(b) and 658.)

Under the Act, a safety or health standard is a standard ''which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment.'' (29 U.S.C. 652(8).) A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when it substantially reduces or eliminates significant risk, and is technologically and economically feasible, cost effective, consistent with prior Agency action or supported by a reasoned justification for departing from prior Agency action, and supported by substantial evidence; it also must effectuate the Act's purposes better than any national consensus standard it supersedes (see *International Union, UAW* v. *OSHA (LOTO II)*, 37 F.3d 665 (DC Cir. 1994; and 58 FR 16612–16616 (March 30, 1993)). Rules promulgated by the Agency must be highly protective (see 58 FR 16612, 16614–15 (March 30, 1993); *LOTO II*, 37 F.3d 665, 669 (DC Cir. 1994)). Moreover, Section 8(g)(2) of the Act authorizes OSHA ''to prescribe such rules and regulations as [it] may deem necessary to carry out its responsibilities under the Act'' (see 29 U.S.C. 657(g)(2)).

OSHA based the proposed rule on evidence that its provisions are necessary to ensure proper employee protection when they are exposed to confined spaces. Accordingly, the Agency believes that the proposed provisions will substantially reduce the significant risk faced by employees working in confined spaces (see *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U.S. 607, 655 (1980); *International Union* v. *Pendergrass*, 878 F.2d 389, 392–93 (DC Cir. 1989); *Building and Construction Trades Dept., AFL–CIO v. Brock*, 838 F.2d 1258, 1264–65 (DC Cir. 1988)). OSHA also made a preliminary finding that the proposed rule is technologically feasible because the protective measures it requires already exist (see *American Textile Mfrs. Institute* v. *OSHA (Cotton Dust)*, 452 U.S. 490, 513 (1981); *American Iron and Steel Institute* v. *OSHA (Lead II)*, 939 F.2d 975, 980 (DC Cir. 1991)).

The Agency believes that the proposed rule is economically feasible because the construction industry can absorb or pass on the costs of compliance without threatening its long-term profitability or competitive structure (see *Cotton Dust*, 452 U.S. at 530 n. 55 (1981); *Lead II*, 939 F.2d 975, 980 (DC Cir. 1991)). Moreover, the preliminary economic analysis of the proposed rule describes the benefits and costs of the proposed rule (see section V.B. of this preamble, ''Summary of the Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis''). Based on this information, OSHA made a preliminary determination that the proposed rule is an economically feasible means of meeting its statutory objective of reducing the risk associated with employee exposure to confined spaces (see *Cotton Dust*, 453 U.S. at 514 n. 32 (1981); *LOTO II*, 37 F.3d 665, 668 (DC Cir. 1994)).

B. Summary of the Preliminary Economic Analysis and the Initial Regulatory Flexibility Analysis

Under Section 6(b) of the Occupational Safety and Health Act of 1970 (''the Act''; 29 U.S.C. 655), OSHA must ensure and demonstrate that standards promulgated under the Act are reasonably necessary or appropriate, as well as technologically and economically feasible. Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act also require OSHA to estimate the costs, assess the benefits, and analyze the impacts of certain rules that the Agency promulgates. Accordingly, OSHA has prepared a Preliminary Economic Analysis (PEA) for this proposed standard. The complete PEA can be found in OSHA Docket OSHA–2007–0026 (Ex. OSHA–2007–0026–0002); a summary of the analysis is presented here. OSHA based the PEA largely on research conducted for this purpose by CONSAD Research Corporation (Ex. OSHA–2007–0026–0003).

Need for Regulation

Employees in work environments addressed by the proposed standard are exposed to a variety of significant hazards that can and do cause serious injury and death. The risks to employees are excessively large due to the existence of market failures, and existing and alternative methods of alleviating these negative consequences have been shown to be insufficient. After carefully weighing the various potential advantages and disadvantages of using a regulatory approach to improve upon the current situation, OSHA preliminarily concludes that in this case the proposed mandatory standard represents the best choice for reducing the risks to employees.

Affected Industries

The proposal would affect employers and employees in a variety of different construction industries in which confined spaces are entered as part of the performance of work duties. These industries include firms involved in construction projects such as multi-family housing; industrial buildings and warehouses; other non-residential buildings; highway and street construction; water, sewer, power, and communication line construction; and other construction projects in which confined spaces may be present. The firms that would be primarily affected by the proposed standard would be those that have overall responsibility for the work done on a particular construction project involving a confined space, including the work of their own employees and that of any subcontractors.

Benefits, Net Benefits, and Cost Effectiveness

The proposed standard is expected to result in an increased degree of safety for the affected employees. Compliance with the relevant provisions of the standard is expected to reduce the numbers of accidents, fatalities, injuries, and illnesses associated with the affected projects (Ex. OSHA–2007–0026–0002).

Preliminary estimates indicate that about six fatalities and 880 injuries could be avoided annually through full compliance with the provisions of the proposed standard. Applying an average monetary value of $50,000 per prevented injury, and an average monetary value of $6.8 million per prevented fatality, results in an estimated monetized benefit of about $85 million annually.

Additional benefits associated with this rulemaking involve providing updated, clear, and comprehensive information about appropriate safety requirements and procedures regarding construction work in confined spaces to the relevant employers, employees, and interested members of the public. OSHA believes that the updated standard would enhance employee safety and would be easier to understand and to apply than the various requirements currently applicable to such work. They will benefit employers and employees by facilitating compliance, while improving safety. The benefits associated with providing updated and clear safety standards have not been monetized or quantified.

Table 2 below provides a summary of the costs and benefits of the proposed standard, and shows the net benefits and cost effectiveness of the standard. Net benefits are estimated to be $8.2 million annually. The cost effectiveness of the standard can be expressed as the prevention of approximately one fatality and 147 injuries per $13 million in costs, or alternatively, $1.11 of benefits per dollar of cost.

TABLE 2.—NET BENEFITS AND COST EFFECTIVENESS

Requirement	Cost
Annualized Costs	
Evaluation, classification, and notification	$5.6 million.
Issue permits, verify safety, and review procedures	$6.1 million.
Provide ventilation and isolate hazards	$6.0 million.
Atmospheric monitoring	$11.7 million.
Attendant	$14.0 million.
Respiratory protection	$10.0 million.
Rescue capability	$9.6 million.
Training	$8.1 million.
Other requirements	$5.7 million.
Total annual costs	$76.8 million.
Benefit	**Quantity**
Annual Benefits	
Number of fatalities prevented	6.
Number of injuries prevented	880.
Monetized benefits (assuming $6.8 million per fatality and $50,000 per injury prevented).	$85 million.
OSHA standards updated and clarified	Not quantified.
Total annual benefits	6 fatalities and 880 injuries prevented.
Net annual benefits (benefits minus costs)	$8.2 million.
Cost effectiveness	1 fatality and 147 injuries prevented per $13 million or $1.11 of benefits per $1.00 of cost.

Note: Costs represent 2002 dollars.

OSHA recognizes that uncertainties may be associated with estimates of benefits. Therefore, OSHA is asking for public comment on the overall estimates of benefits addressed by the proposed standard, and the methodology used to determine the effectiveness of the standard in preventing death and injury.

Compliance Costs

The estimated compliance costs for this proposed standard represent the additional costs necessary for employers to achieve full compliance. They do not include costs incurred by employers who already are complying with the new requirements that would be imposed by the proposed standard (Ex. OSHA–2007–0026–0002).

The total annual cost of compliance with the proposed standard is estimated to be about $77 million. The major provisions involving compliance costs include the evaluation, classification, and notification of confined spaces ($5.6 million); issuing entry permits, verifying the safety of spaces, and reviewing procedures ($6.1 million); isolating hazards and providing sufficient ventilation ($6.0 million); conducting atmospheric monitoring ($11.7 million); providing an attendant ($14.0 million); providing a complete respiratory-protection program as required by 29 CFR 1926.103 ($10.0 million); providing rescue capability ($9.6 million); providing training ($8.1 million); and other requirements ($5.7 million).

Economic Impacts

To assess the effects and magnitude of the economic impacts associated with compliance with the proposed rule, OSHA developed quantitative estimates of the potential economic impact of the requirements on entities in each of the affected industry sectors (Ex. OSHA–2007–0026–0002). The estimated costs of compliance were compared with industry revenues and profits to provide an assessment of potential economic impacts.

The costs of compliance with the proposed rule are not large in relation to the corresponding annual financial flows associated with the regulated activities. The estimated costs of compliance represent about 0.1 percent or less of revenues for each affected industry. Alternatively, the compliance costs represent less than 1 percent of profits for most affected industries, and no more than 2.5 percent of profits for any affected industry.

The economic impact of the proposed rule is most likely to consist of a small increase in prices for affected construction projects of less than 0.03 percent on average. It is unlikely that a price increase on the magnitude of 0.03 percent or less will significantly alter the services demanded by the public or any other affected customers or intermediaries. If the compliance costs of the proposed rule can be substantially recouped with a minimal increase in

prices, there may be little or no effect on profits.

OSHA concludes that compliance with the requirements of the proposed rule is economically feasible in every affected industry sector. In addition, based on an analysis of the costs and economic impacts associated with this rulemaking, OSHA preliminarily concludes that the effects of the proposed standard on international trade, employment, wages, and economic growth for the United States would be negligible.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act, as amended in 1996, requires the preparation of an Initial Regulatory Flexibility Analysis (IRFA) for certain proposed rules. (5 U.S.C. 601–612.) Under the provisions of the law, each such analysis shall contain:

1. A description of the impact of the proposed rule on small entities;

2. A description of the reasons why action by the agency is being considered;

3. A succinct statement of the objectives of, and legal basis for, the proposed rule;

4. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

5. A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;

6. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule; and

7. A description and discussion of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including:

(a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(c) The use of performance rather than design standards; and

(d) An exemption from coverage of the rule, or any part thereof, for such small entities.

The Regulatory Flexibility Act further states that the required elements of the IRFA may be performed in conjunction with or as part of any other agenda or analysis required by any other law if such other analysis satisfies the relevant provisions. The following paragraphs discuss each of the elements of the IRFA.

1. Impact of the Proposed Rule on Small Entities.

OSHA has analyzed the potential impact of the proposed standards on small entities. The total annual cost of compliance with the proposal for small entities is estimated to be $42.4 million, as shown by industry in Table 3. To assess the potential economic impact of the proposal on small entities, OSHA calculated the ratios of compliance costs to profits and to revenues. These ratios are presented for each affected industry in Table 3. OSHA expects that among small entities potentially affected by the proposal, the average increase in prices necessary to completely offset the compliance costs would be 0.02 percent. The average price increase necessary to completely offset compliance costs would not exceed 0.12 percent among small entities in any industry.

TABLE 3.—POTENTIAL ECONOMIC IMPACTS FOR SMALL ENTITIES (SBA DEFINITION)

Industry code	Industry name	Compliance costs	Small entity revenues ($000)	Small entity profits ($000)	Costs as a percent of revenues (%)	Costs as a percent of profits (%)
SIC 1522	Residential Housing—Multi-family	$5,725,951	$11,495,106	$505,785	0.05	1.13
SIC 1541	Industrial Buildings and Warehouses	5,866,386	19,360,399	793,776	0.03	0.74
SIC 1542	Other Nonresidential Buildings	11,180,340	91,307,565	3,287,072	0.01	0.34
SIC 1611	Highway and Street Construction	6,010,530	26,957,228	1,186,118	0.02	0.51
SIC 1622	Bridges, Tunnels, and Elevated Highways.	4,842,583	3,933,715	110,144	0.12	4.40
SIC 1623	Water, Sewer, Power, and Communication Lines.	1,494,314	18,867,729	641,503	0.01	0.23
SIC 1629	Heavy Construction, Not Elsewhere Classified.	5,304,682	15,031,723	977,062	0.04	0.54
SIC 1791	Structural Steel Erection Contractors	2,023,887	5,160,641	258,032	0.04	0.78
Total [1]		42,448,675	192,114,106	7,759,492	0.02	0.55

[1] For all Affected Industries.

Only to the extent that such price increases are not possible would there be any effect on the average profits of small entities. Even in the unlikely event that no costs could be passed through, the compliance costs could be completely absorbed through an average reduction in profits of 0.55 percent. In most affected industries the compliance costs could be completely absorbed through an average reduction in profits of less than 1 percent; the reduction would be no more than 4.4 percent in any of the affected industries.

To further ensure that potential impacts on small entities were fully analyzed and considered, OSHA also separately examined the potential impacts of the proposed standards on very small entities, defined as those with fewer than 20 employees. To assess the potential economic impact of the proposed standards on very small entities, OSHA calculated the ratios of compliance costs to profits and to revenues. These ratios are presented for each affected industry in Table 4. OSHA expects that among very small entities potentially affected by the proposed standards, the average increase in prices necessary to completely offset the compliance costs would be 0.03 percent.

TABLE 4.—POTENTIAL ECONOMIC IMPACTS ON VERY SMALL ENTITIES (FEWER THAN 20 EMPLOYEES)

Industry code	Industry name	Compliance costs	Very small entity revenues ($000)	Very small entity profits ($000)	Costs as a percent of revenues (%)	Costs as a percent of profits (%)
SIC 1522	Residential Housing—Multi-family	$3,654,087	$7,366,193	$103,127	0.05	3.54
SIC 1541	Industrial Buildings and Warehouses	2,790,417	8,612,408	310,047	0.03	0.90
SIC 1542	Other Nonresidential Buildings	5,186,374	36,053,770	1,117,667	0.01	0.46
SIC 1611	Highway and Street Construction	1,880,936	6,869,911	82,439	0.03	2.28
SIC 1622	Bridges, Tunnels, and Elevated Highways.	1,234,911	797,366	45,450	0.15	2.72
SIC 1623	Water, Sewer, Power, and Communication Lines.	531,241	6,186,875	327,904	0.01	0.16
SIC 1629	Heavy Construction, Not Elsewhere Classified.	4,256,837	10,014,249	80,114	0.04	5.31
SIC 1791	Structural Steel Erection Contractors	817,833	2,023,377	22,257	0.04	3.67
Total [1]		20,352,635	77,924,149	2,089,005	0.03	0.97

[1] For All Affected Industries

Only to the extent that such price increases are not possible would there be any effect on the average profits of very small entities. Even in the unlikely event that no costs could be passed through, the compliance costs could be completely absorbed through an average reduction in profits of 0.97 percent among affected very small entities.

2. A Description of the Reasons Why Action by the Agency is Being Considered

Employees performing construction work in confined spaces are potentially exposed to a variety of significant hazards that can and do cause serious injury and death. Based on research conducted by CONSAD (Ex. OSHA–2007–0026–0003), OSHA estimates that an average of 967 serious injuries and 6.5 fatalities occur annually among these workers, and that an estimated six fatalities and 880 injuries would be prevented annually through full compliance with the proposed standard.

Additional benefits associated with this rulemaking involve providing updated, clear, and comprehensive safety standards regarding construction work in confined spaces to the relevant employers, employees, and interested members of the public. The existing OSHA standards for the construction industry do not directly address work in confined spaces in a comprehensive manner. An additional and more complete discussion of the reasons why this standard is being proposed by the Agency is provided in other sections of the preamble of this proposal.

3. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The primary objective of the proposed standard is to provide an increased degree of occupational safety for employees performing construction work in confined spaces. As stated above, an estimated 880 injuries and six fatalities would be prevented annually through compliance with the proposed standard. Another objective of the proposed rulemaking is to provide updated, clear, and comprehensive safety standards regarding construction work in confined spaces to the relevant employers, employees, and interested members of the public.

The legal basis for the rule is the responsibility given the Department of Labor through the Occupational Safety and Health (OSH) Act of 1970. The OSH Act authorizes and obligates the Secretary of Labor to promulgate mandatory occupational safety and health standards as necessary ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b). The legal authority can also be cited as 29 U.S.C. 655(b); 40 U.S.C. 333.

4. Description of and Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

OSHA has completed a preliminary analysis of the impacts associated with this proposal, including an analysis of the type and number of small entities to which the proposed rule would apply, as described above. In order to determine the number of small entities potentially affected by this rulemaking, OSHA used the definitions of small entities developed by the Small Business Administration (SBA) for each industry.

For the construction industry generally, SBA defines small businesses using revenue-based criteria. For most of the affected construction industries, including those which are mostly comprised of general contractors, firms with annual revenues of less than $28.5 million are classified as small businesses. For specialty contractors, such as structural steel erection contractors, firms with annual revenues of less than $12 million are considered to be small businesses.

The proposed standard would primarily impact firms that are general contractors on projects for which employees must enter confined spaces for purposes of performing construction work. Based on the definitions of small entities developed by SBA for each industry, the proposal is estimated to potentially affect a total of 86,012 small entities, as shown in Table 5. Included in this number are an estimated 74,088 entities with fewer than 20 employees.

TABLE 5.—PROFILE OF POTENTIALLY AFFECTED SMALL ENTITIES

Industry code	Industry name	Number of small entities (SBA definition)	Establishments operated by small entities	Number of employees of small entities	Number of very small entities (<20 employees)	Number of employees of very small entities
SIC 1522	Residential Housing—Multi-family	7,328	7,334	46,593	6,879	29,734
SIC 1541	Industrial Buildings and Warehouses	8,342	8,353	80,498	7,254	38,290
SIC 1542	Other Nonresidential Buildings	29,483	29,523	311,451	25,710	144,477
SIC 1611	Highway and Street Construction	10,068	10,113	149,342	7,940	46,735
SIC 1622	Bridges, Tunnels, and Elevated Highways	996	1,001	20,360	673	5,192
SIC 1623	Water, Sewer, Power, & Communication Lines	10,582	10,597	144,659	8,470	51,427
SIC 1629	Heavy Construction, Not Elsewhere Classified	15,173	15,194	120,414	13,888	96,629
SIC 1791	Structural Steel Erection Contractors	4,040	4,043	48,514	3,274	19,604
Totals		86,012	86,158	921,831	74,088	432,088

Source: CONSAD (Ex. OSHA–2007–0026–0003), Tables 7.1 and 7.2.

5. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule

OSHA is proposing a standard that would address the work practices to be used, and other requirements to be followed, for performing construction work in confined spaces. Employers would be required to keep records associated with work in confined spaces as specified by the standard. Records would include entry permits and verification documents. Regular reporting would not be required by the proposed standard; however, employers would be required to demonstrate compliance with the recordkeeping requirements as part of OSHA compliance inspections.

Other compliance requirements of the proposed standard include, as required, the evaluation and classification of confined spaces, isolating hazards and providing sufficient ventilation, conducting atmospheric monitoring, providing an attendant, providing respiratory protection, providing rescue capability, and providing training.

The preamble to the proposed standard provides a comprehensive description of, and further detail regarding, the provisions of the proposed rulemaking. A description of the types of entities that would be subject to the new and revised requirements, and the types of professional skills necessary for compliance with the requirements, is presented in greater detail in the preliminary economic analysis (Ex. OSHA–2007–0026–0002).

6. Federal Rules Which May Duplicate, Overlap or Conflict With the Proposed Rule

OSHA recognizes that this proposed standard may overlap with provisions in other part 1926 standards, such as those generically addressing obligations to provide training or to provide respiratory protection when appropriate. OSHA has clarified the relationship between the proposed standard and other pre-existing construction standards that may be applicable in a confined space. In § 1926.1202(c), as well as Appendix A, OSHA has explained how overlapping standards would interact with each other, and the obligations of an employer in such situations. OSHA has also explained in the preamble how practical situations would be evaluated under the requirements of the draft standard when it overlaps with another OSHA requirement. OSHA has not identified any other Federal rules that may duplicate, overlap, or conflict with the proposal, and requests comments from the public regarding this issue.

7. Alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities

OSHA evaluated many alternatives to the proposed standards to ensure that the proposed requirements would accomplish the stated objectives of applicable statutes and would minimize any significant economic impact of the proposal on small entities. In developing the proposal, and especially in establishing compliance or reporting requirements or timetables that affect small entities, the resources available to small entities were taken into account. Compliance and reporting requirements under the proposal applicable to small entities were clarified, consolidated, and simplified to the extent practicable. Wherever possible, OSHA has proposed the use of performance rather than design standards. An exemption from coverage of the rule for small entities was not considered to be a viable option under the OSH Act because the safety and health of the affected employees would be unduly jeopardized. The OSH Act contains no explicit provision that permits an exemption of small entities for purposes of setting safety and health standards.

Many other specific alternatives to the proposed requirements were considered and discussed elsewhere in the preamble. The Small Business Advocacy Review Panel, which was convened for purposes of soliciting comments on the proposal from affected small entities, addressed several alternatives. A discussion of these alternatives is provided below in Table 6. Nonregulatory alternatives were also considered in determining the appropriate approach to reducing occupational hazards associated with construction work in confined spaces. These alternatives were discussed in Chapter III of the preliminary economic analysis (Ex. OSHA–2007–0026–0002).

Recommendations of the Small Business Advocacy Review Panel

On September 26, 2003, OSHA convened a Small Business Advocacy Review Panel (''Panel'') for this rulemaking in accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as codified at 5 U.S.C 601 *et seq.* The Panel consisted of representatives of OSHA, of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB), and of the Office of Advocacy within the U.S. Small Business Administration (SBA). The Panel received oral and written comments on a draft proposal and a draft economic analysis from small entities that would potentially be affected by this rulemaking. The Panel, in turn, prepared a written report which

was delivered to the Assistant Secretary for Occupational Safety and Health. The report summarized the comments received from the small entities, and included recommendations from the Panel to OSHA regarding the proposal and the associated analysis of compliance costs. Table 6 below lists each of the recommendations made by the Panel and describes the corresponding answers or changes made by OSHA in response to the issues raised.

TABLE 6.—SUMMARY OF SMALL BUSINESS ADVOCACY REVIEW PANEL RECOMMENDATIONS AND OSHA RESPONSES

Panel recommendation	OSHA's response
1. The SERs generally believed that OSHA had underestimated the costs of the draft proposed standard. OSHA is committed by law to develop its analyses using the best available evidence, and it will consider carefully the SER comments in the light of this test. The Panel recommends that OSHA revise its economic and regulatory flexibility analysis as appropriate to reflect the SERs' comments on underestimation of costs, and that the Agency compare OSHA's revised estimates to alternative estimates provided by the SERs. For those SER estimates that OSHA does not adopt, OSHA should explain its reasons for preferring an alternative estimate, and solicit comment on the issue.	The Agency relied on the comments from the SERs to help ensure that the estimated costs of compliance with the proposed standard would reflect the actual costs that businesses could be expected to incur when complying with the requirements specified by the draft proposed standard. OSHA incorporated the comments from the SERs in the development of the proposed standard and the associated analysis in three ways. First, some requirements (such as those addressing hazardous-enclosed spaces) were eased or eliminated altogether in light of the information provided and issues raised by the SERs with regard to achieving compliance in real-world situations. Second, some requirements (such as those involving communications to/from controlling employers and the classification of spaces) were revised or clarified to avoid the potential for misinterpretations regarding the applicability of requirements and the specific actions necessary to ensure compliance, which appeared to be a source of misinterpretation among the SERS when they reviewed the estimates of compliance costs in the draft proposed standard. Third, OSHA revised upwards the estimated costs of compliance associated with some requirements (such as those involving training and atmospheric monitoring). The revisions are each discussed in further detail below in the responses to the specific Panel recommendations separately addressing each of these issues.
2. Many SERs observed that OSHA had underestimated the cost of training. They were concerned particularly about the length of time required for training, training the trainers, renewal training, and multilingual training. The SERs also noted that much retraining could be avoided if OSHA adopted the general industry rule because most firms already have trained their employees on that rule. Some SERs also noted that they still need to train employees on the general industry standard because some of their work would come under the general industry standard. In these situations, they would need to continue training on the general industry standard while adding training on the Construction standard, and on how employees should determine which standard applies. Because OSHA's economic analysis examined training on a project basis, it is difficult to compare OSHA's cost estimates to the estimates provided by the SERs. The Panel recommends that OSHA carefully analyze the SERs' comments on training costs by developing methods for comparing these cost estimates to those estimates provided in OSHA's economic analysis. OSHA then should compare these costs to its present cost estimates, and revise its training costs as necessary based on all of the available information.	The Agency reviewed its estimates of the costs of complying with the training requirements in the proposed standard in light of the additional information provided by the SERs. Many SERs expressed that they already train employees to comply with the general industry standard. While some new terms, equipment, and information exchange requirements have been introduced in the proposed construction standard, the core provisions in the proposed construction standard are already required by the general industry standard. Therefore, OSHA believes that because the proposed standard retains most of the requirements of the general industry standard, there will be only minimal additional costs for employers in training employees to comply with the construction standard. As such, it is anticipated that employers who are already familiar with the general industry standard will find that they already comply with the draft construction standard in everyday work, therefore minimizing the amount of possible ''retraining'' necessary. However, under the proposed standard, OSHA has decided not to allow compliance with the general industry standard in lieu of compliance with the construction industry standard for construction projects since there are situations where the general industry standard would not adequately protect construction employees because of the unique characteristics of construction work (see section II.B. (''History'') of this notice for a discussion of this issue.). As a result of the comments submitted by the SERs, OSHA incorporated additional cost elements in its estimates of training costs that effectively doubled the cost estimates initially provided to the SERs. To facilitate comparability, OSHA also converted the estimated costs from project-based estimates to employer-based estimates. Under the proposed standard, on an average annual basis, estimated training costs would be equivalent to ten hours of employee time plus one hour of supervisor time for each employee; in addition, 32 hours of supervisory time plus eight hours of clerical time (or an equivalent cost) would be spent every five years to develop and review the training program.

TABLE 6.—SUMMARY OF SMALL BUSINESS ADVOCACY REVIEW PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

Panel recommendation	OSHA's response
3. Many SERs stated that OSHA had neglected some elements of monitoring costs, such as the need for a competent person to conduct the monitoring, the need for the entire crew to wait while a supervisor performs the monitoring, the short life span in the field of monitoring equipment, and costs associated with calibrating the equipment. Those SERs affected by the hazardous-enclosed spaces portion of the draft proposed rule were concerned particularly about increased monitoring costs. The Panel notes that if the SERs' views about the life of equipment and the need for the entire crew to suspend work during monitoring are correct, and no other assumptions are changed, the costs of monitoring would be three to five times higher than OSHA estimated, adding $6 to $12 million to the cost of the draft proposed standard. The Panel recommends that OSHA consider these factors and revise its monitoring-cost estimates accordingly, and that monitoring costs reflect the total actual costs associated with conducting monitoring, including the cost of transporting and maintaining equipment, and the costs associated with crew members waiting for the completion of monitoring activities.	The Agency reviewed its estimates of the costs of complying with the atmospheric-monitoring requirements in the proposed standard in light of the additional information provided by the SERs. As a result of the comments submitted by the SERs, OSHA incorporated additional cost elements in its estimates of monitoring costs that increased the cost estimate initially provided to the SERs by almost $6 million per year. The costs associated with setting up monitoring equipment were increased to 20 minutes (instead of 10 minutes) to reflect the possibility of additional losses of productive work time by other employees. The costs associated with purchasing and maintaining the necessary monitoring equipment were doubled from $1,400 every five years to $1,400 every 2.5 years to reflect various incidental costs identified by the SERs, and to reflect less-than-ideal real world conditions and unanticipated occurrences that can increase actual costs. OSHA also doubled the costs associated with periodic calibration of the equipment to reflect possible additional time and costs associated with the transportation of equipment and other incidental expenses.
4. Many SERs were concerned that the hazardous-enclosed spaces provisions of the draft proposed rule would result in extensive costs with few benefits. Some SERs thought the provisions required little recordkeeping beyond what they currently do. Also, some SERs noted that OSHA had underestimated the costs associated with recordkeeping. The Panel is concerned that the hazardous-enclosed spaces provision would require major atmospheric-testing and -monitoring burdens not identified in the cost analysis. The Panel recommends that OSHA carefully examine the benefits and costs of this portion of the rule, and compare these requirements carefully to what is required under other existing regulations, and to existing construction industry practice.	As recommended by the Panel, OSHA carefully examined the hazardous-enclosed space portion of the draft proposed standard. OSHA also reexamined applicable existing requirements, the effects and extent of occupational risks involved, and the potential for risk reduction with the promulgation of additional regulatory requirements for hazardous-enclosed spaces. Based on this reexamination, the Agency concluded that, for now, no new or additional requirements will be proposed for hazardous-enclosed spaces. OSHA believes that potential hazards associated with these spaces are adequately covered by other standards (for example, 29 CFR 1926.55). Therefore, all requirements involving hazardous-enclosed spaces have been eliminated from the proposed standard for confined spaces in construction.
5. Most SERS were concerned that the treatment of controlling employers in the draft proposed standard would result in additional costs for controlling employers in the form of increased monitoring and supervision of subcontractor activities. SERs also were concerned with the costs and time required to meet the coordination and communication requirements of the draft proposed standard. The Panel recommends that, if OSHA does not clarify these provisions, then it should examine further the possible costs of the controlling-employer provisions in the draft proposed rule. Also, OSHA should be certain that it has accounted for all of the burdens associated with this provision.	The Agency has since clarified the duties of the controlling employer in § 1926.1204 of the proposed standard (Work evaluation, information exchange, and coordination). In addition to explaining in paragraph (a) of this proposed section that the controlling employer is only required to share specific information it may already have about the space with its subcontractors, OSHA has further clarified in a note to this paragraph that the controlling or host employer is not required to enter a confined space to collect the specified information for its subcontractors. Therefore, we believe that compliance with proposed § 1926.1204 would not be an added cost to controlling employers. Its purpose is to aid them in their duties to safely coordinate the activities of their subcontractors within the space.
6. Many SERs were concerned that the increased complexity of the classification system would add not only to the training costs but also to the costs associated with classifying confined spaces. The Panel recommends that, if the classification process is not simplified, OSHA should further analyze the costs associated with classifying confined spaces.	The Agency has revised the classification system to clarify and simplify how confined spaces are to be classified. The Agency believes that this system is an improvement over the general industry standard when applied to the construction industry because it explicitly defines possible classifications, some of which enable compliance burdens for employers to be reduced where appropriate.

TABLE 6.—SUMMARY OF SMALL BUSINESS ADVOCACY REVIEW PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

Panel recommendation	OSHA's response
7. OSHA estimated that the draft proposed standard potentially affects small entities performing construction work in confined and enclosed spaces. Small entities in eight specific construction industry classifications were identified as being potentially affected by the draft proposed standard. These classifications include Residential Housing (SIC 1522); Industrial Buildings (SIC 1541); Other Nonresidential Buildings (SIC 1542); Highway and Street Construction (SIC 1611); Bridge and Tunnel Construction (SIC 1622); Water, Sewer, and Pipeline Construction (SIC 1623); Other Heavy Construction (SIC 1629); and Structural Steel Erection (SIC 1791). For each of these industry classifications, Table 3 in the Panel report shows estimates of the total number of small firms in the industry, the number of establishments operated by these firms, the number of employees of these firms, and the total sales of these firms. These figures represent the best available estimates for the numbers of potentially affected small entities meeting the definition of a small entity established by the Small Business Administration for these particular industry sectors. In summary, an estimated 86,012 small entities are potentially affected by the draft proposed standard. These firms operate an estimated 86,158 establishments, employ an estimated 921,831 employees, and generate total sales estimated at $192 billion. In addition to the small entities identified above, small entities in another industry classification, General Contractors for Single Family Homes (SIC 1521), may be affected by the provisions of the draft proposed standard addressing hazardous-enclosed spaces. The Panel recommends that prior to publishing a proposed standard, OSHA should clarify these requirements and include the associated compliance costs, impacts, and benefits in the analysis of the proposal.	As noted in the Agency's response to item 4 above, the requirements addressing hazardous-enclosed spaces that the Panel believed may impose a burden on the industrial sector for General Contractors for Single Family Homes have been deleted from the proposed standard.
8. Almost all of the SERs found the draft proposed standard difficult to follow. The SERs stated that they currently were using the general industry standard and were familiar with it. A few SERs saw some advantages to the differences between the draft proposed standard and the general industry standard, but even these SERs did not believe that these advantages were sufficient to justify the amount of training the draft proposed standard would require. The Panel recommends that OSHA either make the standard easier to follow, consider a standard closer to the general industry standard, or develop a standard in which the classification provisions that provide greater flexibility to employers are optional rather than required.	OSHA addressed the concerns of the SERs about the difficulty in following the text of the proposed standard. OSHA has reorganized the regulatory text in such a manner that an employer will be led step-by-step through the classification and safety-precaution requirements for each type of confined space. In addition, OSHA has included sample forms (Appendix B) to aid employers in following the proposed standard. OSHA has recognized and addressed problematic situations common to construction sites that are not clearly addressed by the general industry standard (i.e., sites where there is no host, the kind of information that needs to be exchanged between entities, doing the initial hazard assessment of a previously unclassified space, etc.). OSHA has adopted many of the general industry provisions, and adjusted them for use on a construction worksite.
9. Most SERs were confused by the distinctions between types of confined spaces. One SER referred to the distinctions as ''metaphysical.'' The Panel recommends that if these distinctions are retained, they should be made clearer, or OSHA should consider making such classifications optional.	OSHA has revised the regulatory text to allow an employer to choose, to a degree, the level of protection provided by a classification of a confined space that is most appropriate for the hazards within the space. One exception is, as stated in proposed § 1926.1206(a)(1), employers must classify any confined space as a CS–PRCS if that space meets the definition of a CS–PRSC. For all other spaces, proposed § 1926.1206(a)(2) allows employers to classify a space as a PRCS or, alternatively, as a CACS or IHCS if the employer can meet the applicable requirements.
10. Many SERs noted that the hazardous-enclosed spaces requirements would result in a major recordkeeping burden. Some SERs believed that these requirements represented major new requirements for many contractors. OSHA notes that a few of the SERs seemed unacquainted with some of the requirements of existing regulations. The Panel notes that the requirement to evaluate each potentially hazardous space, implicit in § 1926.1225(a)(3), could radically alter the compliance requirements and the costs of the rule in ways not reflected in OSHA's Preliminary Initial Regulatory Flexibility Analysis. The Panel recommends that OSHA more carefully explain the relation of these requirements to existing requirements and practice, and explain the need for different requirements.	See the Agency's response to item 4 above.

TABLE 6.—SUMMARY OF SMALL BUSINESS ADVOCACY REVIEW PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

Panel recommendation	OSHA's response
11. SERs were concerned that the provisions addressing controlling employers would require general contractors to develop confined-space expertise and provide confined-space supervision. OSHA's intent with these provisions was not to change existing relations between general contractors and their subcontractors, but rather to assure that general contractors provide subcontractors with the information they possess relevant to confined spaces. Some SERs agreed that additional information could be useful. The Panel recommends that OSHA clarify this requirement to indicate that the role of the controlling employer is only to provide any information they possess concerning confined spaces.	As stated above, OSHA has clarified the responsibilities of controlling employers in proposed § 1926.1204. In addition to sharing specific information that it may have about the space with its affected subcontractors, the note to that section clearly states that employers are not required to enter a confined space to gather such information for its subcontractors. OSHA's intent is not to change existing relations between general contractors and their subcontractors, but rather to assure that general contractors provide subcontractors with the information they possess relevant to their subcontractors working safely within a confined space. The proposed standard does not require controlling employers to develop ''confined-space expertise'' to fulfill their duties in the proposed standard.
12. OSHA's Hazard Communication standard also provides guidance to employers on the use of certain chemicals in the workplace. However, OSHA does not see any conflict between this standard and the draft proposed standard. The Hazard Communication standard provides general precautionary information regarding the use of certain chemicals and products; the draft proposed standard provides more explicit requirements for conditions specific to confined and enclosed spaces. Also, many construction contractors still will need to follow the general industry standard [for confined spaces] in some types of work, and thus need to train their workers in using two different standards, and when to apply each standard. The SERs identified other federal standards that they believe address the hazards associated with confined and enclosed spaces, including OSHA standards for Ventilation (§ 1926.57) and for Gases, Vapors, Fumes, Dusts, and Mists (1926.55), and EPA and HUD rules on abatement work. Accordingly, the Panel recommends that OSHA clarify the exact relation between the draft proposed standard and other standards affecting work by construction employers in confined or enclosed spaces, including the Hazard Communication standard, the general industry standard, the Permissible Exposure Limit standards, the Ventilation standard, the Gases, Vapors, Fumes, Dusts, and Mists standard, and applicable EPA and HUD standards.	OSHA recognizes that the draft proposed standard may overlap with provisions in other 1926 standards. OSHA has clarified the relationship between the draft proposed standard and other pre-existing construction standards which may be applicable in a confined space. In § 1926.1202(c), as well as Appendix A, of the proposed standard, OSHA has explained how overlapping standards would interact with each other, and the obligations of an employer in such situations. OSHA has also explained in the preamble of the proposal how practical situations would be evaluated under the requirements of the proposed standard when it overlaps with another OSHA requirement. OSHA is currently unaware of any other Federal agency standards that overlap or conflict with those of OSHA.
13. Alternatives to adopting the draft proposed standard developed by OSHA include adopting the draft proposed standard developed by the Advisory Committee for Construction Safety and Health [ACCSH], the industry consensus standard developed by the American National Standards Institute [ANSI], or the existing OSHA general industry standard [for confined spaces]. Additional alternatives include modifying the OSHA draft proposed standard by removing provisions addressing hazardous-enclosed spaces, removing the requirement to classify spaces in the least hazardous category, revising requirements for atmospheric monitoring to allow periodic monitoring instead of continuous monitoring, and/or reducing or eliminating recordkeeping requirements. The Panel recommends that OSHA continue to consider these alternatives, and discuss and solicit comment on them in the proposed rule.	OSHA considered alternatives to drafting its own confined-space standard for construction. The general industry standard was considered, but found to be unsuitable for the construction industry. OSHA believes that the general industry standard does not adequately address some problematic situations common to construction sites. These concerns include multiple subcontractors working within one space and hazards created as a confined space is built around employees. ANSI is presently considering whether it is feasible to begin drafting a confined-spaces standard for application specifically in construction. OSHA addressed major concerns of the SERs regarding the hazardous-enclosed space requirements in the draft proposed standard by removing that section completely. As previously stated above, OSHA has also revised the draft proposed standard to allow employers greater flexibility in choosing the classification of a confined space that provides the best protection for its employees from the hazards within the particular space. Finally, OSHA has worked to reduce employers' recordkeeping requirements by minimizing the time necessary for employers to maintain documentation. For example, in proposed § 1926.1218, an employer will only be required to maintain entry permits for one year, while verification documents must only be kept so long as there is ongoing work in that confined space.

TABLE 6.—SUMMARY OF SMALL BUSINESS ADVOCACY REVIEW PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

Panel recommendation	OSHA's response
14. Most SERs indicated a preference for using the general industry standard for construction work, as opposed to the draft proposed standard. OSHA is concerned that not all construction employers are as familiar with the general industry standard as the SERs are, and that some employers might benefit from a standard designed to provide greater compliance flexibility. The Panel recommends that OSHA consider the alternative of adopting the general industry standard and, if this alternative is not adopted, discuss and solicit comment on this alternative in the proposed rule. If OSHA does not adopt a standard closer to the general industry standard, the Panel recommends that OSHA revise its comparative cost analysis of the general industry rule and the draft proposed standard to take account of SERs' concerns about the increased training, communication, and classification costs associated with the draft proposed standard. The Panel also recommends that OSHA solicit comment on how an alternative standard similar to the general industry standard could be adapted to the construction sector. In addition, the Panel recommends that OSHA analyze and solicit comment on the nonregulatory alternative of not issuing a final standard, relying instead on existing standards and improved outreach.	As stated before, the draft proposed confined-spaces standard for construction addresses some concerns that are unique to the construction industry. OSHA believes that the reorganization of the proposed standard and the elimination of the section on hazardous-enclosed spaces address the safety concerns of confined spaces in construction in a manner that makes it easier to read and to comply with than the general industry standard for confined spaces. OSHA requests that the public submit comments regarding the degree of flexibility granted to employers in classifying confined spaces. In addition, OSHA solicits comment on how an alternative standard similar to the general industry standard could be adapted to the construction sector. [Note that the general industry standard and other alternatives to the proposed rule are discussed above under item 13 of this table. In addition to the general industry standard, other alternatives include the ANSI and draft ACCSH standards for confined spaces. The applicability and relationship of the general industry standard and the other alternative standards to this proposed standard are discussed elsewhere in this preamble (i.e., in the section entitled ''History'' for the general industry and draft ACCSH standards, and in the section entitled ''Applicability of Existing Consensus Standards'' for the ANSI standard).]
15. The SERs were confused by the variety of distinctions among confined spaces, and generally believed that the training required by these provisions negated any advantages that might arise from the flexibility of different types of confined spaces. The Panel recommends that OSHA examine and solicit comment on alternatives that reduce the number of types of confined spaces, and that OSHA consider alternatives that would allow employers the choice of using or ignoring these provisions.	The Agency has reduced the number of classifications by removing the classification of ''Hazardous-Enclosed Space.'' We have further clarified the four remaining categories by reorganizing the text of the proposed standard to ensure that all requirements for each classification type can be found in one section. OSHA requests that the public submit comments regarding other alternatives to the proposed rule. The Agency believes that, because the proposed standard is based on many of the requirements already required in the general industry standard, there will be minimal additional costs for employers to train their employees on the proposed construction standard.
16. Many SERs viewed the requirements for hazardous-enclosed spaces as highly burdensome. The Panel recommends that OSHA remove this provision unless OSHA can (1) clarify exactly how the requirements of this provision are different from other existing requirements and practices; (2) develop a detailed cost analysis of this provision; (3) quantify the hazards associated with hazardous-enclosed spaces; and (4) explain how the hazardous-enclosed space provisions can serve to reduce these hazards. If OSHA retains this requirement or one like it, OSHA also should solicit comment on the need for the recordkeeping requirements in the provision. In addition, OSHA should solicit comment on removing this provision entirely.	As recommended by the Panel, OSHA has removed the provisions for Hazardous-Enclosed Spaces.
17. Most SERs were concerned that the provisions for controlling employers would alter the existing relationship between contractors and subcontractors with little gain in reduced risk to employees. OSHA notes that the purpose of this provision was only to ensure that contractors share available information at multi-employer worksites. OSHA cannot regulate contractual matters between parties or prevent terms of contracts that require subcontractors to follow instructions of general contractors. Some SERs agreed that information sharing would be helpful, but were concerned that the OSHA draft went far beyond this purpose. The Panel recommends that OSHA consider removing this provision or clarifying the purpose of this provision, and solicit comment in the proposal on the need for this provision.	As stated previously, proposed § 1926.1204(a), and the note to that section, clarify the duties of the controlling employer and explain that a controlling employer will not be required to enter a confined space to gather the specified information for the subcontractor. [As noted above in the preamble discussion to proposed § 1926.1204(a), employees of subcontractors on multi-employer worksites, which are common in the construction industry, may enter a confined space after another subcontractor's employees have completed work within the space. In these confined space situations, the completed work can affect the health and safety of employees who subsequently enter the confined space. Therefore, it is critical for the safety of all employees on a worksite that contractors and subcontractors communicate the following information with each other: the location of confined spaces, hazardous conditions affecting confined spaces, precautions taken to address those hazards, and classifications of the confined spaces. Requiring communication between employers is an efficient way to ensure that each employer learns important information about the confined space hazards present so that all employees are adequately protected.]

C. OMB Review Under the Paperwork Reduction Act of 1995

The proposed Confined Spaces in Construction Standard contains collection-of-information (paperwork) requirements that are subject to review by the Office of Management and Budget (''OMB'') under the Paperwork Reduction Act of 1995 (''PRA–95''), 44 U.S.C. 3501 *et seq.*, and OMB's regulations at 5 CFR part 1320. The Paperwork Reduction Act defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless

of form or format * * *'' (44 U.S.C. 3502(3)(A)). OSHA submitted the collection-of-information requirements identified in the NPRM to OMB for review (44 U.S.C. 3507(d)). OSHA solicits comments on the collection-of-information requirements and the estimated burden hours associated with these collections, including comments on the following:

- Whether the proposed collection-of-information requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply, for example, by using automated or other technological techniques for collecting and transmitting information.

The title, description of the need for and proposed use of the information, description of the respondents, and frequency of response of the information collections are described below, along with an estimate of the annual reporting burden and cost as required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2).

Title: Confined Spaces in Construction (29 CFR part 1926 subpart AA).

Description and Proposed Use of the Collections of Information: The proposed standard would impose new information-collection requirements for purposes of PRA–95. The collection-of-information requirements in the proposed standard have not been approved by OMB. These provisions are needed to protect the health and safety of employees who work in confined spaces at construction worksites.

The paperwork requirements would impose a duty to produce and maintain records on employers who implement controls and take other measures to protect employees from confined-space hazards in construction. Accordingly, each construction business that has employees who enter a confined space would be required to have, as applicable, the following documents on file and available at the job site: entry permits that contain atmospheric-testing and -monitoring information; documentation regarding classification of the space; inspection information identifying physical hazards; signed verifications regarding atmospheric- and physical-hazard determinations and the methods used to protect employees from these hazards; information required to be communicated to contractors and controlling contractors; a copy of the standard or written permit-required confined-space (PRCS) entry program; information provided to medical facilities; an annual review of PRCS entries, and training records for each employee. The documents would have to be made available for review by the affected employees and their authorized representatives before employees enter the space. OSHA also would have access to the records to determine compliance. An employer's failure to generate and disclose the information required in this standard will affect significantly the Agency's effort to control and reduce injuries and fatalities related to confined spaces in construction.

Table 7 below identifies and describes the new collections of information contained in the proposed standard.

TABLE 7.—COLLECTION-OF-INFORMATION REQUIREMENTS OF THE PROPOSED STANDARD

Paragraph 1926.1204(c): Contractors must provide confined-space information to controlling contractors and host employers.
Paragraph 1926.1205(b)(1): Employers must provide or communicate atmospheric-hazard information to medical facilities treating employees for exposure to atmospheres that are immediately dangerous to life and health.
Paragraph 1926.1209(a)(2): Employers must post PRCS danger signs.
Paragraph 1926.1209(d)(5): Employers must maintain records containing specified PRCS training information.
Paragraph 1926.1209(f): Employers must develop safe PRCS termination procedures.
Paragraph 1926.1210(a): Employers must prepare and post PRCS entry permits containing specified information.
Paragraphs 1926.1210(e)(2)(v) and 1926.1211(e)(3): Entry supervisors must sign the PRCS entry permits.
Paragraph 1926.1211(c): Employers must document exposure-monitoring results in the PRCS entry permits.
Paragraphs 1926.1211(f)(5), (f)(6), (f)(7), and (f)(11): Attendants must: communicate with authorized entrants under specified conditions; inform PRCS rescue services when a non-entry or entry rescue is required; inform employers when non-entry or entry rescue begins, and the need to provide medical aid or escape assistance to authorized entrants; warn individuals who are not authorized entrants to stay away from, or to exit, PRCSs; and warn authorized entrants and entry supervisors of any unauthorized PRCS entry.
Paragraphs 1926.1211(g)(2), (g)(3), and (g)(4)(i): Authorized entrants must: communicate with attendants under specified conditions; and inform attendants of any signs, symptoms, unusual behavior or other effect of a hazard.
Paragraph 1926.1211(h)(2): Employers must summon PRCS entry rescue services under specified conditions.
Paragraph 1926.1213(b)(2): Employers must provide PRCS entry rescue services with specified information regarding the PRCSs in which the services conduct rescue operations.
Paragraph 1926.1214(b): Employers must review PRCS entry permits at least annually using specified documents and information.
Paragraph 1926.1216(a)(3): Employers must verify and document specified CACS initial conditions.
Paragraph 1926.1216(b)(1)(ii): Employers must post CACS danger signs.
Paragraph 1926.1216(b)(2)(v): Employers must maintain records containing specified CACS training information.
Paragraphs 1926.1216(d)(4) and (e)(3): Employers must verify and document specified CACS conditions before entry and during entry.
Paragraphs 1926.1217(a)(4) and (c)(3): Employers must verify and document specified IHCS initial conditions and conditions before entry.
Paragraphs 1926.1219(a), (b), and (d): Employers must: maintain a copy of the standard or a written confined-space program at the worksite; retain PRCS entry permits for at least one year; and maintain CACS and IHCS verification documents until the confined-space work is completed.
Paragraph 1926.1219(e): On request from the Secretary of Labor or the Secretary's designee, employers must disclose documents required to be retained by the standard.

Affected Public: Business or other for-profit.

Number of Respondents: 90,760.

Frequency: On occasion (for most of the information-collection requirements; determined by the onset of confined-space operations); annually (for reviewing PRCS entry permits).

Average Time per Response: Varies from one minute to maintain a training record to one hour to develop a written confined-space program.

Estimated Total Burden Hours: 1.04 million hours.

Estimated Costs (Operation and Maintenance): $0.

Submitting comments. Members of the public who wish to comment on the

paperwork requirements in this proposal must send their written comments to the Office of Information and Regulatory Affairs, Attn: OSHA Desk Officer (RIN 1218–AB47), Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503. The Agency encourages commenters to also submit their comments on these paperwork requirements to the rulemaking docket, along with their comments on other parts of the proposed rule. For instructions on submitting these comments to the rulemaking docket, see the sections of this **Federal Register** notice titled **DATES** and **ADDRESSES**.

Docket and inquiries. To access the docket to read or download comments and other materials related to this paperwork determination, including the complete Information Collection Request (ICR) (containing the Supporting Statement (describing the paperwork determinations in detail), OMB–83–I Form, and attachments) use the procedures described under the section of this notice titled **ADDRESSES**. You also may obtain an electronic copy of the complete ICR by visiting the Web page *http://www.reginfo.gov/public/do/PRAMain*. Scroll under ''Currently Under Review'' to ''Department of Labor (DOL)'' to view all of the DOL's ICRs, including those ICRs submitted for proposed rulemakings. To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

D. Federalism

The Agency reviewed the proposed rule according to the most recent Executive Order (''E.O.'') on Federalism (E.O. 13132, 64 FR 43225). This E.O. requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. The E.O. allows Federal agencies to preempt State law only with the expressed consent of Congress. In such cases, Federal agencies must limit preemption of State law to the extent possible.

Section 18 of the Occupational Safety and Health Act of 1970 (''the Act''; 29 U.S.C. 667) expressly provides OSHA with authority to preempt State occupational safety and health standards to the extent that the Agency promulgates a Federal standard under Section 6 of the Act. Accordingly, Section 18 of the Act authorizes the Agency to preempt State promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the State has an OSHA-approved occupational safety and health plan (namely, is a State-Plan State). (See *Gade* v. *National Solid Wastes Management Association,* 112 S. Ct. 2374 (1992).)

With respect to States that do not have OSHA-approved plans, the Agency concludes that this proposed rule would conform to the preemption provisions of the Act. Additionally, Section 18 of the Act prohibits States without approved plans from issuing citations for violations of OSHA standards; the Agency finds that the proposed rulemaking would not expand this limitation. Therefore, for States that do not have approved occupational safety and health plans, this proposed rule would not affect the preemption provisions of Section 18 of the Act.

OSHA has authority under E.O. 13132 to promulgate the proposed rule in 26 CFR part 1926 because the employee exposures to confined spaces in the construction industry addressed by the proposed requirements are national in scope. The Agency concludes that the requirements in this proposed rule would provide employers in every State with critical information to use when protecting their employees from the risks of exposure to confined spaces. However, while OSHA drafted the proposed requirements to protect employees in every State, Section 18(c)(2) of the Act permits State-Plan States and Territories to develop and enforce their own standards for confined spaces in construction provided these requirements are at least as effective in providing safe and healthful employment and places of employment as the final requirements that result from this proposal.

In summary, this proposed rule complies with E.O. 13132. In States without OSHA-approved State Plans, Congress expressly provides for OSHA standards to preempt State job safety and health rules in areas addressed by the Federal standards; in these States, this rule limits State policy options in the same manner as every standard promulgated by the Agency. In States with OSHA-approved State Plans, this rulemaking does not significantly limit State policy options.

E. State-Plan States

Section 18(c)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667(c)(2)) requires State-Plan States to adopt mandatory standards promulgated by OSHA. Accordingly, the 24 States and two Territories with their own OSHA-approved occupational safety and health plans would have to adopt provisions comparable to the provisions in this proposed rule within six months after the Agency publishes the final rule that it develops from this proposal. The Agency believes that the proposed rule would provide employers in State-Plan States and Territories with critical information and methods necessary to protect their employees from the physical and atmospheric hazards found in and around confined spaces during construction. The 24 States and two Territories with State Plans are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only. Until a State-Plan State/Territory promulgates its own comparable provisions base on the final rule developed from this proposal, Federal OSHA will provide the State/Territory with interim enforcement assistance, as appropriate.

F. Unfunded Mandates Reform Act

OSHA reviewed this proposed rule according to the Unfunded Mandates Reform Act of 1995 (''UMRA''; 2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (58 FR 58093). As discussed above in section III of this preamble (''Summary of the Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis''), the Agency estimates that compliance with this proposed rule would require private-sector employers to expend about $77 million each year. However, while this proposed rule establishes a federal mandate in the private sector, it is not a significant regulatory action within the meaning of Section 202 of the UMRA (2 U.S.C. 1532).

Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. Thus, although OSHA has included compliance costs for the affected public sector entities in its analysis of the expected impacts associated with the proposal, the proposal would not involve any unfunded mandates being imposed on any State or local government entity. Consequently, this proposed rule does not meet the

definition of a ''Federal intergovernmental mandate'' (see Section 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the Agency preliminarily certifies that this proposed rule does not mandate that State, local, and tribal governments adopt new, unfunded regulatory obligations, nor does the proposed rule increase the expenditures by the private sector of more than $100 million a year.

G. Applicability of Existing Consensus Standards

Section 6(b)(8) of the Occupational Safety and Health Act of 1970 (''the Act''; 29 U.S.C. 655(b(8)) requires OSHA to explain ''why a rule promulgated by the Secretary differs substantially from an existing national consensus standard,'' by publishing ''a statement of the reasons why the rule as adopted will better effectuate the purposes of the Act than the national consensus standard.'' The Agency is not proposing to adopt the American National Standards Institute (ANSI) Z117.1 consensus standard (''Safety Requirements for Confined Spaces'') as the OSHA confined-spaces-in-construction standard for several reasons:

1. The Agency believes that the ANSI standard concentrates on confined spaces with oxygen-deficient atmospheres, or with potential overexposures to air contaminants. In this regard, OSHA concurs with the findings it published in the preamble to the general industry confined-spaces standard (58 FR 4464). After reviewing relevant publications by the National Institute for Occupational Safety and Health, the ANSI Z117.1 standards (both the 1989 and the 1977 editions), and the relevant guidelines developed by other organizations, the Agency decided to diverge from the approach used by those standards-setting groups because their documents do not provide sufficient guidance for employers to distinguish among the several types of confined spaces that may be encountered, and among the variety of hazards associated with each type of confined space.

2. OSHA believes that the structure and organization of the ANSI standard is not sufficiently user-friendly for small businesses, especially those that rarely deal with confined spaces.

3. The ANSI standard does not adequately address construction-specific hazards, such as those posed by CS-PRCSs.

OSHA understands that ANSI is developing a consensus standard for confined spaces in construction. Should ANSI publish this consensus standard after the comment period for this proposed standard ends but prior to completing a final rule, OSHA will determine whether it is appropriate to reopen the rulemaking record based on its careful review of the ANSI standard.

H. Review of the Proposed Standard by the Advisory Committee for Construction Safety and Health

The proposed subpart would add requirements to the existing standards in 29 CFR part 1926 that protect employees from exposure to confined-space hazards found in the construction industry. Accordingly, OSHA's regulation governing the Advisory Committee on Construction Safety and Health (ACCSH) at 29 CFR 1912.3 requires OSHA to consult with the ACCSH whenever the Agency proposes a rule that involves the occupational safety and health of construction employees. At the regular meeting of the ACCSH on October 19, 2004, OSHA briefed the members on the proposed subpart using a slide presentation, and then responded to their questions. It subsequently provided the members of the ACCSH with copies of the slides and the proposed regulatory text for their review. At the ACCSH's next regular meeting on February 17, 2005, the OSHA staff answered additional questions from the members; the members then recommended that OSHA proceed with publishing the proposal, taking into consideration written and oral comments provided by them during the meeting.

I. Public Participation—Comments and Hearings

OSHA encourages members of the public to participate in this rulemaking by submitting comments on the proposal and documentary evidence. In this regard, the Agency invites interested parties having knowledge of, or experience with, confined spaces in construction to participate in this process, and welcomes any pertinent data and cost information that will provide it with the best available evidence on which to develop the final regulatory requirements.

Comments. The Agency invites interested parties to submit written data, views, and arguments concerning this proposal. In particular, the Agency welcomes comments on its determination of the economic or other regulatory impacts of the proposed rule on the regulated community. When submitting comments, follow the procedures specified above in the sections titled **DATES** and **ADDRESSES**. The comments must clearly identify the provision of the proposal being addressed, the position taken with respect to each issue, and the basis for that position. Comments, along with supporting data and references, received by the end of the specified comment period will become part of the proceedings record, and will be available electronically for public inspection at the Federal eRulemaking Portal (*http://www.regulations.gov*), or may be read at the OSHA Docket Office, Room N–2625, 200 Constitution Ave., NW., Washington. (See the section of this **Federal Register** notice titled **ADDRESSES** for additional information on how to access these documents.)

Informal Public Hearings. Requests for a hearing should be submitted to the Agency as set forth above under the sections of this notice titled **DATES** and **ADDRESSES**.

List of Subjects in 29 CFR Part 1926

Construction industry, Occupational safety and health, Safety.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, directed the preparation of this notice. The Agency is issuing this proposal under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Section 4 of the Administrative Procedure Act (5 U.S.C. 553); Secretary of Labor's Order No. 5–2002 (67 FR 65008); and 29 CFR part 1911.

Signed at Washington, DC on November 2, 2007.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated in the preamble of this proposed rule, the Agency is proposing to amend 29 CFR part 1926 by adding subpart AA to read as follows:

PART 1926—[AMENDED]

Subpart AA—Confined Spaces in Construction

Sec.

1926.1200 [Reserved]
1926.1201 Introduction.
1926.1202 Scope.
1926.1203 Definitions applicable to this subpart.
1926.1204 Worksite evaluation, information exchange, and coordination.
1926.1205 Atmospheric testing and monitoring.
1926.1206 Classification and precautions.
1926.1207 Reassessment.

1926.1208 Permit-required confined spaces.
1926.1209 PRCS—initial tasks.
1926.1210 PRCS—preparing for entry.
1926.1211 PRCS—during entry.
1926.1212 PRCS—terminating entry.
1926.1213 PRCS—rescue criteria.
1926.1214 PRCS—entry permits.
1926.1215 Continuous System-PRCS.
1926.1216 Controlled-atmosphere confined spaces—requirements for classification and accident prevention and protection.
1926.1217 Isolated hazard confined spaces—requirements for classification and accident prevention and protection.
1926.1218 Equipment.
1926.1219 Records.
Appendix A to subpart AA of part 1926—List of Confined-Space Requirements in Other Construction Standards that Supplement the Requirements of subpart AA (Mandatory)
Appendix B to subpart AA of part 1926—Sample Entry Permit for PRCSs and CS–PRCSs and Sample Verification Document for CACSs and IHCSs (Non-Mandatory)

Subpart AA—Confined Spaces in Construction

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 5–2007 (72 FR 31159); and 29 CFR Part 1911.

§ 1926.1200 [Reserved]

§ 1926.1201 Introduction.

(a) This standard sets out safety precautions that must be taken when working within or near a confined space that is subject to a hazard. Wherever the term ''hazard'' is used in this standard, it means an existing hazard or a hazard that has a reasonable probability of occurring in or near a confined space. A confined space is a space that has all of the following characteristics: Is large enough and so arranged that an employee can bodily enter it, has limited or restricted means for entry and exit, and is not designed for continuous employee occupancy.

(b) A confined space that is subject to a hazard must be classified. The classification determines what accident-prevention and -protection requirements apply to that space.

(1) There are four classifications:

(i) Continuous System-Permit-Required Confined Space (CS-PRCS).

(ii) Permit-Required Confined Space (PRCS).

(iii) Controlled-Atmosphere Confined Space (CACS).

(iv) Isolated-Hazard Confined Space (IHCS).

(2) The employer has the option of selecting any of these classifications, as long as the employer meets the applicable requirements for the classification selected . The one exception is that a space with the characteristics of a CS–PRCS cannot be given a different classification.

(c) There are precautions that must be followed if employees have to enter a space when in the process of determining which classification will be used (see § 1926.1204(b)(2)).

(d) If the contractor determines under § 1926.1204 that the confined space is not subject to any hazards (in which case the confined space need not be classified), the contractor must complete a reassessment of that determination upon the occurrence of any of the indications for reassessment specified in § 1926.1207(a).

§ 1926.1202 Scope.

(a) This standard applies to employers engaged in construction work and who have confined spaces at their job site, unless one of the exceptions in paragraph (b) of this section applies.

Note to § 1926.1202(a): Examples of locations where confined spaces may occur include, but are not limited to, the following: Bins; boilers; pits (such as elevator, escalator, pump, valve or other equipment); manholes (such as sewer, storm drain, electrical, communication, or other utility); tanks (such as fuel, chemical, water, or other liquid, solid or gas); boilers; incinerators; scrubbers; concrete pier columns; sewers; transformer vaults; heating, ventilation, and air-conditioning (HVAC) ducts; storm drains; water mains; precast concrete and other pre-formed manhole units; drilled shafts; enclosed beams; vessels; digesters; lift stations; cesspools; silos; air receivers; sludge gates; air preheaters; step up transformers; turbines; chillers; bag houses; and/or mixers/reactors.

(b) *Exceptions.* This standard does not apply to:

(1) Construction work regulated by 29 CFR Part 1926 subpart Y (Diving).

(2) Non-sewer construction work regulated by 29 CFR part 1926 subpart P (Excavations).

(3) Non-sewer construction work regulated by 29 CFR part 1926 subpart S (Underground Construction, Caissons, Cofferdams and Compressed Air).

(c) Where this standard applies and there is a provision that addresses a confined space hazard in another applicable OSHA standard, the employer must comply with both that standard's provision(s) and the applicable provisions of this standard.

Note to § 1926.1202(c): A list of confined-space provisions in other construction standards is in Appendix A to this subpart.

(d) The duties of controlling contractors under this standard include, but are not limited to, the duties specified in § 1926.1204(a).

§ 1926.1203 Definitions applicable to this subpart.

Atmospheric hazard (see the definition of *Hazardous atmosphere*).

Attendant is an employee stationed outside one or more PRCSs who performs the duties specified in § 1926.1211(f) (Attendant duties).

Authorized entrant is an employee who the employer authorizes to enter a PRCS and performs the duties specified in § 1926.1211(g) (Authorized entrant duties).

Barrier means a physical obstruction that blocks or limits access.

Blanking or blinding means closing a pipe, line, or duct by covering its bore with a solid plate that can withstand the maximum pressure inside the pipe, line, or duct without leaking. A plate may be a spectacle blind or a skillet blind.

Confined space is a space that has all of the following characteristics:

(1) Is large enough and so arranged that an employee can bodily enter it.

(2) Has limited or restricted means for entry and exit.

(3) Is not designed for continuous employee occupancy.

Note: There are four confined space classifications: Isolated-Hazard Confined Space, Controlled-Atmosphere Confined Space, Permit-Required Confined Space and Continuous System-Permit-Required Confined Space.

Continuous System-Permit-Required Confined Space (CS–PRCS) is a Permit-Required Confined Space that has all of the following characteristics:

(1) Is part of, and contiguous with, a larger confined space (for example, sewers).

(2) The employer cannot isolate it from the larger confined space.

(3) Is subject to a potential hazard release from the larger confined space that would overwhelm personal protective equipment and/or hazard controls, resulting in a hazard that is immediately dangerous to life and health.

Contractor is an employer who has employees engaged in construction, and is neither a controlling contractor nor a host employer.

Control is the action taken to reduce the level of any hazard inside a confined space using engineering methods (for example, by isolation or ventilation), and then using these methods to maintain the reduced hazard level. *Control* also refers to the engineering methods used for this purpose. Personal protective equipment is not a control.

Controlled-Atmosphere Confined Space (CACS) is a confined space that has all of the following characteristics:

(1) Contains no physical hazards or only isolated physical hazards.

(2) Uses ventilation alone to control atmospheric hazards at safe levels.

Controlling contractor is the employer that has overall responsibility for construction at the worksite.

Note: If the controlling contractor owns or manages the property, then it is both a controlling employer and a host employer.

Double block and bleed means (with regard to lines, ducts, and pipes) closing two in-line valves and locking or tagging them in the closed position, and then opening the drain or vent in the line between the two closed in-line valves and locking or tagging it in the open position.

Early-warning system is the method used to alert authorized entrants and attendants that an engulfment hazard may be developing. Examples of early-warning systems include, but are not limited to: Alarms activated by remote sensors; and lookouts with equipment for immediately communicating with the authorized entrants and attendants.

Emergency is any occurrence, inside or outside a confined space, that could cause death or serious physical harm to employees whose work is covered by this standard. For example, an emergency occurs if an employer fails to isolate a physical hazard or if ventilation or atmosphere-monitoring equipment malfunctions.

Engulfment hazard is a physical hazard consisting of a liquid or flowable solid substance that can surround and capture an individual. Engulfment hazards may cause death or serious physical harm if: the individual inhales the engulfing substance into the respiratory system (drowning, for example); the substance exerts excessive force on the individual's body resulting in strangulation, constriction, or crushing; or the substance suffocates the individual.

Entrant (see the definition of *Authorized entrant*).

Entry occurs when any part of an employee's body breaks the plane of an opening into a confined space. *Entry* (or *entry operations*) also refers to the period during which an employee occupies a confined space.

Entry permit means the document used by the employer to control entry into a PRCS as specified in § 1926.1214 (PRCS—entry permits).

Entry rescue occurs when a rescue service enters a PRCS to rescue employees.

Entry supervisor means a qualified individual who the employer assigns to control entry into PRCS as specified in § 1926.1210(e)(2) (Entry supervisor requirements).

Hazard means a *physical hazard or hazardous atmosphere*. See definitions below.

Hazardous atmosphere means an existing or potential atmosphere consisting of at least one of the following:

(1) A flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit.

(2) An airborne combustible dust at a concentration that meets or exceeds its lower explosive limit.

(3) An atmospheric oxygen concentration below 19.5 percent (''oxygen deficient'') or above 23.5 percent (''oxygen enriched'').

(4) An airborne concentration of a substance that exceeds the dose or exposure limit specified by an OSHA requirement.

(5) An atmosphere that presents an immediate danger to life or health.

Host employer owns or manages the property where construction is taking place.

Note: If a host employer has overall responsibility for construction at the worksite, then it is both a host employer and controlling contractor.

Immediately dangerous to life or health (IDLH) is a condition that occurs when an employee is exposed to a physical or atmospheric hazard that could result in any one of the following effects:

(1) An immediate threat to life.

(2) Irreversible adverse health effects.

(3) Serious physical harm.

(4) Impaired ability to escape unaided from a confined space.

Identify a hazard means determining the type, quantity, and characteristics of a hazard, including the likelihood that a hazard currently absent from a confined space could enter the confined space.

Inspection information means any information obtained about a space, including, but not limited to, blueprints, schematics, and/or similar documents, documents regarding previous confined space entries, or physical inspection/testing.

Isolate or isolation means the elimination or removal of a physical or atmospheric hazard by preventing its release into a confined space. Isolation includes, but is not limited to, the following methods: Blanking and blinding; misaligning or removing sections of lines, pipes, or ducts; a double-block-and-bleed system; locking out or tagging out energy sources; machine guarding; and blocking or disconnecting all mechanical linkages.

Isolated-Hazard Confined Space (IHCS) is a confined space in which the employer has isolated all physical and atmospheric hazards.

Limited or restricted means for entry and exit refers to a condition that has a potential to impede an employee's movement into or out of a confined space. Such conditions include, but are not limited to, hazards, poor illumination, slippery floors, inclining surfaces and ladders.

Lower flammable limit or lower explosive limit means the minimum concentration of a substance in air needed for an ignition source to cause a flame or explosion.

Monitor or monitoring means the process used to identify and evaluate the atmosphere in a confined space after an authorized entrant enters the space. This is a process of checking for changes in the atmospheric conditions within a confined space and is performed in a periodic or continuous manner after the completion of the initial testing of that space.

Non-entry rescue occurs when a rescue service, usually the attendant, retrieves employees in a PRCS without entering the PRCS.

OSHA requirement means an OSHA standard or regulation that applies to construction, or the general duty clause of the Occupational Safety and Health Act of 1970 (paragraph (a)(1) of 29 U.S.C. 654).

Permit-Required Confined Space (PRCS) is a confined space that has any one of the following characteristics:

(1) A hazardous atmosphere.

(2) Inwardly converging, sloping, or tapering surfaces that could trap or asphyxiate an employee. For example, a space between walls that narrows towards the base (including, but not limited to, funnels and hoppers).

(3) An engulfment hazard or other physical hazard.

Physical hazard means an existing hazard that can cause death or serious physical harm in or near a confined space, or a hazard that has a reasonable probability of occurring in or near a confined space, and that includes, but is not limited to: explosives (as defined by paragraph (n) of § 1926.914, definition of ''explosive''); mechanical, electrical, hydraulic and pneumatic energy; radiation; temperature extremes; engulfment; noise; and inwardly converging surfaces. Physical hazard also refers to chemicals that can cause death or serious physical harm through skin or eye contact (rather than through inhalation).

Planned conditions are the conditions under which authorized entrants can work safely in a PRCS or CS–PRCS, including hazard levels and methods of employee protection.

Protect or protection means keeping an employee safe in the presence of a physical or atmospheric hazard using methods other than control (for example, using personal protective equipment).

Rescue means retrieving, and providing medical assistance to, employees who are in a PRCS.

Rescue service means the onsite or offsite personnel who the employer designates to engage in non-entry and/or entry rescue of employees from a PRCS.

Retrieval system means the equipment, including mechanical retrieval devices, used for non-entry rescue of authorized entrants from a PRCS.

Safe level is an employee exposure to an atmospheric or physical hazard that meets OSHA requirements.

Serious physical harm means:

(1) An impairment in which a body part is made functionally useless or is substantially reduced in efficiency. Such impairment includes, but is not limited to, loss of consciousness or disorientation, and may be permanent or temporary, or chronic or acute. Injuries involving such impairment would usually require treatment by a physician or other licensed health-care professional; or

(2) An illness that could shorten life or substantially reduce physical or mental efficiency by impairing a normal bodily function or body part.

Simulated Permit-Required Confined Space is a confined space or a mock-up of a confined space that has all of the following characteristics:

(1) Has similar entrance openings, and is similar in size, configuration, and accessibility to the PRCS the authorized entrants enter.

(2) Need not contain any physical or atmospheric hazards.

Standard means this subpart unless otherwise specified.

Test or testing means the process used to identify and evaluate the atmosphere in a confined space before an authorized entrant enters the space.

Unplanned condition means a deviation from the planned conditions.

Ventilate or ventilation means controlling a hazardous atmosphere using continuous forced-air mechanical systems that meet the requirements of 29 CFR 1926.57 (Ventilation).

§ 1926.1204 Worksite evaluation, information exchange, and coordination.

(a) Neither the controlling contractor nor the host employer is required to obtain the information listed in this paragraph. However, if they have it, they must provide it to the contractor for the contractor's evaluation before the contractor first enters a confined space:

(1) The location of each space that the controlling contractor or host employer actually knows is a confined space.

(2) For each of the spaces identified in paragraph (a)(1) of this section:

(i) Any hazards, if known, that affect that space.

(ii) The classification of the space, IHCS, CACS, PRCS, or CS–PRCS, if previously classified.

(iii) Any precautions and procedures that the controlling contractor or host employer previously implemented for entering the space.

Note to § 1926.1204(a): Unless a controlling contractor or host employer has or will have employees in a confined space, they are not required to enter any confined space to collect the information specified in paragraph (a) of this section.

(b) The contractor must determine if there are confined spaces and if these spaces are subject to any hazards, using the following procedures:

(1) Without entering the space, the contractor must consider information, if any, from the host employer and controlling contractor, and use inspection information (see paragraph (b)(2) of this section), to:

(i) Determine if the space meets the definition of a confined space.

(ii) Identify any physical and atmospheric hazards.

(2) If the contractor can demonstrate that obtaining required information without entering the space is infeasible, employees may enter to inspect for that information only if the requirements of §§ 1926.1208 through 1926.1214 (PRCSs) and, if applicable, § 1926.1215 (CS–PRCSs), are met.

(3) To determine if there are atmospheric hazards, the contractor must follow the atmospheric-testing and -monitoring requirements in § 1926.1205. This testing must be done without using mechanical ventilation or altering the natural ventilation in the space.

(4) The contractor must meet other applicable OSHA requirements, including training requirements, for the use of personal and other protective equipment, as required in § 1926.1213(c)(2).

(c) If the contractor classifies a space as an IHCS, CACS, PRCS, or CS–PRCS, it must:

(1) Inform the controlling contractor and host employer of the precautions and procedures the contractor will follow for entry into the space.

(2) At the conclusion of entry operations, inform the controlling contractor and host employer about any hazards that were present, or that developed, during entry operations.

(d) If more than one employer will have employees in the space at the same time, the controlling contractor shall coordinate entry operations with the contractors.

(e) *Employee participation and notification*. The employer must provide its employees who enter a confined space, and their authorized representatives, with an opportunity to observe the evaluations of the space (§ 1926.1204(b)), any reassessment conducted pursuant to § 1926.1207, and atmospheric testing and monitoring required by this standard.

§ 1926.1205 Atmospheric testing and monitoring.

(a) When testing or monitoring atmospheric hazards in a confined space, the employer must:

(1) Test or monitor in the following order: Oxygen, combustible gases and vapors, and toxic gases and vapors, unless testing or monitoring is conducted simultaneously.

(2) Test or monitor for other atmospheric hazards as specified by applicable OSHA requirements.

(3) Monitor periodically and as necessary, unless applicable OSHA requirements or other provisions of this standard specify a different frequency.

(4) Test or monitor using a properly calibrated, direct-reading instrument(s).

(b) If a medical facility treats an employee exposed to an atmosphere that is immediately dangerous to life and health, then the employer must:

(1) Provide or communicate to the medical facility any information that the employer is required to retain regarding the atmosphere (for example, the name of and level of exposure to atmospheric contaminants, and the information required by 29 CFR 1910.1200 (Hazard Communications) to be provided on Material Safety Data Sheets).

(2) Do so as soon as practical after the exposure.

§ 1926.1206 Classification and precautions.

(a) Using the information obtained in § 1926.1204, the employer must classify the space as a Continuous System-Permit-Required Confined Space (CS–PRCS) if the space has all of the following characteristics:

(1) Is part of, and contiguous with, a larger confined space (for example, sewers).

(2) Is not isolated from the larger confined space.

(3) Is subject to a potential hazard release from the larger confined space that would overwhelm personal

protective equipment and/or hazard controls, resulting in a hazard that is immediately dangerous to life and health.

(b) For confined spaces other than a CS–PRCS, the employer must use the information obtained in § 1926.1204 to classify the space as a PRCS (§ 1926.1208) or, alternatively, as a CACS (§ 1926.1216) or IHCS (§ 1926.1217) if the space meets the applicable requirements for the classification selected.

(c) The employer must meet the accident-prevention and -protection requirements applicable to the space classification before any employee enters the space, unless otherwise specified.

§ 1926.1207 Reassessment.

(a) If the contractor made a determination under § 1926.1204 that the confined space was not subject to any hazards, the contractor must reassess that determination if there is an indication that the conditions under which the determination was made have changed. Such indications include, but are not limited to:

(1) A change in the configuration or use of, or the type of work conducted or materials used in, the confined space.

(2) New information regarding a hazard in or near a confined space.

(3) An employee or authorized representative provides a reasonable basis for believing that a hazard determination is inadequate.

(b) If the contractor made a determination under § 1926.1204 that the confined space was subject to a hazard, the contractor must reassess the determinations, procedures, and equipment used to protect employees in or near a confined space if there is an indication that the measures taken may not protect employees. Such indications include, but are not limited to:

(1) A change in the configuration or use of, or the type of work conducted or materials used in, the confined space.

(2) New information regarding a hazard in or near a confined space.

(3) An employee or authorized representative provides a reasonable basis for believing that a hazard determination or protective measure is inadequate.

(4) An unauthorized entry into a PRCS.

(5) Detection of a hazard in or near a PRCS that is not addressed by the entry permit.

(6) Detection of a hazard level in or near a PRCS that exceeds the planned conditions specified in the entry permit.

(7) The occurrence, during an entry operation, of an injury, fatality or near-miss.

(c) If the contractor must reassess the confined space based on paragraphs (a) or (b) of this section, then the contractor must ensure that:

(1) All employees exit the confined space immediately.

(2) No employee reenters the space until the contractor:

(i) Identifies physical and atmospheric hazards in accordance with § 1926.1204(b).

(ii) Follows the classification procedures specified by § 1926.1206 (Classification and precautions).

(iii) Meets the accident-prevention and -protection requirements applicable to the space classification selected by the contractor before any employee reenters the space.

§ 1926.1208 Permit-required confined spaces.

(a) *Permit-required confined space (PRCS) classification requirements.* (1) A PRCS is a confined space that has any one of the following characteristics:

(i) A hazardous atmosphere; or

(ii) Inwardly converging, sloping, or tapering surfaces that could trap or asphyxiate an employee. For example, a space between walls that narrows towards the base (including, but not limited to, funnels and hoppers); or

(iii) In engulfment hazard or other physical hazard.

(2) The requirements for a confined space classified as a PRCS are:

(i) For each physical hazard that was identified using the procedures in § 1926.1204(b), the employer must determine an isolation method or a method of protecting employees from the physical hazard that meets applicable OSHA requirements.

(ii) For each atmospheric hazard that was identified using the procedures in § 1926.1205, the employer must determine an isolation method or a method for controlling the hazard at a safe level or protecting employees from the atmospheric hazard with personal protective equipment.

(b) *Planned conditions.* (1) Using the determinations made in paragraph (a)(2) of this section, the employer must define the conditions under which authorized entrants can work safely in the PRCS, including hazard levels and methods of employee protection (that is, ''planned conditions'').

(2) The employer must determine that, in the event the ventilation system stops working, the monitoring procedures will detect an increase in atmospheric hazard levels in sufficient time for the entrants to safely exit the PRCS.

§ 1926.1209 PRCS—initial tasks.

(a) *Notification and posting danger signs.* (1) The contractor must notify its employees that it anticipates will be in or near the PRCS and their authorized representative, and the controlling contractor, about the location of, and the hazards/dangers posed by, the PRCSs located at the job site.

(2) The employer must post a danger sign to warn employees about the PRCS. Posting signs at or near the entrances to the PRCS that read, ''Danger—Permit-Required Confined Space—Authorized Employees Only'' or ''Danger—Do Not Enter Without a Permit,'' or similar language, will meet this requirement. If the employer demonstrates that a sign is infeasible, then an equally effective means of warning employees must be used.

(b) *Prohibiting entry.* The employer must decide if employees will be authorized to enter the PRCS. Where no employees will be authorized to enter, the following steps must be taken:

(1) Use barriers to permanently close the PRCS.

(2) Post danger signs that comply with paragraph (a)(2) of this section.

(3) Inform the employees and the controlling contractor of the location of that PRCS and the steps used to prevent entry.

(c) *Limiting entry.* (1) Where one or more employees will be authorized to enter the PRCS, the employer must prevent the non-authorized employees from entering the PRCS by taking the following steps:

(i) Across the entrances to the PRCS, use barriers or high-visibility physical restrictions, such as warning lines with flags.

(ii) Post danger signs that comply with paragraph (a)(2) of this section.

(iii) Inform the non-authorized employees and the controlling contractor of the location of, and hazards in, the PRCS, and the steps used to prevent unauthorized entry.

(2) Only employees who are ''authorized entrants'' are to be permitted to enter the PRCS.

(d) *Training.* (1) The employer must ensure that employees the employer anticipates will be in or near a PRCS (*i.e.*, employees who have duties specified by the applicable sections of this standard (entry supervisors, attendants, authorized entrants, and rescue-service employees)) acquire the knowledge and skills necessary for the safe performance of these duties. This training must result in an understanding of the hazards in the PRCS and the methods used to isolate, control or in other ways protect employees from these hazards.

(2) *Hazards of rescue.* The employer must train employees the employer anticipates will be in or near a PRCS who are not authorized to perform entry rescues about the dangers of attempting such rescues.

(3) *When to train under paragraphs (d)(1) and (d)(2) of this section:*

(i) Prior to initial entry into the PRCS.

(ii) If an employee the employer anticipates will be in or near a PRCS receives a change in assigned duties that relate to maintaining the planned conditions, any additional training necessitated by the change in duties must be completed before the employee re-enters the PRCS.

(iii) If a new hazard is introduced or occurs in the PRCS for which the employees the employer anticipates will be in or near a PRCS received no previous training, the authorized entrant must exit the space immediately and this training must be completed before resuming work in the space.

(4) The employer must ensure that the employees the employer anticipates will be in or near a PRCS can demonstrate proficiency in the duties required by this standard, including new and revised PRCS procedures.

(5) *Training records.* The employer must maintain training records for each employee. The training records must:

(i) Show that the employee accomplished the training requirements specified above in paragraphs (d)(1) through (d)(4) of this section.

(ii) Contain the employee's name, names of the trainers, and dates of the training.

(6) *Retraining.* Before employees continue with PRCS entry operations, the employer must train those employees it has reason to believe:

(i) Deviated from the PRCS entry procedures specified in §§ 1926.1209 through 1926.1214 of this standard; or

(ii) Do not have adequate knowledge and skills of PRCS entry procedures.

(e) *Rescue preparations.* Before any authorized entrant enters the PRCS, the employer must complete arrangements for providing for the rescue of these employees in accordance with § 1926.1213.

(f) *Safe termination procedures.* For each PRCS that authorized entrants will enter, the employer must develop procedures for safely terminating entry operations under both planned and emergency conditions.

§ 1926.1210 PRCS—preparing for entry.

Before entry, the employer must ensure that the following requirements are met:

(a) *Entry permit.* Prepare and post an entry permit where the authorized entrants enter the PRCS. Entry permit requirements are in § 1926.1214.

(b) *Removing entrance covers.* Prior to removing an entrance cover, eliminate any condition (for example, high pressure in the PRCS) that makes it unsafe to remove the cover.

(c) *Guarding holes and openings.* Outside the space, when necessary to protect employees working in and around the space, promptly: use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR part 1926 subpart G (Signs, Signals, and Barricades).

(d) *Safe access.* Ensure that a safe method of entering and exiting a PRCS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements. If a hoisting system is used, it must be designed and manufactured for personnel hoisting; however, a job-made hoisting system is permissible if it is approved for personnel hoisting by a registered professional engineer prior to use.

(e) *Entry supervisor.* (1) Assign an entry supervisor to supervise PRCS entry operations.

(2) *Entry supervisor requirements.* Ensure that each entry supervisor:

(i) Knows the physical and atmospheric hazards in the PRCS.

(ii) Knows how these hazards enter the body (such as skin contact and inhalation), signs and symptoms, and characteristic effects (such as behavioral effects) of exposure to these hazards.

(iii) Verifies that the conditions in the PRCS are within the planned conditions as defined under § 1926.1208(b) and specified in the entry permit by checking the appropriate entries in the entry permit, verifying completion of the atmospheric testing specified in the entry permit, and verifying that any other procedures and equipment specified in the entry permit are in place.

(iv) Verifies that the rescue service is available and that the means for summoning the rescue service works.

(v) Signs the entry permit to authorize entry into the PRCS.

(vi) Terminates PRCS entry operations in accordance with § 1926.1212(b) (Supervisor requirements) of this standard.

(f) *Attendant.* (1) Assign an attendant to be stationed outside the PRCS for the duration of the entry operation.

(2) *Hazard awareness.* Ensure that each attendant knows:

(i) The physical and atmospheric hazards in the PRCS.

(ii) How the hazards enter the body (such as skin contact and inhalation), signs and symptoms, and characteristic effects (including behavioral effects) of exposure to these hazards.

(3) *Attending multiple PRCSs.* If a single attendant is assigned to monitor multiple PRCSs, then ensure that:

(i) The attendant can fully perform the duties specified by § 1926.1211(f) (Attendant duties).

(ii) The equipment and procedures are provided to enable an attendant to respond to an emergency affecting any of the PRCSs the attendant is monitoring.

(g) *Authorized entrant.* (1) Designate which employee(s) are authorized entrants in the PRCS.

(2) *Hazard awareness.* Ensure that each authorized entrant knows:

(i) The physical and atmospheric hazards in the PRCS.

(ii) How the hazards enter the body (such as skin contact and inhalation), signs and symptoms, and characteristic effects (such as behavioral effects) of exposure to these hazards.

(h) *Criteria for assigning simultaneous roles.* (1) Employees are prohibited from serving as authorized entrants and attendants simultaneously.

(2) Authorized entrants may serve simultaneously as entry supervisors only if the employer ensures that they meet the requirements of both §§ 1926.1210(e) (Entry supervisor) and 1926.1210(g) (Authorized entrant).

(3) Attendants may serve simultaneously as entry supervisors only if the employer ensures that they meet the requirements of both §§ 1926.1210(e) (Entry supervisor) and 1926.1210(f) (Attendant).

(i) [Reserved]

(j) *Equipment.* In addition to the equipment required in § 1926.1218, the employer shall provide and ensure the use of the following equipment:

(1) Communication equipment for compliance with paragraphs (f)(5), (g)(2) (entrant-to-attendant communication requirements), and (h)(2) (Entry rescue—when to summon) of § 1926.1211.

(2) Lighting equipment needed to comply with 29 CFR 1926.56 (Illumination).

(3) Railings, covers, or barriers as required in §§ 1926.1209(b) (Prohibiting entry) and (c) (Limiting entry), and 1926.1210(c) (Guarding holes and openings).

(4) Equipment, such as ladders, needed for safe entry to and exit from a PRCS.

(5) Rescue and emergency equipment required to comply with § 1926.1213 (PRCS—rescue criteria), unless a rescue service provides its own rescue and emergency equipment.

(6) Any other equipment necessary for safe rescue operations in or near PRCSs.

(k) Document the determinations made and the actions taken in paragraphs (b) through (j) of this section by entering the information in the entry permit as required in § 1926.1214(a).

§ 1926.1211 PRCS—during entry.

While any authorized entrant is in a PRCS, the employer must ensure that the following requirements are met:

(a) The physical and atmospheric hazards remain isolated or controlled, or the employees remain protected from them, in accordance with the determinations made in § 1926.1208 (Permit-required confined spaces).

(b) *Monitoring.* Atmospheric hazards are monitored as specified in § 1926.1205 (Atmospheric testing and monitoring). Monitoring must be continuous unless the employer can demonstrate that the equipment for continuously monitoring a hazard is not commercially available or that periodic monitoring is of sufficient frequency to ensure that the atmospheric hazard is being controlled at safe levels.

(c) The procedures and monitoring results in paragraphs (a) and (b) are documented by entering the information in the entry permit as stated in § 1926.1214(a).

(d) *Entry supervisor duties.* Each entry supervisor:

(1) Ensures that entry conditions are being properly monitored and that these conditions remain consistent with the planned conditions specified in the entry permit.

(2) Removes individuals who are not authorized entrants who enter, or who attempt to enter, a PRCS.

(3) *Evacuation.* Orders authorized entrants to exit the PRCS as quickly as possible if required under either paragraph (d)(3)(i) or (d)(3)(ii) of this section, as follows:

(i) The entry supervisor detects or learns of any of the following:

(A) An unplanned condition.

(B) Any sign, symptom, unusual behavior or other effect of a hazard in an authorized entrant.

(C) An evacuation alarm.

(D) A situation outside the PRCS that could endanger the authorized entrants.

(ii) The entry supervisor cannot effectively and safely perform all the duties required by § 1926.1210(e)(2) (Entry supervisor requirements) and cannot be immediately replaced.

(4) *Entry permit cancellation.* Cancels the entry permit upon the occurrence of any of the following:

(i) An evacuation is required under this section.

(ii) Any of the indications that require a reassessment under § 1926.1207(b).

(iii) The entry operations covered by the entry permit have been completed.

(e) *Transfer of supervisory responsibilities.* If responsibility for the entry operation is transferred to another entry supervisor, then the new entry supervisor must:

(1) Meet the requirements specified above in § 1926.1210(e)(2) (Entry supervisor requirements).

(2) Review the entry permit and verify that entry conditions are consistent with the planned conditions specified in the entry permit.

(3) Sign the entry permit.

(f) *Attendant duties.* Each attendant:

(1) Continuously maintains an accurate count of authorized entrants who are in the PRCS.

(2) Has a means to accurately identify authorized entrants who are in the PRCS (§ 1926.1214(a)(2)(ii)(A) specifies the means for doing so).

(3) Remains at a location outside the PRCS that allows the attendant to fully perform the duties and responsibilities specified in this section and does so until properly relieved by another attendant.

(4) Monitors entry conditions to determine if they are consistent with the entry permit.

(5) Communicates with authorized entrants as necessary to monitor entrant status and to alert entrants of the need to evacuate the PRCS as specified below in paragraph (g)(2) of this section.

(6) Monitors activities inside and outside the PRCS to determine if the PRCS remains safe for authorized entrants and informs the rescue service whenever a non-entry or entry rescue is required.

(7) Informs the employer if a non-entry or entry rescue begins or an authorized entrant may need medical aid or assistance in escaping from the PRCS.

(8) Performs non-entry rescue as required in paragraph (h)(1) of this section and in accordance with § 1926.1213(a) (Non-entry rescue criteria).

(9) Does not enter a PRCS for rescue purposes unless the employer: provides the attendant with the appropriate training and equipment specified below in § 1926.1213(c) (Protecting and training rescue-service employees), and ensures that another attendant properly relieves the attendant prior to performing the entry rescue.

(10) Performs no duties that could interfere with the primary duty to monitor and protect the authorized entrants.

(11) Warns any individual who is not an authorized entrant, and who approaches a PRCS during entry operations, to stay away from the PRCS. If the individual enters the PRCS, the attendant must tell the individual to exit immediately, and inform the authorized entrants and entry supervisor of the unauthorized entry.

(12) *Evacuation.* Orders authorized entrants to exit the PRCS as quickly as possible if required under either paragraph (f)(12)(i) or (f)(12)(ii) of this section, as follows:

(i) The attendant detects or learns of any of the following:

(A) An unplanned condition.

(B) Any sign, symptom, unusual behavior or other effect of a hazard in an authorized entrant.

(C) An evacuation alarm.

(D) A situation outside the PRCS that could endanger the authorized entrants.

(ii) The attendant cannot effectively and safely perform all the duties required by this section and cannot immediately be replaced.

(g) *Authorized entrant duties.* During PRCS entry operations, each authorized entrant:

(1) Properly uses the retrieval equipment required below in paragraphs (a)(2) through (a)(4) of § 1926.1213 (requirements for non-entry retrieval systems).

(2) Communicates with the attendant as necessary so that the attendant can monitor the authorized entrant's status and alert the entrant of the need to evacuate the PRCS, as required above in paragraph (f)(5) of this section (requirements for attendant-to-authorized entrant communications).

(3) Informs the attendant of any sign, symptom, unusual behavior or other effect of a hazard.

(4) *Evacuation.* Exits from the PRCS as quickly as possible if either:

(i) The entry supervisor or the attendant orders the authorized entrant to evacuate the PRCS; or

(ii) The authorized entrant detects or learns of any of the following:

(A) An unplanned condition (for example, a new hazard) in or near the PRCS.

(B) Any sign, symptom, unusual behavior or other effect of a hazard.

(C) An evacuation alarm.

(h) *Rescue.* Non-entry rescue and entry rescue is provided as follows:

(1) *Non-entry rescue.*

(i) Provide non-entry rescue capability during the period that authorized entrants are in the PRCS that meets the requirements of § 1926.1213(a).

(ii) Except where the conditions specified in paragraph (h)(1)(iii) of this section are present, non-entry rescue must be initiated if required under paragraphs (h)(1)(ii)(A) or (h)(1)(ii)(B) of this section, as follows:

(A) There is a need to evacuate pursuant to paragraphs (d)(3), (f)(12), or (g)(4) of § 1926.1211 and the employee is unable to evacuate without assistance; or

(B) There is a reasonable probability that an employee may need immediate medical aid and is unable to exit the PRCS without assistance.

(iii) Non-entry rescue shall not be initiated if doing so would present a greater hazard to the employee than sole reliance on entry rescue (for example, where the configuration of the space would cause the retrieval lines to not work or result in greater injury to the employee than injury from waiting for entry rescue).

(2) *Entry rescue—when to summon.* Ensure that an entry rescue service has been summoned immediately if any of the following occurs:

(i) A non-entry rescue is initiated.

(ii) There is a need to evacuate pursuant to paragraphs (d)(3), (f)(12), or (g)(4) of § 1926.1211 and the employee is unable to evacuate without assistance.

(iii) There is a reasonable probability that an employee may need immediate medical aid and is unable to exit the PRCS without assistance.

(iv) Non-entry rescue is prohibited under conditions specified in § 1926.1211(h)(1)(iii).

§ 1926.1212 PRCS—terminating entry.

(a) The employer must implement procedures for safely terminating PRCS entry operations under both planned conditions and in an emergency.

(b) *Entry supervisor requirements.* The employer must ensure that an entry supervisor terminates entry and cancels the entry permit upon expiration of the entry permit, completion of the entry operations covered by the permit, any of the indications that require reassessment under § 1926.1207(b), or an evacuation required under § 1926.1211(d)(3), whichever occurs first.

Note to § 1926.1212(b): After entry is terminated, no employees can reenter the space until the employer: Identifies the physical and atmospheric hazards in accordance with § 1926.1204(b); follows the classification procedures specified by § 1926.1206 (Classification and precautions); and meets the accident-prevention and -protection requirements applicable to the space classification selected by the employer.

§ 1926.1213 PRCS—rescue criteria.

(a) *Non-entry rescue criteria.* For non-entry rescue, the employer must meet the following requirements:

(1) Ensure that attendants and employees designated to perform non-entry rescue acquire the knowledge and skills necessary for the safe performance of non-entry rescue.

(2) Use a retrieval system that:

(i) Is available as soon as needed by the attendant or other rescue service.

(ii) Is designed and manufactured for personnel retrieval; however, a job-made hoisting system is permissible if it is approved for personnel hoisting by a registered professional engineer prior to use.

(iii) The attendant or other rescue service can operate effectively.

(iv) Has a chest or full-body harness and a retrieval line. The retrieval line must have:

(A) One end attached in a manner that allows the attendant or other rescue service to remove the entrant from the PRCS without causing further injury.

(B) The other end attached to a mechanical retrieval device or fixed anchor point outside the PRCS in a manner that allows rescue to begin as soon as the attendant or other rescue service detects or learns of the need for rescue. Movable equipment (for example, earth-moving equipment), that is sufficiently heavy to serve as an anchor point, may be used for this purpose only if effectively locked out or tagged out.

(3) For retrievals involving vertical distances over 5 feet (1.52 m), a mechanical retrieval device must be provided and used. This device must not be used for entry into the PRCS unless it is designed for that purpose.

(4) Equipment that is unsuitable for retrieval, including the following equipment, must not be used:

(i) Equipment that increases the overall risk of entry or impedes rescue of an authorized entrant.

(ii) Retrieval lines that have a reasonable probability of becoming entangled with the retrieval lines used by other authorized entrants, or will not work due to the internal configuration of the PRCS (see § 1926.1211(h)(1)(iii)).

(iii) Wristlets or ankle straps used as attachment points for retrieval lines, unless the employer can demonstrate that: Use of a harness is infeasible or creates a greater hazard for safe rescue than wristlets or ankle straps; and wristlets or ankle straps are the safest alternative available.

(5) Prior to beginning entry operations, ensure that the employees designated to perform non-entry rescue (including attendants, if applicable) have access to the PRCS the authorized entrant will enter or to a Simulated PRCS, so it can develop appropriate rescue plans and practice rescue operations.

(b) *Entry rescue: Preparing rescue-service employees.* (1) The employer must ensure that the entry rescue service can effectively perform entry-rescue tasks in the PRCSs the authorized entrant(s) will enter. Accordingly, the employer must ensure that the entry rescue service:

(i) Can respond to a rescue summons in a timely manner. Timeliness depends on how quickly serious physical harm may result from the physical or atmospheric hazards in the PRCS.

(ii) Prior to beginning entry operations, has access to the PRCS the authorized entrants will enter or to a Simulated PRCS so the entry rescue service can develop appropriate rescue plans and practice rescue operations.

(2) Prior to the entry rescue service entering a PRCS for any purpose, the employer must inform them of the physical and atmospheric hazards they are likely to encounter when performing rescue operations in the PRCS, and other relevant information actually known by the employer.

(c) *Protecting and training entry rescue-service employees.* Employers of entry rescue-service employees must:

(1) Provide them with the personal protective equipment (PPE) and rescue equipment (including retrieval lines if necessary) required to make safe rescues.

(2) Train them in the proper use of the PPE and rescue equipment.

(3) Train them to perform assigned rescue duties.

(4) Train them in basic first aid and in cardiopulmonary resuscitation (CPR).

(5) Ensure that at least one member of the entry rescue service who participates in the onsite rescue operations holds current certification in first aid (including CPR).

(6) Ensure that the entry rescue-service employees practice rescue operations at least once prior to beginning entry operations and at least once every 12 months thereafter. This practice must involve:

(i) Removing dummies/mannequins or individuals from the PRCS the authorized entrants will enter, or from a Simulated PRCS. In doing so, comply with the requirements of this standard that apply to the confined space used for this purpose.

(ii) Using the same PPE, retrieval, and rescue equipment they would use to perform retrieval or rescue operations in the PRCS.

(d) *Exemption from practice.* An employer is exempt from the requirement to practice rescue operations if the entry rescue-service employees properly performed a rescue operation during the last 12 months in the same PRCS the authorized entrant will enter, or in a similar PRCS.

§ 1926.1214 PRCS—entry permits.

(a) *Contents.* Employers must ensure that the entry permits for PRCSs include the following:

(1) *General information*—(i) An identification of the PRCS to be entered.

(ii) The purpose (including the tasks/job) of entering the PRCS.

(iii) The effective date and the authorized duration of the entry permit. The duration of the permit is prohibited from exceeding the time required to complete the tasks/job identified in paragraph (a)(1)(ii) of this section.

(2) *Planned conditions for entry*—(i) *Hazard information.*

(A) Identify the physical and atmospheric hazards the PRCS is subject to (that is, all physical and atmospheric hazards, regardless of how they have been isolated or controlled, or how authorized entrants are protected from them) consistent with the requirements of §§ 1926.1206 (Classifications and precautions) and 1926.1208(a) (Permit-required confined space (PRCS) classification requirements).

(B) State the methods used to isolate or control hazards, or used to protect authorized entrants from hazards in the PRCS. This information must be consistent with the requirements specified in §§ 1926.1208(a) (Permit-required confined space (PRCS) classification requirements) and 1926.1210 (PRCS—preparing for entry), and must include, as applicable, the methods used to isolate or control the hazards, the type of personal protective equipment provided, the methods used to monitor each hazard (including the use of early-warning systems, if required by § 1926.1215), and how frequently each hazard is to be monitored.

(C) State the atmospheric-testing and -monitoring results obtained in §§ 1926.1204(b) (requirements for determining confined-space hazards), 1926.1211 (PRCS—during entry), and 1926.1215(a)(1) (requirements for continuous atmospheric monitoring of CS–PRCSs). Include the type and brand of the equipment used, the names and signature/initials of the individuals who performed these functions, as well as the date and time (or time period, for continuous monitoring) they performed them.

(D) List the conditions under which authorized entrants can work safely in the PRCS, including hazard levels and methods of employee protection, consistent with the requirements specified in § 1926.1208(b) (Planned conditions). In addition, when applicable, the determinations made in paragraph (b)(2) of § 1926.1208.

(ii) *Personnel, equipment, and procedures.*

(A) Identify by name (or other effective identifier) each authorized entrant who is currently in the PRCS. This requirement can be met by referring in the entry permit to a system, such as a roster or tracking system, used to keep track of who is currently in the PRCS.

(B) List the names of the current attendants.

(C) Clearly indicate the name of the current entry supervisor and the entry supervisor who originally authorized entry into the PRCS. In addition, include the signatures or initials of both of these individuals.

(D) Identify the methods used during entry operations to maintain contact between authorized entrants and attendants.

(E) Identify the rescue service that will rescue workers during emergencies, and the methods for summoning this service, including the communication equipment to use and the telephone numbers to call.

(F) Identify the equipment needed (see §§ 1926.1210(j) (Equipment) and 1926.1218 (Equipment), and, for CS–PRCSs, § 1926.1215(b)).

(3) *Other information*—(i) Identify additional permits issued to perform authorized work in the PRCS (for example, hot-work permits).

(ii) Provide any other information necessary to ensure employee safety in or near the PRCS, including notations of any problems encountered.

Note to § 1926.1214(a): Appendix B to this subpart provides an example of an entry permit.

(b) *Annual PRCS review.* The employer must review, at least annually, PRCS entries made during the previous 12 months to determine if there are deficiencies in the employer's entry operation procedures. For this review, the employer must use:

(1) Canceled entry permits retained as required by § 1926.1219(b) (Retaining entry permits).

(2) Any other information retained regarding entry operations.

(c) *Retaining entry permits.* Entry permits must be kept in accordance with the requirements of § 1926.1219(b).

(d) *Canceling entry permits.* Entry permits must be cancelled in accordance with § 1926.1211(d)(4).

§ 1926.1215 Continuous System—PRCS.

(a) For a Continuous System-PRCS (CS–PRCS), the employer must complete all requirements in §§ 1926.1208 through 1926.1214, as well as:

(1) Monitor continuously for atmospheric hazards; employers may use periodic monitoring for monitoring an atmospheric hazard if they can demonstrate that equipment for continuously monitoring that hazard is not commercially available.

(2) Monitor continuously for non-isolated engulfment hazards using an early-warning system. The system must alert authorized entrants and attendants in sufficient time for the authorized entrants to safely exit the CS–PRCS.

(b) *Equipment.* In addition to the equipment required in §§ 1926.1210(j) and 1926.1218, the employer shall also provide:

(1) Equipment necessary for monitoring of atmospheric hazards.

(2) An early-warning system for continuous monitoring of non-isolated engulfment hazards. The system must alert authorized entrants and attendants in sufficient time for the authorized entrants to safely exit the CS–PRCS.

§ 1926.1216 Controlled-atmosphere confined spaces—requirements for classification and accident prevention and protection.

(a) The requirements for classifying a Controlled-Atmosphere Confined Space (CACS) are:

(1) For each physical hazard that was identified using the procedures specified in § 1926.1204(b), determine and implement an isolation method.

(2) Ventilation.

(i) Test the atmosphere while using ventilation equipment to verify that ventilation alone is sufficient to control these atmospheric hazards at safe levels. Ventilation must consist of continuous forced-air mechanical systems that meet the requirements of 29 CFR 1926.57 (Ventilation).

(ii) Determine that, in the event the ventilation system stops working, the monitoring procedures will detect an increase in atmospheric hazard levels in sufficient time for the entrants to safely exit the CACS.

Note to § 1926.1216(a)(2)(ii): The following paragraph requires documentation of this determination.

(3) Document that all physical hazards have been isolated and that ventilation alone is sufficient to control the atmospheric hazards. The documentation must contain: The location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, date and time the

physical hazards were isolated and name and signature/initials of the individual who completed the isolation work, the identity and safe levels of the atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-testing results, date and time of atmospheric testing and the name and signature/initials of the individual who completed the atmospheric testing, the determinations made under paragraph (a)(2)(ii) of this section, name and signature/initials of the person who completed this document, and the date and time the document was completed. The documentation shall be made available by posting or other methods to each employee entering the space and to that employee's authorized representative.

Note to § 1926.1216(a)(3): Appendix B to this subpart provides an example of a verification document.

(b) *Accident-prevention and protection requirements*. The employer must:

(1) *Notification and posting danger signs*.

(i) Notify the employees that the employer anticipates will be in or near the CACS and their authorized representatives about the location of, and the dangers posed by, all CACSs located at the job site.

(ii) Post danger signs to notify employees about a CACS. Posting signs near the outside entrances to the CACS that read, ''Danger—Controlled-Atmosphere Confined Space—Authorized Employees Only,'' or similar language, will meet this requirement. If the employer demonstrates that a sign is infeasible, then it must use an equally effective means of warning employees.

(2) *Training*. (i) Ensure that each of its employees who enter a CACS acquires the knowledge and skills necessary for the safe performance of CACS entry operations. This training must result in an understanding of the hazards in the CACS that the employee will enter, the methods used to isolate or control these hazards, and recognition of signs, symptoms, and characteristic effect (such as behavioral effects) of exposure to these hazards.

(ii) *Hazards of rescue*. Train the employees that the employer anticipates will be in or near the CACS and not authorized to perform entry rescues about the dangers of such rescues.

(iii) *When to train under paragraphs (b)(2)(i) and (b)(2)(ii) of this section:*

(A) Prior to the employee's initial entry.

(B) If an employee the employer anticipates will be in or near a CACS receives a change in assigned tasks and additional training is necessitated by the change in tasks, any additional training that relates to maintaining the conditions necessary to comply with the requirements of the CACS classification must be completed before the employee enters the CACS to perform these newly assigned tasks.

(C) If a new hazard is introduced or occurs in the CACS for which the employee received no previous training, the employee must exit the space and complete the training before resuming work in the space.

(iv) Ensure that the employee can demonstrate proficiency in the duties required by this standard, including new and revised procedures.

(v) *Training records*. Maintain training records for each employee. The training records must:

(A) Show that the employee accomplished the training requirements specified in paragraph (b)(2) of this section before entering a CACS.

(B) Contain the employee's name, names of the trainers, and dates of the training.

(c) *General preparations for entry*. Before any employee enters a CACS, the employer must:

(1) Prior to removing an entrance cover, eliminate any condition (for example, high pressure in the space) that makes it unsafe to remove the entrance cover.

(2) Outside the space, when necessary to protect employees working in and around the space, promptly: Use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR Part 1926 subpart G (Signs, Signals, and Barricades).

(3) Ensure that a safe method of entering and exiting a CACS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements. If a hoisting system is used, it must be designed and manufactured for personnel hoisting; however, a job-made hoisting system is permissible if it is approved for personnel hoisting by a registered professional engineer prior to use.

(d) *Before entry*. Immediately before any employee enters a CACS, the employer must:

(1) Ensure that the physical hazards identified in § 1926.1204(b) remain isolated.

(2) Test for atmospheric hazards as specified in § 1926.1205(a) to ensure that the ventilation is controlling the atmospheric hazards at safe levels.

(3) Control the atmospheric hazards at safe levels using ventilation alone. Ventilation must consist of continuous forced-air mechanical systems that meet the requirements of 29 CFR 1926.57 (Ventilation).

(4) Document that the physical hazards are isolated and the atmospheric hazards are being controlled. The documentation must contain: The location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity and safe level of atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-testing results, date and time of atmospheric testing and the name and signature/initials of the individual who completed the atmospheric testing, name and signature/initials of the individual who completed this document, and the date and time the document was completed. The documentation shall be made available by posting or other methods to each employee entering the space and to that employee's authorized representative.

(e) *During entry*. While any employee is in a CACS, the employer must:

(1) Ensure that the physical hazards identified above in § 1926.1204(b) remain isolated.

(2) Ensure that ventilation alone is controlling atmospheric hazards at safe levels by monitoring for atmospheric hazards as specified above in § 1926.1205(a) (requirements for atmospheric testing and monitoring). Monitoring must be continuous unless the employer can demonstrate that the equipment for continuously monitoring a hazard is not commercially available or periodic monitoring is sufficient. Where periodic monitoring is used, it must be of sufficient frequency to ensure that atmospheric hazards are being controlled at safe levels.

(3) Document the determinations made above in paragraphs (e)(1) and (e)(2) of this section by completing a written verification that contains: The location of the CACS, identity of the physical hazards, methods for isolating the physical hazards, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity and safe level of atmospheric hazards, methods for controlling the atmospheric hazards, atmospheric-monitoring

results, date and time of atmospheric monitoring and the name and signature/initials of the individual who completed the atmospheric monitoring, name and signature/initials of the individual who completed this document, and the date and time the document was completed. The documentation shall be made available by posting or other methods to each employee entering the space and to that employee's authorized representative.

(f) *Emergencies*. In the event an emergency occurs during entry operations, including the presence of a non-isolated physical hazard or atmospheric hazard at unsafe levels, then the employer must:

(1) Ensure that the employees exit the CACS immediately.

(2) Identify the physical and atmospheric hazards in accordance with § 1926.1204(b).

(3) Using the information obtained in the preceding provision, follow the classification procedures specified by § 1926.1206 (Classification and precautions), and meet the accident-prevention and -protection requirements applicable to the space classification selected by the employer before any employee reenters the space.

§ 1926.1217 Isolated hazard confined spaces—requirements for classification and accident prevention and protection.

(a) The requirements for classifying a confined space as an Isolated-Hazard Confined Space (IHCS) are:

(1) For each physical hazard that was identified using the procedures in § 1926.1204(b), determine and implement an isolation method.

(2) For each atmospheric hazard that was identified using the procedures in § 1926.1205(a), determine and implement an isolation method.

(3) The employer must accomplish the isolation of the hazards in paragraphs (a)(1) and (a)(2) of this section without entering the IHCS, unless it can demonstrate that this is infeasible. If it is infeasible to do this work without entering the IHCS, then the employer must follow the requirements for a PRCS (§§ 1926.1208 through 1926.1214) and, if applicable, for a CS–PRCS (§ 1926.1215) to protect employees entering the space to do this work.

(4) Document that isolation of all hazards has been accomplished. The documentation must contain: The location of the IHCS, identity of the physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated and name and signature/initials of the individual who completed the isolation work, the identity of atmospheric hazards, methods for isolating the atmospheric hazards, the date and time the atmospheric hazards were isolated and the name and signature/initials of the individual who completed the isolation work, name and signature/initials of the individual who completed this document, and the date and time the document was completed. The documentation shall be made available by posting or other methods to each employee entering the space and to that employee's authorized representative.

(b) *Training*. Before any employee enters an IHCS, the employer must:

(1) Ensure that the employee acquires the knowledge and skills necessary to recognize signs, symptoms, and characteristic effects (such as behavioral effects) of exposure to these hazards. This training must also result in an understanding of the methods used to isolate these hazards.

(2) *Hazards of rescue*. Train employees the employer anticipates will be in or near the IHCS and not authorized to perform entry rescues about the dangers of attempting such rescues.

Note to § 1926.1217(b): No documentation is required for this training.

(c) *General preparations for entry*. Before any employee enters an IHCS, the employer must:

(1) Prior to removing an entrance cover, eliminate any condition (for example, high pressure in the space) that makes it unsafe to remove the entrance cover.

(2) Outside the space, when necessary to protect employees working in and around the space, promptly: Use guardrails or covers as specified in 29 CFR 1926.502 (Fall protection systems criteria and practices) of subpart M (Fall Protection) to guard holes and openings into the space from falling individuals and objects and institute measures to control pedestrian and vehicle traffic in accordance with the requirements in 29 CFR part 1926 subpart G (Signs, Signals, and Barricades).

(3) Ensure that a safe method of entering and exiting an IHCS (such as stairways or ladders) is provided and used, and that it meets applicable OSHA requirements. If a hoisting system is used, it must be designed and manufactured for personnel hoisting; however, a job-made hoisting system is permissible if it is approved for personnel hoisting by a registered professional engineer prior to use.

(d) *Before entry*. Before any employee enters an IHCS, the following must be met:

(1) Ensure that the physical hazards identified above in § 1926.1217(a)(1) (requirements for isolating physical hazards) are isolated.

(2) Ensure through testing that the atmospheric hazards identified above in paragraph (a)(2) of this section are isolated.

(3) Document the determinations made and the actions taken above in paragraphs (d)(1) and (d)(2) of this section by completing a written verification that contains: The location of the IHCS, identity of the physical hazards, methods for isolating the physical hazards, date and time the physical hazards were isolated, date and time of determining that physical hazards remain isolated and the name and signature/initials of the individual who made this determination, identity of the atmospheric hazards, methods for isolating the atmospheric hazards, date and time the atmospheric hazards were isolated, date and time of determining that atmospheric hazards remain isolated and the name and signature/initials of the individual who made this determination, name and signature/initials of the individual who completed this document, and date and time the document was completed. The documentation shall be made available by posting or other methods to employees entering the space and to the employees' authorized representative.

(e) *During entry*—(1) *Hazard isolation*. Once any employee enters an IHCS, the employer must ensure that the physical and atmospheric hazards identified above in § 1926.1217(a) (requirements for classifying IHCSs) remain isolated.

(2) *Emergencies*. In the event an emergency occurs during entry operations, including the presence of a non-isolated physical or atmospheric hazard, then the employer must:

(i) Ensure that the employees exit the IHCS immediately.

(ii) Identify the physical and atmospheric hazards in accordance with § 1926.1204(b).

(iii) Using the information obtained in the preceding provision, follow the classification procedures specified by § 1926.1206 (Classification and precautions), and meet the accident-prevention and -protection requirements applicable to the space classification selected by the employer before any employee reenters the space.

§ 1926.1218 Equipment.

(a) The employer must provide and ensure the use of the following equipment:

(1) Atmospheric-testing and -monitoring equipment needed to comply with this standard.

(2) Forced-air mechanical ventilation equipment where needed to meet the requirements of this standard.

(3) Personal protective equipment, including respirators, if needed to comply with this standard. If employees use respirators, then the respirator requirements in 29 CFR 1926.103 (Respiratory protection) must be met.

(4) Any other equipment necessary for safe confined space operations.

Note to § 1926.1218(a): There are additional equipment requirements for PRCSs (§ 1926.1210(j)) and for C–PRCSs (§ 1926.1215(b)).

(b) *Equipment maintenance, calibration, and use.* The employer shall ensure that all equipment needed to comply with this standard is maintained, calibrated, and used as specified by:

(1) Applicable OSHA requirements.

(2) In the absence of applicable OSHA requirements, in accordance with:

(i) The manufacturer's instructions; or

(ii) If manufacturers' instructions are not available, the recommendations of a qualified individual as defined by 29 CFR 1926.32(m).

§ 1926.1219 Records.

(a) *Copy of this standard.* For sites where there is a confined space, the employer must maintain a copy of this standard at the site. Alternatively, the employer may maintain a copy of a written confined space program at the site that incorporates the requirements of this standard.

(b) *Retaining entry permits.* The employer must retain entry permits for at least one year from the date the permit is cancelled.

Note to § 1926.1219(b): With regard to retention and access to employee exposure records, the employer must comply with the requirements of 29 CFR 1910.1020 (Access to employee exposure and medical records), which are made applicable to construction by 29 CFR 1926.33.

(c) The employer must maintain training records, as specified in §§ 1926.1209(d)(5) (PRCSs) and 1926.1216(b)(2)(v) (CACSs), for the period of time the employee is employed by them.

(d) The employer must maintain verification documents required in §§ 1926.1216(a)(3), (d)(4), and (e)(3) (CACSs) and 1926.1217(a)(4) and (c)(3) (IHCSs) until the work in the confined space is completed.

Note to § 1926.1219(d): With regard to retention and access to employee exposure records, the employer must comply with the requirements of 29 CFR 1910.1020 (Access to employee exposure and medical records), which are made applicable to construction by 29 CFR 1926.33.

(e) The employer must make the documents required to be retained in this standard available on request to the Secretary of Labor or the Secretary's designee.

Appendix A to Subpart AA of Part 1926—List of Confined-Space Requirements in Other Construction Standards That Supplement the Requirements of Subpart AA (Mandatory)

The construction standards listed below have confined-space requirements for the performance of specific activities and equipment. Employers must comply with these provisions, as well as this subpart.

Subpart D—Occupational Health and Environmental Controls

Process safety management requirements: §§ 1926.64(f)(4) and (j) HAZWOPER requirements: §§ 1926.65(b)(4)(ii)(I), (c) through (p), and (j)(9).

Subpart J—Welding and Cutting

§§ 1926.353(a), (b), (c), (d), and (e).

Subpart V—Power Distribution and Transmission

§§ 1926.956(a) and (b).

BILLING CODE 4510–26–P

APPENDIX B TO SUBPART AA OF PART 1926—SAMPLE ENTRY PERMIT FOR PRCSS AND CS-PRCSS AND SAMPLE VERIFICATION DOCUMENT FOR CACSS AND IHCSS (NON-MANDATORY)

Sample Entry Permit for PRCSs and CS-PRCSs

ENTRY PERMIT PSEUDO CONSTRUCTION CO.
GENERAL INFORMATION
Identity (e.g., location) of the space: 1500 K Street, northwest corner.
Purpose of entry: Replace communication cable in sewer line.
Duration of entry: First entry on January 22, 2007; complete work and terminate entry operations on January 26, 2007.
Identify the physical hazards in the space: (1) Engulfment—sewer water. (2) Electrical—communication cables.
Describe the methods for isolating or controlling the physical hazards, or used to protect authorized entrants: (1) Engulfment—Disconnect and lockout all sewer-system overflow pumps, and disconnect, blind, and lockout, all water lines, within 100 feet of the work area, including lateral lines. (2) Electrical—deenergize, tag, and ground all communication cables in work area. Use heavy duty, insulated work gloves for handling cables and conduits.
Identify the atmospheric hazards in the space (e.g., oxygen deficiency, flammable/explosive gases/vapors, others (including toxic particulates, gases, and vapors)): (1) Oxygen deficiency—possibility that oxygen level may be less than 19.5%. (2) Flammable/explosive gases/vapors—methane may be present. (2) Other—hydrogen sulfide may be present.
Describe the methods for isolating or controlling the atmospheric hazards, or used to protect authorized entrants: Space ventilation—mechanical ventilation systems set at 100% outside air. Where possible, open additional manholes to increase air circulation. Use portable blowers to augment natural ventilation if needed. Repeat atmospheric testing after ventilating the space for 10 mins.
Describe the determination made to show that if the ventilation system stops working, atmospheric hazards will remain at safe levels long enough for entrants to recognize the

ENTRY PERMIT
PSEUDO CONSTRUCTION CO.

problem and safely exit the space: Fully ventilated the unoccupied space and got non-detect readings for methane and hydrogen sulfide. After securing the mechanical ventilation system, ports, and portable blowers, found that both methane and hydrogen sulfide reached maximum limits in two hours, which is well outside the 60-minute period used to monitor and record atmospheric-hazard values in the space.

PLANNED CONDITIONS

Safe conditions and/or monitoring determined for physical hazards:
(1) Water levels—pooling water level inside PRCS not to exceed 2 inches; survey PRCS every hour to assess pooling water level and seeping water from piping and sewer.
(2) Electrical—visually confirm every hour that electrical cables remain disconnected and tagged.
(3) Early-warning system—when alarm sounds, evacuate authorized employees immediately.

Safe levels of atmospheric hazards:

Hazard	Minimum limit	Maximum limit
Oxygen	19.50%	23.00%
Flammable gas/vapors (specify): (1) Methane	0% LEL	10% LEL
Others (specify): (1) Hydrogen sulfide	0 ppm	20 ppm

Atmospheric-testing/-monitoring results: (see attachment)

PERSONNEL

Current Entry Supervisor:
Name: ~~S. Smith~~ Signature/initial: /s/
Name: J. Jones Signature/initial: /s/
Name: Signature/initial:
Name: Signature/initial:
Name: Signature/initial:

Current Attendants:
Name: ~~J. James~~ Name:
Name: B. Bills Name:
Name: Name:
Name: Name:
Name: Name:

Authorized entrants: Refer to daily tracking roster for names of authorized entrants.

Identity of the rescue service: Washington, DC Fire and Rescue Service, Station 1. Each attendant and entry supervisor has cell phone pre-programmed with DC Fire and Rescue Service emergency hotline number (e.g., 202-123-4567).

Name and signature/initials of the entry supervisor who first verified this entry permit and authorized initial entry into this PRCS:

ENTRY PERMIT
PSEUDO CONSTRUCTION CO.

Name: S. Smith Signature/initials: /s/
Date and time of first verification: January 22, 2007; 7:00 AM

EQUIPMENT

Methods of communication between attendants and authorized entrants: Attendant and authorized entrants will use Type X walkie-talkies.

Equipment Needed:
(1) Lighting equipment: two explosion-proof and water-proof lights with 50-ft. extension cords.
(2) Ventilation: one explosion-proof blower and 15-foot of duct.
(3) Heating: N/A
(4) Guardrails, barriers, and covers: one portable guardrail and tent assembly.
(5)Controlled descent/retrieval systems: N/A
(6) Ladders: a 16-foot fixed ladder for access/egress.
(7) Scaffolding: N/A
(8) Early warning system: remote high-water-level detector and alarm installed 100 yards upstream from the work area in the inflow conduit.
(9) Emergency equipment: one emergency-retrieval system with adjustable harness and 50-foot of retrievable lanyard.
(10) Other: portable gas-powered electric generator with GFCI.

OTHER INFORMATION

Information not documented elsewhere on this permit (see section 1926.1210(k):
(1) Describe any condition making it unsafe to remove an entrance cover, and how the condition was eliminated: Determined that the entrance cover was vented, which eliminated the potential for a hazardous pressure conditions to exist in the space.
(2) Describe any actions taken to guard holes and openings into the space from falling individuals and objects: A portable guardrail system was erected around the entry point, in addition to placing warning cones to divert pedestrian traffic around the space.
(3) Describe the method used for entering and exiting the space: A 16-foot fixed ladder.

Additional information:
Hot-work permit issued for welding work.

ENTRY PERMIT CANCELLATION

Reason for cancellation: Completed work in PRCS.

Name and signature/initials of the individual who cancelled the entry permit:
Name: J. Jones Signature/initials: /s/
Date and time this entry permit was cancelled: January 26, 2007; 4:00 PM

ATTACHMENT
ATMOSPHERIC-TESTING/-MONITORING RESULTS
PSEUDO CONSTRUCTION CO.

INSTRUCTIONS: Use this attachment to document the results of, and the procedures involved in, collecting atmospheric-testing/-monitoring results. Note that providing information about the equipment used to collect atmospheric-testing/-monitoring samples is not mandatory, but would be useful in assuring that the samples are reliable. After documenting the information in the first sample about the type of confined space, purpose of the atmospheric testing/monitoring, type of monitoring used, and the equipment used to collect the samples, it is unnecessary to provide this information for subsequent samples unless the information changes.

SAMPLE #1:

Type of confined space:
___ PRCS
_X_ CS-PRCS

Purpose of the atmospheric testing/monitoring:
_X_ worksite evaluation (section 1926.1204(b))
___ during entry (section 1926.1211(b) or section 1926.1215(a)(1))

Type of atmospheric monitoring used: _X_ Periodic ___ Continuous
Note: If using continuous monitoring, a printed record may be substituted for this attachment if it contains the information listed below and conforms to the procedures described above in the instructions.

Equipment used to collect samples (nonmandatory):
Equipment type and brand: Gas monitor; Speedogas
Model #: 500 Z Calibration time and date: 4:00 PM, January 19, 2007

Name and signature/initials of individual collecting the sample:
Name: A. Ables Signature/initials: /s/
Date and time sample collected: 7:30 AM, January 22, 2007

Results: Oxygen = 20%; methane = 5% LEL; hydrogen sulfide = 5 ppm

SAMPLE #2:

Type of confined space:
___ PRCS
___ CS-PRCS

Purpose of the atmospheric monitoring:
___ worksite evaluation (section 1926.1204(b))
___ during entry (section 1926.1211(b) or section 1926.1215(a)(1))

ATTACHMENT
ATMOSPHERIC-TESTING/-MONITORING RESULTS
PSEUDO CONSTRUCTION CO.

Type of monitoring used: ___ Periodic ___ Continuous
Note: If using continuous monitoring, a printed record may be substituted for this attachment if it contains the information listed below and conforms to the procedures described above in the instructions.

Equipment used to collect samples (nonmandatory):
Equipment type and brand: _____
Model #: _____ Calibration time and date: _____

Name and signature/initials of individual collecting the sample:
Name: A. Ables Signature/initials: /s/
Date and time sample collected: 8:30 AM, January 22, 2007

Results: Oxygen = 20.5%; methane = 4.1% LEL; hydrogen sulfide = 3.6 ppm

(Add more pages as necessary)

Sample Verification Document for CACSs and IHCSs

VERIFICATION DOCUMENT
PSEUDO CONSTRUCTION CO.

INSTRUCTIONS

Complete this document when verifying (1) CACS determinations made for space classification (section 1926.1216(a)(3)), before entry (section 1926.1216(d)(4)), and during entry (section 1926.1216(e)(3)), or (2) IHCS determinations made for space classification (section 1926.1217(a)(4)) and before entry (1926.1217(d)(3)). It is necessary to provide the information under the sections of this document titled "General Information," "Physical Hazards," and "Atmospheric Hazards" only once, unless the information changes for one of the CACS or IHCS determinations; in that case, attach a new verification document to this document, add the changed information, and use the new document to continue the verification-documentation process. If the information remains the same from one determination to the next, it is only necessary to verify the information for the appropriate type of space and purpose listed under "Document Verification" near the end of this document.

GENERAL INFORMATION

VERIFICATION DOCUMENT
PSEUDO CONSTRUCTION CO.

Type of confined space covered by this document: X CACS __ IHCS

For both CACSs and IHCSs, provide the location of the confined space: 1500 K Street, northwest corner.

PHYSICAL HAZARDS

For both CACSs and IHCSs, identify the physical hazards in the space:
(1) Electrical—power line.

For both CACSs and IHCSs, describe the methods for isolating the physical hazards:
(1) Electrical—In accordance with 29 CFR subpart K, deenergize the line at the distribution panel and lock out and tag out the switch at the panel.

ATMOSPHERIC HAZARDS

For CACSs, identify the atmospheric hazards and the safe levels of these hazards; for IHCSs, identify the atmospheric hazards only:

Hazard	Minimum limit	Maximum limit
Oxygen	19.50%	23.00%
Flammable gas/vapors (specify): (1) Methane	0% LEL	10% LEL
Others (specify): (1) Hydrogen sulfide	0 ppm	20 ppm

For CACSs only, describe the methods for controlling the atmospheric hazards:
Space ventilation—mechanical ventilation systems set at 100% outside air. Where possible, open additional ports to increase air circulation. Use portable blowers to augment natural ventilation if needed. Repeat atmospheric testing after ventilating the space for 10 mins.

For CACSs only, atmospheric-testing/-monitoring results: (see attachment)

For CACS classification purposes only under section 1926.1216(a)(3), describe the determination made to show that if the ventilation system stops working, atmospheric hazards will remain at safe levels long enough for entrants to recognize the problem and safely exit the space: Fully ventilated the unoccupied space and got non-detect readings for methane and hydrogen sulfide. After securing the mechanical ventilation system, ports, and portable blowers, found that both methane and hydrogen sulfide reached maximum limits in two hours, which is well outside the 60-minute period used to monitor and record atmospheric-hazard values in the space.

For IHCSs only, describe the methods for isolating the atmospheric hazards:

DOCUMENT VERIFICATION
(Provide verifications only for the appropriate type of space and purpose)

VERIFICATION DOCUMENT
PSEUDO CONSTRUCTION CO.

Type of space: CACS
Purpose: Verify determinations made for space classification
(section 1926.1216(a)(3))

Name and signature/initials of the individual who completed isolating the physical hazards:
Name: S. Smith Signature/initials: /s/
Date and time isolation work completed: 6:30 AM, January 22, 2007

Name and signature/initials of the individual who completed this verification document:
Name: J. Jones Signature/initials: /s/
Date and time verification document completed: 7:00 AM, January 22, 2007

Type of space: CACS
Purpose: Verify determinations made before entry
(section 1926.1216(d)(4))

Name and signature/initials of the individual who determined the physical hazards remain isolated:
Name: _____ Signature/initials: _____
Date and time determination made: _____

Name and signature/initials of the individual who completed this verification document:
Name: _____ Signature/initials: _____
Date and time verification document completed: _____

Type of space: CACS
Purpose: Verify determinations made during entry

(section 1926.1216(e)(3))

Name and signature/initials of the individual who determined the physical hazards remain isolated:
Name: _____ Signature/initials: _____
Date and time determination made: _____

Name and signature/initials of the individual who completed this verification document:
Name: _____ Signature/initials: _____
Date and time verification document completed: _____

Type of space: IHCS
Purpose: Verify determinations made for space classification
(section 1926.1217(a)(4))

VERIFICATION DOCUMENT
PSEUDO CONSTRUCTION CO.

Name and signature/initials of the individual who completed isolating the physical hazards:
Name: _____ Signature/initials: _____
Date and time isolation work completed: _____

Name and signature/initials of the individual who completed isolating the atmospheric hazards:
Name: _____ Signature/initials: _____
Date and time isolation work completed: _____

Name and signature/initials of the individual who completed this verification document:
Name: _____ Signature/initials: _____
Date and time verification document completed: _____

Type of space: IHCS
Purpose: Verify determinations made before entry
(section 1926.1217(d)(3))

Name and signature/initials of the individual who determined the physical hazards remain isolated:
Name: _____ Signature/initials: _____
Date and time determination made: _____

Name and signature/initials of the individual who determined the atmospheric hazards remain isolated:
Name: _____ Signature/initials: _____
Date and time isolation work completed: _____

Name and signature/initials of the individual who completed this verification document:
Name: _____ Signature/initials: _____
Date and time verification document completed: _____

ATTACHMENT
ATMOSPHERIC-TESTING/-MONITORING RESULTS
PSEUDO CONSTRUCTION CO.

INSTRUCTIONS: Use this attachment to document the results of, and the procedures involved in, collecting atmospheric-testing/-monitoring results for (1) CACS determinations made for space classification (section 1926.1216(a)(3)), before entry

ATTACHMENT
ATMOSPHERIC-TESTING/-MONITORING RESULTS
PSEUDO CONSTRUCTION CO.

(section 1926.1216(d)(4)), and during entry (section 1926.1216(e)(3)), or (2) IHCS determinations made for space classification (section 1926.1217(a)(4)) and before entry (1926.1217(d)(3)). Note that providing information about the equipment used to collect atmospheric-testing/-monitoring samples is not mandatory, but would be useful in assuring that the samples are reliable. After documenting information in the first sample about the type of confined space, purpose of the atmospheric testing/monitoring, type of monitoring used, and the equipment used to collect the samples, it is unnecessary to provide this information for subsequent samples unless the information changes for one of the CACS or IHCS determinations.

SAMPLE #1:

Type of confined space:
_X_ CACS
___ IHCS

Purpose of the atmospheric testing/monitoring:
_X_ for classification
___ before entry
___ during entry

Type of monitoring used: _X_ Periodic ___ Continuous
Note: If using continuous monitoring, a printed record may be substituted for this attachment if it contains the information listed below and conforms to the procedures described above in the instructions.

Equipment used to collect samples (nonmandatory):
Equipment type and brand: Gas monitor; Speedogas
Model #: 500 Z Calibration time and date: 4:00 PM, January 19, 2007

Name and signature/initials of individual collecting the sample:
Name: A. Ables Signature/initials: /s/
Date and time sample collected: 7:30 AM, January 22, 2007

Results: Oxygen = 20%; methane = 5% LEL; hydrogen sulfide = 5 ppm

SAMPLE #2:

Type of confined space:
___ CACS
___ IHCS

Purpose of the atmospheric testing/monitoring:

ATTACHMENT
ATMOSPHERIC-TESTING/-MONITORING RESULTS
PSEUDO CONSTRUCTION CO.

___ for classification
___ before entry
___ during entry

Type of monitoring used: ___ Periodic ___ Continuous
Note: If using continuous monitoring, a printed record may be substituted for this attachment if it contains the information listed below and conforms to the procedures described above in the instructions.

Equipment used to collect samples (nonmandatory):
Equipment type and brand: _____
Model #: _____ Calibration time and date: _____

Name and signature/initials of individual collecting the sample:
Name: A. Ables Signature/initials: /s/
Date and time sample collected: 8:30 AM, January 22, 2007

Results: Oxygen = 20.5%; methane = 4.1% LEL; hydrogen sulfide = 3.6 ppm

(Add more pages as necessary)

[FR Doc. E7–21893 Filed 11–27–07; 8:45 am]
BILLING CODE 4510–26–C

Federal Register

Wednesday,
November 28, 2007

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for 12 Species of Picture-Wing Flies From the Hawaiian Islands; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU93

Endangered and Threatened Wildlife and Plants; Revised Proposed Designation of Critical Habitat for 12 Species of Picture-Wing Flies From the Hawaiian Islands

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), revise our August 15, 2006, proposal to designate critical habitat for 12 species of Hawaiian picture-wing flies (*Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera*, and *D. tarphytrichia*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 9,238 acres (ac) (3,738 hectares (ha)) fall within the boundaries of this revised proposed critical habitat designation. The revised proposed critical habitat is located in four counties (City and County of Honolulu, Hawaii, Maui, and Kauai) in Hawaii.

DATES: We will accept comments from all interested parties until January 28, 2008. We must receive requests for public hearings, in writing, at the address shown in the **ADDRESSES** section by January 14, 2008.

ADDRESSES: If you wish to comment on this revised proposed rule, you may submit your comments and materials by any one of several methods:

1. By mail or hand-delivery to: Patrick Leonard, Field Supervisor, Pacific Islands Fish and Wildlife Office, U.S. Fish and Wildlife Service, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, HI 96850.
2. By electronic mail (e-mail) to: *fw1pie_pwfch@fws.gov*. Please see the Public Comments Solicited section below for other information about electronic filing.
3. By fax to: the attention of Patrick Leonard at 808–792–9581.
4. Via the Federal eRulemaking Portal at: *http://www.regulations.gov*. Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Patrick Leonard, Field Supervisor, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, HI 96850; telephone 808–792–9400; facsimile 808–792–9581. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this revised proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this revised proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act, including whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent;

(2) Specific information on:

- The amount and distribution of *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera*, and *D. tarphytrichia* habitat,
- What areas occupied at the time of listing and that contain the features essential for the conservation of the species we should include in the designation and why, and
- What areas not occupied at the time of listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts;

(5) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments; and

(6) Our proposed exclusion of 78 acres (ac) (31 hectares (ha)) of lands currently managed under the U.S. Army's Oahu Integrated Natural Resources Management Plan (INRMP), and whether this INRMP provides a benefit to the species and should therefore exempt these lands from designation.

You may submit your comments and materials concerning this revised proposal by any one of several methods (see **ADDRESSES**). If you use e-mail to submit your comments, please include ''Attn: Hawaii picture-wing flies critical habitat'' in your e-mail subject header, preferably with your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your e-mail, contact us directly by calling our Pacific Islands Fish and Wildlife Office at 808–792–9400. Please note that we must receive comments by the date specified in the **DATES** section in order to consider them in our final determination and that we will close out the e-mail address *fw1pie_pwfch@fws.gov* at the termination of the public comment period.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this revised proposed rule, will be available for public inspection, by appointment, during normal business hours at the Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, HI 96850, (telephone 808–792–9400).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this revised proposed rule. For additional information on the 12 species of Hawaiian picture-wing flies for which we are proposing to designate critical habitat, refer to the final listing rule for the 12 species of picture-wing flies published in the **Federal Register** on May 9, 2006 (71 FR 26835).

This revised proposal replaces our original proposal to designate critical habitat for the 12 species of picture-wing flies published on August 15, 2006 (71 FR 46994). In that rule, we proposed to designate approximately 18 acres (ac) (7.3 hectares (ha)) as critical habitat for 11 of the 12 species of Hawaiian picture-wing flies. In that same proposal we indicated our intent to exclude several areas from the critical habitat designation under section 4(b)(2) of the Act and not to include specific areas that we believed did not meet the definition of critical habitat under

section 3(5)(A) of the Act. We did not propose critical habitat for *Drosophila neoclavisetae*, a species endemic to Maui, because we did not believe that Maui Pineapple Company's Puu Kukui Watershed Management Area met the definition of critical habitat under section 3(5)(A) of the Act, based on ongoing conservation efforts. These were the only areas identified to be essential for the conservation of *D. neoclavisetae*. Under this revised proposed rule, we are proposing to designate critical habitat for *D. neoclavisetae*. Under this revised proposed rule, we are proposing to designate approximately 9,238 ac (3,738 ha) as critical habitat for 12 species of Hawaiian picture-wing flies. Of these lands, we are exempting 78 ac (31 ha) of land from this proposed critical habitat revision under section 4(a)(3)(B)(i) of the Act that are covered by the U.S. Army Garrison Hawaii Oahu Training Areas Natural Resource Management (Final Report, August 2000) and the Oahu Integrated Natural Resource Management Plan 2002–2006 (Army 2000).

We are revising our original proposal because we received comments from peer reviewers in response to the original proposed rule questioning the methodology and lack of scientific basis. The current revised proposal is based on the best scientific data available, including defining suitable habitat based on distribution and density of host plants. The methods section of this notice presents the specific details and approach used to identify the revised proposed critical habitat unit boundaries.

Previous Federal Actions

For more information on previous Federal actions concerning the 12 species of Hawaiian picture-wing flies, refer to the final listing rule published in the **Federal Register** on May 9, 2006 (71 FR 26835), and the original proposed designation of critical habitat published in the **Federal Register** on August 15, 2006 (71 FR 46994).

Under the terms of a settlement agreement approved by the U.S. District Court for the District of Hawaii on August 31, 2005 (*CBD* v. *Allen*, CV–05–274–HA), we were to (1) make a final listing decision for the 12 picture-wing flies by May 6, 2006; (2) propose to designate critical habitat by September 15, 2006; and (3) finalize a critical habitat rule by April 17, 2007. Our determination that the designation of critical habitat for the 12 species of Hawaiian picture-wing flies was prudent was included in the final listing rule, published in the **Federal Register** on May 9, 2006 (71 FR 26849).

On August 15, 2006, we published a proposal to designate 18 ac (7.3 ha) of critical habitat for 11 picture-wing fly species on the islands of Hawaii, Kauai, Molokai, and Oahu (71 FR 46994). Publication of this proposed rule opened a 60-day public comment period, which closed on October 16, 2006. On January 4, 2007, we published a notice announcing the availability of the draft economic analysis for the designation of critical habitat for 11 species of picture-wing flies and reopening the public comment period on the proposal until January 19, 2007 (72 FR 321).

We received comments from peer reviewers expressing concern with the biological adequacy of the proposed 18-acre (7.3-ha) designation, and the need to consider host plant density and distribution information in determining critical habitat boundaries. In addition, one of the peer reviewers presented new observation data for one of the species addressed in the proposed rule. On April 16, 2007, we submitted a joint stipulation with the Center for Biological Diversity (CBD) to the U.S. District Court to modify the timetable of the August 31, 2005, settlement agreement for the proposed and final critical habitat rules for the 12 Hawaiian picture-wing flies, citing the need to address comments received during the public comment periods and to conduct additional review of the proposal. A joint stipulation was approved by the Court on April 18, 2007, to allow additional time to reconsider the proposed rule in light of the comments received, and to provide an opportunity for additional public comment. Under the terms of the extension, we are required to submit a proposed critical habitat rule to the **Federal Register** by November 15, 2007, and a final critical habitat rule by November 15, 2008.

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features:

(a) essential to the conservation of the species and

(b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by the landowner.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must first contain features that are essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection.

Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential to the conservation needs of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994, (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and

with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be proposed as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species, as additional scientific information may become available in the future. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts to the extent any new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain the features essential to the conservation of *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia,* and areas unoccupied at the time of listing that are essential to their conservation. Based on the best available information, the units being proposed in this revised proposed rule as critical habitat represent the only geographical areas known to us that provide these essential conservation features. As a result, we are not proposing critical habitat in any areas outside the geographical areas presently occupied by each of the 12 species.

We have also reviewed the available information that pertains to the habitat requirements for these species. The following geospatial, tabular data sets were used in preparing this revised proposed critical habitat: Occurrence data for all 12 species (K. Kaneshiro, in litt. 2005a, pp. 1–16); vegetation mapping data for the Hawaiian Islands (Gap Analysis Program (GAP) Data—Hawaiian Islands 2005); color mosaic 1:19,000 scale digital aerial photographs for the Hawaiian Islands dated April to May 2005; and 1:24,000 scale digital raster graphics of U.S. Geological Survey (USGS) topographic quadrangles. Land ownership was determined from geospatial data sets associated with parcel data from Oahu County (2006); Hawaii County (2005); Kauai County (2005); and Maui County (2004).

We reviewed a variety of peer-reviewed and other articles for this revised proposal, which included background information on the biology of each of the 12 species, (e.g., Montgomery 1975, pp. 83, 94, 96–98, and 100; Foote and Carson 1995, pp. 1–4; Kaneshiro and Kaneshiro 1995, pp. 1–47); plant ecology and biology (Wagner et al. 1999, pp. 45, 52–53, 971, 1,314–1,315, and 1,351–1,352); and the ecology of the Hawaiian Islands and the areas being considered in this revised proposal (e.g., Smith 1985, pp. 227–233; Stone 1985, pp. 251–253, 256, and 260–263; Cuddihy and Stone 1990, pp. 59–66, 73–76, and 88–94). Additional information reviewed included the October 29, 1991, final rule listing the plant species *Urera kaalae* (a host plant for two of the fly species) as endangered (56 FR 55770); the May 9, 2006, final listing rule for the 12 species of picture-wing flies (71 FR 26835); the August 15, 2006, proposed critical habitat designation for 11 species of picture-wing flies (71 FR 46994); unpublished reports by TNCH; and aerial photographs and satellite imagery of the Hawaiian Islands.

We obtained additional information through personal communications with landowners, scientists, and land managers familiar with the 12 species and their habitats, including individuals affiliated with the University of Hawaii, University of California at Berkeley, the U.S. Geological Survey, the Bishop Museum, Hawaii State Department of Land and Natural Resources, TNCH, and the U.S Army. Specific information from these sources included estimates of historic and current distribution, abundance, and territory sizes for the 12 species, as well as data on resources and habitat requirements.

As described in the final listing rule (May 9, 2006, 71 FR 26835), each species of Hawaiian picture-wing fly addressed in this revised proposal is found only on a single island, and the larvae of each species is dependant upon only a single or a few related species of plants (host plant(s)) (summarized in Table 1).

TABLE 1.—DISTRIBUTION OF 12 HAWAIIAN PICTURE-WING FLIES BY ISLAND, GENERAL HABITAT TYPE, AND PRIMARY HOST PLANT(S)

Species	Island	Elevation range	General habitat type	Primary host plants
Oahu Species				
Drosophila aglaia	Oahu	1,400–2,900 feet (ft) (425–885 meters (m)).	Mesic forest	*Urera glabra.*
D. hemipeza	Oahu	1,500–2,900 ft (460–885 m).	Mesic forest	*Cyanea* sp., *Lobelia* sp., *Urera kaalae* (E).
D. montgomeryi	Oahu	1,900–2,900 ft (580–885 m).	Mesic forest	*Urera kaalae* (E).
D. obatai	Oahu	1,500–2,500 ft (460–760 m).	Dry to mesic forest	*Pleomele forbesii.*

TABLE 1.—DISTRIBUTION OF 12 HAWAIIAN PICTURE-WING FLIES BY ISLAND, GENERAL HABITAT TYPE, AND PRIMARY HOST PLANT(S)—Continued

Species	Island	Elevation range	General habitat type	Primary host plants
D. substenoptera	Oahu	1,300–4,000 ft (395–1,220 m).	Wet forest	*Cheirodendron platyphyllum, C. trigynum, Tetraplasandra kavaiensis, T. oahuensis.*
D. tarphytrichia	Oahu	1,900–2,900 ft (580–885 m).	Mesic forest	*Charpentiera obovata.*
Hawaii (Big Island) Species				
D. heteroneura	Big Island	3,000–6,000 ft (915–1,830 m).	Mesic to wet forest	*Cheirodendron trigynum*, *Clermontia* sp., *Delissea parviflora.*
D. mulli	Big Island	2,150–3,250 ft (655–990 m).	Wet forest	*Pritchardia beccariana.*
D. ochrobasis	Big Island	3,400–5,400 ft (1,035–1,645 m).	Mesic to wet forest	*Clermontia* sp., *Marattia douglasii*, *Myrsine* sp.
Molokai Species				
D. differens	Molokai	3,650–4,500 ft (1,115–1,370 m).	Wet forest	*Clermontia* sp.
Kauai Species				
D. musaphilia	Kauai	2,600–3,700 ft (790–1,130 m).	Mesic forest	*Acacia koa.*
Maui Species				
D. neoclavisetae	Maui	3,400–4,600 ft (1,040–1,400 m).	Wet forest	*Cyanea kunthiana, C. macrostegia* ssp., *macrostegia.*

Oahu Species

Drosophila aglaia

Drosophila aglaia is historically known from five localities within the Waianae Mountains of Oahu between 1,400–2,900 feet (ft) (425–885 meters (m)) above sea level. *Drosophila aglaia* is restricted to the natural distribution of its larval stage host plant, *Urera glabra* (family Urticaceae), which is a small shrub-like endemic tree found within dry to mesic, lowland, *Diospyros* sp., ohia and koa forest. The larvae of *D. aglaia* feed within the decomposing bark and stem of *U. glabra*. This plant does not form large stands, and is infrequently scattered throughout slopes and gulches within mesic forest habitat in the Waianae Mountains on Oahu.

Drosophila hemipeza

Drosophila hemipeza is restricted to the island of Oahu where it is historically known from seven localities between 1,500–2,900 ft (460–885 m) above sea level (not including the Pupukea site, which is considered an extirpated population). Montgomery (1975, p. 96) determined that *D. hemipeza* larvae feed within the decomposing portions of several different mesic forest plants, including the decomposing stems of *Lobelia* sp. (family Campanulaceae), and the decomposing bark and stems of *Cyanea* sp. (family Campanulaceae), on steep ridges and gulches within dry to mesic, lowland, ohia and koa forest (Kaneshiro and Kaneshiro 1995, p. 17; Science Panel 2005, p. 16). The larvae also feed within the decomposing bark of *Urera kaalae* (family Urticaceae), a federally endangered plant (Service 1995, pp. 81–83; October 29, 1991, 56 FR 55770) that grows on slopes and in gulches of diverse mesic forest (Wagner et al. 1999, pp. 1,314–1,315). In 2004, only 41 individuals of *U. kaalae* were known to remain in the wild (USFWS 2004, p. 9). In 2005, TNCH outplanted many seedlings of this species at several locations within *D. hemipeza*'s historic range (TNCH 2005, p. 6).

Drosophila montgomeryi

Drosophila montgomeryi is historically known from three localities within the Waianae Mountains on western Oahu between 1,900–2,900 ft (580–885 m) above sea level. Montgomery (1975, p. 97) reported that the larvae of this species feed within the decaying bark of *Urera kaalae,* a federally endangered plant (USFWS 1995, pp. 81–83; October 29, 1991, 56 FR 55770) that grows on slopes and in gulches within mesic, lowland, diverse ohia and koa forest (Wagner et al. 1999, pp. 1,314–1,315). As stated earlier, in 2004, only 41 individuals of *U. kaalae* were known to remain in the wild (USFWS 2004, p. 9). In 2005, TNCH outplanted many seedlings of this species at several locations within *D. montgomeryi*'s historic range (TNCH 2005, p. 6).

Drosophila obatai

Drosophila obatai is historically known from two localities between 1,500–2,500 ft (460–760 m) above sea level on the island of Oahu. *Drosophila obatai* larvae feed within decomposing portions of *Pleomele forbesii* (family Agavaceae), a candidate for Federal listing (May 11, 2005, 70 FR 24883) (Kaneshiro and Kaneshiro 1995, p. 27; Montgomery 1975, p. 98). These host plants grow on slopes within dry to mesic, lowland, ohia and koa forest, and occur singly or in small clusters, rarely forming large stands (Wagner et al. 1999, pp. 1,351–1,352).

Drosophila substenoptera

Drosophila substenoptera is historically known from seven localities in both the Koolau and Waianae Mountains on the island of Oahu at elevations between 1,300–4,000 ft (395–1,220 m) above sea level. Montgomery (1975, p. 100) determined that *D. substenoptera* larvae feed within the decomposing bark of *Cheirodendron platyphllum* and C. *trigynum* trees (family Araliaceae), and *Tetraplasandra kavaiensis* and *T. oahuensis* trees

(family Araliaceae) in localized patches within mesic to wet, lowland to montane, ohia and koa forest.

Drosophila tarphytrichia

Drosophila tarphytrichia was historically known from both the Koolau and the Waianae Mountains between 1,900–2,900 ft (580- to 885 m) above sea level on the island of Oahu. *Drosophila tarphytrichia* is now apparently extirpated from the Koolau range, where it was originally discovered near Manoa Falls, and is presently known from four localities in the Waianae Mountains (Kaneshiro and Kaneshiro 1995; Hawaii Biodiversity and Mapping Program (HBMP), in litt. 2005; K. Kaneshiro, in litt. 2005a). The larvae of *D. tarphytrichia* feed on the decomposing portions of the stems and branches of *Charpentiera obovata* trees (family Amaranthaceae) within dry to mesic, lowland, ohia and koa forest (Montgomery 1975, p. 100).

Hawaii (Big Island) Species

Drosophila heteroneura

Drosophila heteroneura has been the most intensely studied of the 12 species discussed in this revised proposed rule (Kaneshiro and Kaneshiro 1995, p. 19). This species is restricted to the island of Hawaii, where historically it was known to be widely distributed between 3,000–6,000 ft (915–1,830 m) above sea level. *Drosophila heteroneura* has been recorded from 24 localities on 4 of the island's 5 volcanoes (Hualalai, Mauna Kea, Mauna Loa, and Kilauea) within mesic to wet, montane, ohia and koa forest (K. Kaneshiro, in litt. 2005a, pp. 4–8). *D. heteroneura* larvae primarily feed within the decomposing bark and stems of *Clermontia* sp. (family Campanulaceae), including *C. clermontioides,* and *Delissea parviflora* (family Campanulaceae), but it is also known to feed within decomposing portions of *Cheirodendron trigynum* (family Araliaceae) (Kaneshiro and Kaneshiro 1995, p. 19).

Drosophila mulli

Drosophila mulli is restricted to the island of Hawaii and is historically known from three localities between 2,150–3,250 ft (655–990 m) above sea level. Only adult flies of these species have ever been observed, and only on the leaf undersides of the endemic fan palm, *Pritchardia beccariana* (family Arecaceae), occurring within wet, montane, ohia forest. This is the only known association of a *Drosophila* species with a native Hawaiian palm species. The exact larval feeding site on this host plant remains unknown because attempts to rear *D. mulli* from decaying parts of *P. beccariana* have thus far been unsuccessful (W. P. Mull, Biologist, pers. comm. 1994, p. 1; Science Panel 2005, p. 21).

Drosophila ochrobasis

Historically, *Drosophila ochrobasis* was widely distributed between 3,400–5,400 ft (1,035–1,645 m) above sea level on the island of Hawaii. *D. ochrobasis* has been recorded from 11 localities on 4 of the island's 5 volcanoes (Hualalai, Mauna Kea, Mauna Loa, and the Kohala mountains) (K. Kaneshiro, in litt. 2005a, p. 8; K. Magnacca, University of California at Berkley, in litt. 2006). The larvae of this species have been reported to feed within decomposing portions of three different host plant groups, *Myrsine* sp. (family Myrsinaceae), *Clermontia* sp. (family Campanulaceae), and *Marattia douglasii* (family Marattiaceae) within mesic to wet, montane, ohia, koa, and *Cheirodendron* sp. forest (Montgomery 1975, p. 98; Kaneshiro and Kaneshiro 1995, p. 29).

Kauai Species

Drosophila musaphilia

Drosophila musaphilia is historically known from only four sites, one at 1,900 ft (579 m) above sea level, and three sites between 2,600–3,700 ft (790–1,130 m) above sea level on the island of Kauai. Montgomery (1975, p. 97) determined that the host plant for *D. musaphilia* is *Acacia koa* (koa) occurring within mesic, montane, ohia and koa forest. The females lay their eggs on, and the larvae develop in, the moldy slime flux (seep) that occasionally appears on certain trees with injured plant tissue and seeping sap. Understanding the full range of *D. musaphilia* is difficult because its host plant is fairly common and stable within and surrounding its known range on Kauai; however, the frequency of suitable slime fluxes occurring on the host plant appears to be much more restricted and temporally unpredictable (Science Panel 2005, pp. 23–24).

Maui Species

Drosophila neoclavisetae

Two populations of *Drosophila neoclavisetae* were found historically along the Puu Kukui Trail within montane wet *Metrosideros polymorpha* (ohia) forests on West Maui. One habitat site was discovered in 1969 at 4,500 ft (1,370 m) and the other in 1975 at 3,500 ft (1,070 m) above sea level (Kaneshiro and Kaneshiro 1995, p. 26; K. Kaneshiro, in litt. 2005a, p. 11). The larval stage host plant of *D. neoclavisetae* has not yet been confirmed, although it is likely to be one or both of the two *Cyanea* sp. (C*yanea kunthiana and C. macrostegia* ssp. *macrostegia*) (family Campanulaceae) present within its range and occurring within wet, montane, ohia forest. Because both collections of this fly occurred within a small patch of *Cyanea* sp., and many other species in the *Drosophila adiastola* species group use plant species in this genus and other plants in the family Campanulaceae, researchers believe that one or both of the two *Cyanea* sp. found at Puu Kukui are the correct larval stage host plants for *D. neoclavisetae* (Science Panel 2005, pp. 19–20; Kaneshiro and Kaneshiro 1995, p. 26).

Molokai Species

Drosophila differens

Drosophila differens is historically known from three sites between 3,650–4,500 ft (1,115–1,370 m) above sea level, within montane wet ohia forest (K. Kaneshiro, in litt. 2005a, p. 2) on the island of Molokai. Montgomery (1975, p. 83) found that *D. differens* larvae feed within the decomposing bark and stems of *Clermontia* sp. (family Campanulaceae) within wet, montane, ohia forest (Kaneshiro and Kaneshiro 1995, p. 16).

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied at the time of listing to propose as critical habitat, we consider the primary constituent elements (PCEs) to be those physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

We derived the specific primary constituent elements (PCEs) required for these 12 picture-wing flies from the biological needs of each species as described in the listing rule, published in the **Federal Register** on May 9, 2006 (71 FR 26835), and the August 15, 2006,

proposed critical habitat designation for 11 picture-wing flies (71 FR 46994).

Space for Individual and Population Growth and for Normal Behavior

The general life cycle of Hawaiian Drosophilidae is typical of that of most flies: After mating, females lay eggs from which larvae (immature stage) hatch; as larvae grow, they molt (shed their skin) through three successive stages (instars); and when fully grown, the larvae change into pupae (a transitional form) in which they metamorphose and emerge as adults.

Breeding for all 12 species of flies included in this revised proposal generally occurs year-round, but egg laying and larval development increase following the rainy season as the availability of decaying matter, upon which the flies feed, increases in response to the heavy rains (K. Kaneshiro, in litt. 2005b, pp. 1–2). In general, *Drosophila* lay between 50 and 200 eggs at a single time. Eggs develop into adults in about a month, and adults generally become sexually mature one month later. Adults generally live for one to two months.

It is unknown how much space is needed for these flies to engage in courtship and territorial displays, and mating activities. Adult behavior may be disrupted or modified by less than ideal conditions, such as decreased forest cover or loss of suitable food material (K. Kaneshiro, in litt. 2005b, pp. 1–2). Additionally, adult behavior may be disrupted and the flies themselves may be susceptible to the hunting activities of nonnative hymenoptera including yellow jacket wasps and ants (Kaneshiro and Kaneshiro 1995, pp. 41–42). The larvae generally pupate within the soil located below their host plant material, and it is presumed that they require relatively undisturbed and unmodified soil conditions to complete this stage before reaching adulthood (Science Panel 2005, p. 5). Lastly, it is well-known that these 12 species and most picture-wing flies are susceptible to even slight temperature increases, an issue that may be exacerbated by loss of suitable forest cover or the impacts from global warming (K. Kaneshiro, in litt. 2005b, pp. 1–2).

Food

Each species of Hawaiian picture-wing fly described in this document is found only on a single island, and the larvae of each are dependent upon only a single or a few related species of plants (summarized in Table 1). The adult flies feed on a variety of decomposing plant matter. The water or moisture requirements for all 12 of these species is unknown; however, during drier seasons or during times of drought, it is expected that available adult and larval stage food material in the form of decaying plant matter may decrease (K. Kaneshiro, in litt. 2005b, pp. 1–2).

Primary Constituent Elements for Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera, and D. tarphytrichia

Within the geographical areas occupied by each *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera, and D. tarphytrichia,* we must identify the PCEs that may require special management considerations or protections.

Based on the requisites for each species discussed above and our current knowledge of the life history, biology, and ecology of each species, and the requirements to sustain the essential life history functions of the 12 species, the following PCEs for larval and adult life stages of *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia* are:

Oahu Species

The PCEs for *Drosophila aglaia* are: (1) Dry to mesic, lowland, *Diospyros* sp., ohia and koa forest between the elevations of 1,400–2,900 ft (425–885 m); and (2) the larval host plant *Urera glabra.*

The PCEs for *Drosophila hemipeza* are: (1) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,500–2,900 ft (460–885 m); and (2) the larval host plants *Cyanea angustifolia, C. calycina, C. grimesiana* ssp. *grimesiana, C. grimesiana* ssp. *obatae, C. membranacea, C. pinnatifida, C. superba* ssp. *superba, Lobelia hypoleuca, L. niihauensis, L. yuccoides,* and *Urera kaalae.*

The PCEs for *Drosophila montgomeryi* are: (1) Mesic, lowland, diverse ohia and koa forest between the elevations of 1,900–2,900 ft (580–885 m); and (2) the larval host plant *Urera kaalae.*

The PCEs for *Drosophila obatai* are: (1) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,500–2,500 ft (460–760 m); and (2) the larval host plant *Pleomele forbesii.*

The PCEs for *Drosophila substenoptera* are: (1) Mesic to wet, lowland to montane, ohia and koa forest between the elevations of 1,300–4,000 ft (395–1,220 m); and (2) the larval host plants *Cheirodendron platyphyllum* ssp. *platyphyllum, C. trigynum* ssp. *trigynum, Tetraplasandra kavaiensis,* and *T. oahuensis.*

The PCEs for *Drosophila tarphytrichia* are: (1) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,900–2,900 ft (580–885 m); and (2) the larval host plant *Charpentiera obovata.*

Hawaii (Big Island) Species

The PCEs for *Drosophila heteroneura* are: (1) Mesic to wet, montane, ohia and koa forest between the elevations of 3,000–6,000 ft (915–1,830 m); and (2) the larval host plants *Cheirodendron trigynum* ssp. *trigynum, Clermontia clermontioides, C. clermontioides* ssp. *rockiana, C. hawaiiensis, C. kohalae, C. lindseyana, C. montis-loa, C. parviflora, C. peleana, C. pyrularia,* and *Delissea parviflora.*

The PCEs for *Drosophila mulli* are: (1) Wet, montane, ohia forest between the elevations of 3,150–3,250 ft (960–990 m); and (2) the larval host plant *Pritchardia beccariana.*

The PCEs for *Drosophila ochrobasis* are: (1) Mesic to wet, montane, ohia, koa, and *Cheirodendron* sp. forest between the elevations of 3,400–5,400 ft (1,035–1,645 m); and (2) the larval host plants *Clermontia calophylla, C. clermontioides, C. clermontioides* ssp. *rockiana, C. drepanomorpha, C. hawaiiensis, C. kohalae, C. lindseyana, C. montis-loa, C. parviflora, C. peleana, C. pyrularia, C. waimeae, Marattia douglasii, Myrsine lanaiensis, M. lessertiana,* and *M. sandwicensis.*

Kauai Species

The PCEs for *Drosophila musaphilia* are: (1) Mesic, montane, ohia and koa forest between the elevations of 2,600–3,700 ft (790–1,130 m); and (2) the larval host plant *Acacia koa.*

Maui Species

The PCEs for *Drosophila neoclavisetae* are: (1) Wet, montane, ohia forest between the elevations of 3,400–4,600 ft (1,040–1,400 m), and (2) the larval host plants *Cyanea kunthiana* and *C. macrostegia* ssp. *macrostegia.*

Molokai Species

The PCEs for *Drosophila differens* are: (1) Wet, montane, ohia forest between the elevations of 3,650–4,500 ft (1,115–1,370 m); and (2) the larval host plants *Clermontia arborescens* ssp. *waihiae, C. granidiflora* ssp. *munroi, C. kakeana, C. oblongifolia* ssp. *brevipes,* and *C. pallida.*

We propose units for designation based on sufficient PCEs being present

to support at least one of each of the 12 species' life history functions. Each of the areas proposed in this revised proposed rule have been determined to contain sufficient PCEs to provide for both the larval and adult life stage for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia.*

Special Management Considerations or Protections

When designating critical habitat, we assess whether the occupied areas contain features essential to the conservation of the species that may require special management considerations or protections.

Nonnative plants and animals pose the greatest threats to these 12 picture-wing flies. In order to counter the ongoing degradation and loss of habitat caused by feral ungulates and invasive nonnative plants, active management or control of nonnative species is necessary for the conservation of all populations of the 12 picture-wing flies (Kaneshiro and Kaneshiro 1995, pp. 37–38). Without active management or control, native habitat containing the features that are essential for the conservation of the 12 picture-wing flies will continue to be degraded or destroyed. In addition, habitat degradation and destruction as a result of fire, competition with nonnative insects, and predation by nonnative insects, such as the western yellow-jacket wasp (*Vespula pensylvanica*), may significantly threaten many of the populations of the 12 picture-wing flies.

In this revised proposed rule, all of the proposed critical habitat units for the 12 picture-wing flies may require special management to address feral ungulates, invasive nonnative plants, and yellow-jacket wasps. In addition, the units in dry or mesic habitats (see Table 1 above) may also require special management to address fire and ants. These threats are discussed below.

Feral Ungulates

Feral ungulates have devastated native vegetation in many areas of the Hawaiian Islands (Cuddihy and Stone 1990, pp. 60–66). Because the endemic Hawaiian flora evolved without the presence of browsing and grazing ungulates, many plant groups have lost their adaptive defenses such as spines, thorns, stinging hairs, and defensive chemicals (University of Hawaii Department of Geography 1998, p. 138). Pigs (*Sus scrofa*), goats (*Capra hircus*), and cattle (*Bos taurus*) disturb the soil, and readily eat native plants (including the native host plants for 1 or more of the 12 picture-wing flies), and distribute nonnative plant seeds that can alter the ecosystem. In addition, browsing and grazing by feral ungulates in steep and remote terrain causes severe erosion of entire watersheds due to foraging and trampling behaviors (Cuddihy and Stone 1990, pp. 60–64 and 66).

Feral Pigs (Sus scrofa)

Feral pigs threaten all populations of the 12 picture-wing flies. Feral pigs are found from dry coastal grasslands through rain forests and into the subalpine zone on all of the main Hawaiian Islands (Cuddihy and Stone 1990, pp. 64–65). An increase in pig densities and expansion of their distribution has caused widespread damage to native vegetation (Cuddihy and Stone 1990, pp. 64–65). Feral pigs create open areas within forest habitat by digging up, eating, and trampling native species (Stone 1985, pp. 262–263). These open areas become fertile ground for nonnative plant seeds spread through their excrement and by transport in their hair (Stone 1985, pp. 262–263). In nitrogen-poor soils, feral pig excrement increases nutrient availability, enhancing establishment of nonnative weeds that are more adapted to richer soils than are native plants (Cuddihy and Stone 1990, pp. 64–65). In this manner, largely nonnative forests replace native forest habitat (Cuddihy and Stone 1990, pp. 64–65).

Foote and Carson (1995, pp. 2–4) found that pig exclosures on the island of Hawaii supported significantly higher relative frequencies of picture-wing flies compared to other native and nonnative *Drosophila* species (7 percent of all observations outside of the exclosure and 18 percent of all observations inside the exclosure), and their native host plants. Loope et al. (1991, pp. 9–10 and 19) demonstrated that excluding pigs from a montane bog on northeastern Haleakala, Maui, resulted in an increase in native plant cover from 6 to 95 percent after 6 years of protection.

Feral Goats (Capra hircus)

Feral goats threaten populations of the picture-wing flies on Oahu (*Drosophila aglaia* and *D. obatai*), Hawaii (*D. heteroneura*), and Kauai (*D. musaphilia*). Feral goats occupy a wide variety of habitats on Kauai, Oahu, Molokai, Maui, and Hawaii, from lowland dry forests to montane grasslands where they consume native vegetation, trample roots and seedlings, accelerate erosion, and promote invasion of nonnative plants (van Riper and van Riper 1982, pp. 34–35; Stone 1985, p. 261). On Oahu, goat populations are increasing and spreading in the dry upper slopes of the Waianae Mountains, becoming an even greater threat to the native habitat (K. Kawelo, U.S. Army Environmental Division, pers. comm. 2005, p. 1).

Feral Cattle (Bos taurus)

Feral cattle threaten populations of *Drosophila heteroneura* on the island of Hawaii. Large-scale ranching of cattle began in the 19th century on the islands of Kauai, Oahu, Maui, and Hawaii (Cuddihy and Stone 1990, pp. 59–62). Large ranches, tens of thousands of acres in size, still exist on the islands of Maui and Hawaii (Cuddihy and Stone 1990, pp. 59–62). In addition, the grazing of cattle continues in several lowland regions in the northern portion of the Waianae Mountains of Oahu. Degradation of native forests used for ranching activities is evident. Feral cattle occupy a wide variety of habitats from lowland dry forests to montane grasslands, where they consume native vegetation, trample roots and seedlings, accelerate erosion, and promote the invasion of nonnative plants (van Riper and van Riper 1982, p. 36; Stone 1985, pp. 256 and 260).

Nonnative Plants

The invasion of nonnative plants contributes to the degradation of native forests and the host plants of picture-wing flies (Kaneshiro and Kaneshiro 1995, pp. 38–39; Wagner et al. 1999, pp. 52–53 and 971; Science Panel 2005, p. 28), and threatens all populations of the 12 picture-wing flies. Some nonnative plants form dense stands, thickets, or mats that shade or out-compete native plants. Nonnative vines cause damage or death to native trees by overloading branches, causing breakage, or forming a dense canopy cover that intercepts sunlight and shades out native plants below. Nonnative grasses readily burn and often grow at the border of forests, and carry fire into areas with woody native plants (Smith 1985, pp. 228–229; Cuddihy and Stone 1990, pp. 88–94). The nonnative grasses are more fire-adapted and can spread prolifically after a fire, ultimately creating a stand of nonnative grasses where native forest once existed. Some nonnative plant species produce chemicals that inhibit the growth of other plant species (Smith 1985, p. 228; Wagner et al. 1999, p. 971).

Fire

Fire threatens habitat of the Hawaiian picture-wing flies in dry to mesic grassland, shrubland, and forests on the islands of Kauai (*Drosophila musaphilia*), Oahu (*D. aglaia, D.*

hemipeza, D. mongomeryi, D. obatai, and *D. tarphytrichia*), and Hawaii (*D. heteroneura*). Dry and mesic regions in Hawaii have been altered in the past 200 years by an increase in fire frequency, a condition to which the native flora is not adapted. The invasion of fire-adapted alien plants, facilitated by ungulate disturbance, has contributed to wildfire frequency. This change in fire regime has reduced the amount of forest cover for native species (Hughes et al. 1991, p. 743; Blackmore and Vitousek 2000, p. 625) and resulted in an intensification of feral ungulate herbivory in the remaining native forest areas. Habitat damaged or destroyed by fire is more likely to be revegetated by nonnative plants that cannot be used as host plants by these picture-wing flies (Kaneshiro and Kaneshiro 1995, p. 47).

Nonnative Insect Competitors

Tipulid Flies

The Hawaiian Islands now support several established species of nonnative insects which compete with some of the 12 picture-wing flies within their larval stage host plants. The most important group of nonnative insect competitors includes tipulid flies (crane flies, family Tipulidae). The larvae of some species within this group feed within the decomposing bark of some of the host plants utilized by picture-wing flies, including *Charpentiera*, *Cheirodendron*, *Clermontia*, and *Pleomele* spp. (Science Panel 2005, p. 11; K. Magnacca, U.S. Geological Survey, *in litt.* 2005, p. 1; S. Montgomery, *in litt.* 2005a, p. 1). Therefore, all of the picture-wing flies addressed in this rule, except for *Drosophila mulli, D. musaphilia*, and *D. neoclavisetae* face larval-stage competition from nonnative tipulid flies. The tipulid larvae feed within the same portion of the decomposing host plant area normally occupied by the picture-wing fly larvae. The likely effect of this competition is a reduction in available host plant material for picture-wing fly larvae (Science Panel 2005, p. 11). In laboratory studies, Grimaldi and Jaenike (1984, p. 1) demonstrated that competition between *Drosophila* spp. larvae and other fly larvae can exhaust food resources, which affects both the probability of larval survival and the body size of adults, resulting in reduced adult fitness, fecundity, and lifespan.

Scolytid Beetles

Additionally, the Hawaiian Islands now support several species of nonnative beetles (family Scolytidae, genus *Coccotrypes*), a few of which bore into and feed on the nuts produced by certain native plant species including *Pritchardia beccariana*, the host plant of *Drosophila mulli*. Affected *Pritchardia* spp., including *P. beccariana*, drop their fruit before the nuts reach maturity due to the boring action of the scolytid beetles. Little natural regeneration of this host plant species has been observed in the wild since the arrival of this scolytid beetle (K. Magnacca, *in litt.* 2005, p. 1; Science Panel 2005, p. 11). Compared to the host plants of the other picture-wing flies, *P. beccariana* is long lived (up to 100 years), but over time scolytid beetles may have a significant impact on the availability of habitat for *D. mulli*.

Nonnative Insect Predators

Nonnative arthropods pose a serious threat to Hawaii's native *Drosophila*, both through direct predation or parasitism as well as competition for food or space (Howarth and Medeiros 1989, pp. 82–83; Howarth and Ramsay 1991, pp. 80–83; Kaneshiro and Kaneshiro 1995, pp. 40–45 and 47; Staples and Cowie 2001, pp. 41, 54–57). Due to their large colony sizes and systematic foraging habits, species of social Hymenoptera (ants and some wasps) and parasitic wasps pose the greatest predation threat to the Hawaiian picture-wing flies (Carson 1982, p. 1, 1986, p. 7; Gambino et al. 1987, pp. 169–170; Kaneshiro and Kaneshiro 1995, pp. 40–45 and 47).

Ants

Ants are believed to threaten populations of picture-wing flies in mesic areas on Oahu (*Drosophila aglaia, D. hemipeza, D. mongomeryi, D. obatai*, and *D. tarphytrichia*) and Hawaii (*D. heteroneura*) (Kaneshiro and Kaneshiro 1995, p. 43; Science Panel 2005, p. 28). At least 44 species of ants are known to be established on the Hawaiian Islands (Hawaii Ecosystems at Risk Project (HEAR) database, in litt. 2005, p. 2) and 4 particularly aggressive ant species have severely affected the native insect fauna (Zimmerman 1948, p. 173; HEAR database, in litt. 2005, p. 4). Ants are not a natural component of Hawaii's arthropod fauna, and native species evolved in the absence of predation pressure from ants. Ants can be particularly destructive predators because of their high densities, recruitment behavior, aggressiveness, and broad range of diet (Reimer 1993, pp. 14–15, 17). The threat to picture-wing flies is amplified by the fact that most ant species have winged reproductive adults (Borror 1989, pp. 737–738) and can quickly establish new colonies, spreading throughout suitable habitats (Staples and Cowie 2001, pp. 55–57). These attributes and the lack of native species' defenses to ants allow some ant species to destroy isolated prey populations (Nafus 1993, p. 151). Hawaiian picture-wing flies pupate in the ground where they are exposed to predation by ants. Newly emerging adults have been observed with ants attached to their legs (Kaneshiro and Kaneshiro 1995, p. 43).

Western Yellow-Jacket Wasp

An aggressive race of the western yellow-jacket wasp became established in the State of Hawaii in 1978, and this species is now abundant between 1,969–3,445 ft (600–1,050 m) in elevation (Gambino et al. 1990, p. 1,088). On Maui, yellow-jackets have been observed carrying and feeding upon recently captured adult Hawaiian *Drosophila* (Kaneshiro and Kaneshiro 1995, p. 41). While there is no documentation that conclusively ties the decrease in picture-wing fly observations at historical sites with the establishment of yellow-jacket wasps within their habitats, the concurrent arrival of wasps and decline of picture-wing fly observations for all 12 picture-wing flies on several of the islands (Kauai, Maui, Molokai, and Hawaii) suggests that the wasps may have played a significant role in the decline of some picture-wing fly populations (Carson 1982, p. 1, 1986, p. 7; Foote and Carson 1995, p. 3; Kaneshiro and Kaneshiro 1995; Science Panel 2005, p. 28).

Criteria Used To Identify Critical Habitat

In this revised proposed rule, we are proposing to designate critical habitat on lands with documented occurrences and that contain the primary constituent elements for these 12 Hawaiian picture-wing flies. The primary dataset we used to document observations of these 12 picture-wing flies spans the years 1965–1999 (K. Kaneshiro, in litt. 2005a, pp. 1–16). Additional data were obtained from individuals familiar with particular species and locations, and other sources of information as described in the above ''Methods'' section. Many sites were surveyed infrequently or have not been surveyed for a substantial period of time, while other sites have relatively complete records from 1966–1999. It is important to note that the traditional methods used to survey for the 12 species locate only adult flies. The adult flies of all of these species are generalist microbivores; in contrast, the larval stage typically requires a very specific host plant species (in some cases, several species or genera) for successful development. The primary constituent elements of the revised proposed critical

habitat include both the host plants used by the larvae, as well as the native forest components used by foraging adults. We used known adult location data to identify each critical habitat unit, and included the surrounding area encompassing the physical and biological features essential to the conservation of the species.

While there has been considerable survey work conducted for Hawaiian picture-wing flies overall, some areas where these 12 species are found have not been surveyed in many years. We used the results of the best available, recent survey information to develop the revised, initial working draft critical habitat unit maps for each species. In addition, one peer reviewer identified a population of *Drosophila ochrobasis* that was previously unknown to us in an area containing the features essential to the conservation of this species (K. Magnacca, in litt. 2006). This area has been included in this revised proposal (see Unit 19—West Kohala Mountains—*Drosophila ochrobasis*).

We used the best available, recent survey data for adult flies to determine which sites we would identify as occupied and which sites we would identify as unoccupied. Additionally, we did not include in this revised proposal some sites where a given species had been observed according to the most recent survey data if the area had either become degraded (e.g., due to loss or degradation of native vegetation, increase in nonnative vegetation, or documented presence of yellow-jacket wasps) and lacked PCEs, or if multiple surveys at a particular site over the course of several years failed to detect a species. However, we did not use the presence of yellow-jacket wasps alone to conclusively determine a site as being unoccupied, unless the habitat was also degraded in other respects. Lastly, it is important to point out that because of the time that has elapsed since some surveys were conducted, it is possible that some sites identified as unoccupied (and thus not included in this revised proposed critical habitat) have since been re-occupied by the species. Conversely, we recognize it may be possible that some sites that we have identified as occupied according to the most recent survey data may now be unoccupied. However, we believe that using the most recent survey results, in conjunction with information on existing habitat conditions, reflects the best available information for determining occupancy.

After identifying occupied sites for each of the 12 species on a series of maps, we added a Geographic Information System (GIS) layer of the known elevation range of a species in a given area. This elevation range was based upon the lowest and the highest elevation at which an adult fly of a given species was observed during surveys. After this step, GIS data points showing known locations of many of the flies' host plant species were added to the map series. Most of these plant data points were established during botanical surveys unrelated to the historic studies of the picture-wing flies. The larval stages for several of the 12 picture-wing flies are known to feed upon host plant species that are federally listed as endangered or threatened, identified as candidate species for listing under the Act, or identified as Federal species of concern. The data points for the listed and candidate host plant species were available to us from the State's Hawaii Biodiversity and Mapping Program (HBMP), and from survey information compiled from field biologists. For areas lacking host plant data points, we consulted HBMP literature regarding other plant species and/or queried *Drosophila* researchers and field biologists to determine which native host plants were present in those areas.

After generating multilayered GIS maps showing the occupied fly population sites, the known elevation range for each species, and the known host plant locations or habitat types, we prepared preliminary critical habitat unit maps. These preliminary unit maps were then overlaid on a series of satellite imagery and aerial photographs, and examined closely to identify the best quality areas containing contiguous forest and essential features. We then met individually with several *Drosophila* researchers (see the ''Methods'' section above) to review the different series of maps for each species and to confirm whether the preliminary unit maps included PCEs essential to both life stages (larval and adult) of each fly species. Based on these discussions, we adjusted the preliminary unit map boundaries by adding areas identified by the researchers that contain features essential to the conservation of the species, or by removing areas unlikely to contain these features. The critical habitat unit boundaries shown in the maps included in this revised proposed rule reflect the results of this analysis, after taking into account the presence of known developed areas, as described below.

In summary, we identified proposed critical habitat units that: Contain occupied population sites based on the most recent survey information; are known to contain the PCEs essential to both the larval and adult fly life stage for each species; and contain relatively contiguous native or functional native forest.

Lastly, when determining proposed critical habitat boundaries within this revised proposed rule, we made every effort to avoid including developed areas such as buildings, paved areas, and other structures that lack PCEs for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera*, and *D. tarphytrichia*. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps published with this proposed rule have been excluded by text in this revised proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the primary constituent elements in the adjacent critical habitat.

Revised Proposed Critical Habitat Designation

We are proposing 32 units as critical habitat for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera*, and *D. tarphytrichia*. In total, approximately 9,238 ac (3,738 ha) fall within the boundaries of this revised proposed critical habitat designation. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the 12 Hawaiian picture-wing flies.

The areas we propose as critical habitat are:

(1) Island of Oahu: *Drosophila aglaia*—Unit 1—Palikea; *Drosophila aglaia*—Unit 2—Puu Kaua; *Drosophila hemipeza*—Unit 1—Kaluaa Gulch; *Drosophila hemipeza*—Unit 2—Makaha Valley; *Drosophila hemipeza*—Unit 3—Palikea; *Drosophila hemipeza*—Unit 4—Puu Kaua; *Drosophila montgomeryi*—Unit 1—Kaluaa Gulch; *Drosophila montgomeryi*—Unit 2—Palikea; *Drosophila montgomeryi*—Unit 3—Puu Kaua; *Drosophila obatai*—Unit 1—Puu Pane; *Drosophila obatai*—Unit 2—Wailupe; *Drosophila substenoptera*—Unit 1—Mt. Kaala; *Drosophila substenoptera*—Unit 2—Palikea;

Drosophila tarphytrichia—Unit 1—Kaluaa Gulch; *Drosophila tarphytrichia*—Unit 2—Palikea; and *Drosophila tarphytrichia*—Unit 3—Puu Kaua;

(2) Hawaii (Big Island): *Drosophila heteroneura*—Unit 1—Kau Forest; *Drosophila heteroneura*—Unit 2—Kona Refuge; *Drosophila heteroneura*—Unit 3—Lower Kahuku; *Drosophila heteroneura*—Unit 4—Pit Crater; *Drosophila heteroneura*—Unit 5—Waihaka Gulch; *Drosphila mulli*—Unit 1—Olaa Forest; *Drosphila mulli*—Unit 2—Stainback Forest; *Drosphila mulli*—Unit 3—Waiakea Forest; *Drosophila ochrobasis*—Unit 1—Kipuka 9; *Drosophila ochrobasis*—Unit 2—Kipuka 14; *Drosophila ochrobasis*—Unit 3—Kohala Mountains East; *Drosophila ochrobasis*—Unit 4—Kohala Mountains West; and *Drosophila ochrobasis*—Unit 5—Upper Kahuku;

(3) Island of Kauai: *Drosophila musaphilia*—Unit 1—Kokee;

(4) Island of Maui: *Drosophila neoclavisetae*—Unit 1—Puu Kukui;

(5) Island of Molokai: *Drosophila differens*—Unit 1—Puu Kolekole.

The areas identified as containing the features essential to the conservation of each of the 12 Hawaiian picture-wing flies for which we are proposing critical habitat include a variety of undeveloped, forested areas that are used for larval stage development and adult fly stage foraging. Proposed critical habitat includes land under Federal, State, City and County, and private ownership. The approximate area and land ownership of each proposed critical habitat unit are shown in Table 2.

TABLE 2.—PROPOSED CRITICAL HABITAT UNITS FOR DROSOPHILA AGLAIA, D. DIFFERENS, D. HEMIPEZA, D. HETERONEURA, D. MONTGOMERYI, D. MULLI, D. MUSAPHILIA, D. NEOCLAVISETAE, D. OBATAI, D. OCHROBASIS, D. SUBSTENOPTERA, AND D. TARPHYTRICHIA

[Area estimates reflect all land within critical habitat unit boundaries.]

Proposed critical habitat unit	Size of unit in acres	Size of unit in hectares	Land ownership (acres)			
			Federal	State	City & Co. of Honolulu	Private
Oahu Units						
Drosophila aglaia—Unit 1—Palikea	208	84	0	4	0	204
Drosophila aglaia—Unit 2—Puu Kaua	87	35	0	0	0	87
Drosophila hemipeza—Unit 1—Kaluaa Gulch	527	213	0	0	0	527
Drosophila hemipeza—Unit 2—Makaha Valley	111	45	0	40	71	0
Drosophila hemipeza—Unit 3—Palikea	(208)	(84)	0	(4)	0	(204)
Drosophila hemipeza—Unit 4—Puu Kaua	(87)	(35)	0	0	0	(87)
Drosophila montgomeryi—Unit 1—Kaluaa Gulch	(527)	(213)	0	0	0	(527)
Drosophila montgomeryi—Unit 2—Palikea	(208)	(84)	0	(4)	0	(204)
Drosophila montgomeryi—Unit 3—Puu Kaua	(87)	(35)	0	0	0	(87)
Drosophila obatai—Unit 1—Puu Pane	33	13	0	33	0	0
Drosophila obatai—Unit 2—Wailupe	77	31	0	45	0	32
Drosophila substenoptera—Unit 1—Mt. Kaala	116	47	0	59	57	0
Drosophila substenoptera—Unit 2—Palikea	(208)	(84)	0	(4)	0	(204)
Drosophila tarphytrichia—Unit 1—Kaluaa Gulch	(527)	(213)	0	0	0	(527)
Drosophila tarphytrichia—Unit 2—Palikea	(208)	(84)	0	(4)	0	(204)
Drosophila tarphytrichia—Unit 3—Puu Kaua	(87)	(35)	0	0	0	(87)
Hawaii (Big Island) Units						
Drosophila heteroneura—Unit 1—Kau Forest	125	51	0	125	0	0
Drosophila heteroneura—Unit 2—Kona Refuge	3,604	1,459	3,604	0	0	0
Drosophila heteroneura—Unit 3—Lower Kahuku	687	278	687	0	0	0
Drosophila heteroneura—Unit 4—Pit Crater	46	18	0	0	0	46
Drosophila heteroneura—Unit 5—Waihaka Gulch	120	49	0	120	0	0
Drosophila mulli—Unit 1—Olaa Forest	244	99	0	244	0	0
Drosophila mulli—Unit 2—Stainback Forest	76	31	0	76	0	0
Drosophila mulli—Unit 3—Waiakea Forest	373	151	0	373	0	0
Drosophila ochrobasis—Unit 1—Kipuka 9	9	4	0	9	0	0
Drosophila ochrobasis—Unit 2—Kipuka 14	15	6	0	15	9	0
Drosophila ochrobasis—Unit 3—Kohala Mountains East	193	78	0	193	0	0
Drosophila ochrobasis—Unit 4—Kohala Mountains West	132	54	0	41	0	91
Drosophila ochrobasis—Unit 5—Upper Kahuku	88	36	64	24	0	0
Kauai Unit						
Drosophila musaphilia—Unit 1—Kokee	794	321	0	794	0	0
Maui Unit						
Drosophila neoclavisetae—Unit 1—Puu Kukui	584	237	0	134	0	450
Molokai Unit						
Drosophila differens—Unit 1—Puu Kolekole	988	400	0	0	0	988

TABLE 2.—PROPOSED CRITICAL HABITAT UNITS FOR DROSOPHILA AGLAIA, D. DIFFERENS, D. HEMIPEZA, D. HETERONEURA, D. MONTGOMERYI, D. MULLI, D. MUSAPHILIA, D. NEOCLAVISETAE, D. OBATAI, D. OCHROBASIS, D. SUBSTENOPTERA, AND D. TARPHYTRICHIA—Continued

[Area estimates reflect all land within critical habitat unit boundaries.]

Proposed critical habitat unit	Size of unit in acres	Size of unit in hectares	Land ownership (acres)			
			Federal	State	City & Co. of Honolulu	Private
Total (32 units)	9,238	3,738	4,356	2,331	128	2,424

Key: Unit areas in parentheses overlap with other units. Therefore, the total area being proposed as critical habitat for each species will not equal the total area being proposed for the 12 species combined because of this overlap.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for the 12 picture-wing flies, below. All of the proposed critical habitat units for the 12 Hawaiian picture-wing flies were occupied by the species at the time of listing. Each unit contains sufficient PCEs to provide for both the larval and adult life stage of one or more of the 12 species of picture-wing flies, and may require special management considerations or protection (see Table 3).

TABLE 3.—CRITICAL HABITAT UNITS PROPOSED FOR DROSOPHILA AGLAIA, D. DIFFERENS, D. HEMIPEZA, D. HETERONEURA, D. MONTGOMERYI, D. MULLI, D. MUSAPHILIA, D. NEOCLAVISETAE, D. OBATAI, D. OCHROBASIS, D. SUBSTENOPTERA, AND D. TARPHYTRICHIA AND POTENTIAL THREATS TO THE SPECIES PRIMARY CONSTITUENT ELEMENTS

Proposed critical habitat unit	Threats					
	Feral ungulates	Nonnative plants	Yellow-jacket wasps	Ants	Nonnative competitors	Fire
Drosophila aglaia—Unit 1—Palikea	X	X		X	X	X
Drosophila aglaia—Unit 2—Puu Kaua	X	X		X	X	X
Drosophila hemipeza—Unit 1—Kaluaa Gulch	X	X		X	X	X
Drosophila hemipeza—Unit 2—Makaha Valley	X	X		X	X	X
Drosophila hemipeza—Unit 3—Palikea	X	X		X	X	X
Drosophila hemipeza—Unit 4—Puu Kaua	X	X		X	X	X
Drosophila montgomeryi—Unit 1—Kaluaa Gulch	X	X		X	X	X
Drosophila montgomeryi—Unit 2—Palikea	X	X		X	X	X
Drosophila montgomeryi—Unit 3—Puu Kaua	X	X		X	X	X
Drosophila obatai—Unit 1—Puu Pane	X	X		X	X	X
Drosophila obatai—Unit 2—Wailupe	X	X		X	X	X
Drosophila substenoptera—Unit 1—Mt. Kaala	X	X			X	
Drosophila substenoptera—Unit 2—Palikea	X	X			X	
Drosophila tarphytrichia—Unit 1—Kaluaa Gulch	X	X		X	X	X
Drosophila tarphytrichia—Unit 2—Palikea	X	X		X	X	X
Drosophila tarphytrichia—Unit 3—Puu Kaua	X	X		X	X	X
Drosophila heteroneura—Unit 1—Kau Forest	X	X	X	X	X	
Drosophila heteroneura—Unit 2—Kona Refuge	X	X	X	X	X	
Drosophila heteroneura—Unit 3—Lower Kahuku	X	X	X	X	X	
Drosophila heteroneura—Unit 4—Pit Crater	X	X	X	X	X	X
Drosophila heteroneura—Unit 5—Waihaka Gulch	X	X	X	X	X	
Drosophila mulli—Unit 1—Olaa Forest	X	X	X		X	
Drosophila mulli—Unit 2—Stainback Forest	X	X	X		X	
Drosophila mulli—Unit 3—Waiakea Forest	X	X	X	X	X	
Drosophila ochrobasis—Unit 1—Kipuka 9	X	X	X		X	
Drosophila ochrobasis—Unit 2—Kipuka 14	X	X	X		X	

TABLE 3.—CRITICAL HABITAT UNITS PROPOSED FOR DROSOPHILA AGLAIA, D. DIFFERENS, D. HEMIPEZA, D. HETERONEURA, D. MONTGOMERYI, D. MULLI, D. MUSAPHILIA, D. NEOCLAVISETAE, D. OBATAI, D. OCHROBASIS, D. SUBSTENOPTERA, AND D. TARPHYTRICHIA AND POTENTIAL THREATS TO THE SPECIES PRIMARY CONSTITUENT ELEMENTS—Continued

Proposed critical habitat unit	Threats					
	Feral ungulates	Nonnative plants	Yellow-jacket wasps	Ants	Nonnative competitors	Fire
Drosophila ochrobasis—Unit 3—Kohala Mountains East	X	X	X		X	
Drosophila ochrobasis—Unit 4—Kohala Mountains West	X	X	X		X	
Drosophila ochrobasis—Unit 5—Upper Kahuku	X	X	X		X	
Drosophila musaphilia—Unit 1—Kokee	X	X	X	X		X
Drosophila neoclavisetae—Unit 1—Puu Kukui	X	X	X			
Drosophila differens—Unit 1—Puu Kolekole	X	X	X		X	

As provided under section 4(b)(2) of the Act, these units may be considered for exclusion from critical habitat when this rule is finalized. Exclusions are considered based on the relative costs and benefits of designating critical habitat, including information contained in the forthcoming economic analysis.

Oahu Units

Drosophila aglaia—Unit 1—Palikea consists of 208 ac (84 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,920–2,985 ft (585–910 m), this unit is privately and State-owned, and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. aglaia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Urera glabra.*

Drosophila aglaia—Unit 2—Puu Kaua consists of 87 ac (35 ha) of lowland, diverse mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,865–2,855 ft (570–870 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. aglaia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Urera glabra.*

Drosophila hemipeza—Unit 1—Kaluaa Gulch consists of 527 ac (213 ha) of diverse, mesic forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,720–2,785 ft (525–850 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. hemipeza* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Urera kaalae, Cyanea* sp., and *Lobelia* sp.

Drosophila hemipeza—Unit 2—Makaha Valley consists of 111 ac (45 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,995–3,005 ft (610–915 m), this unit is owned by the City and County of Honolulu and the State, and is largely managed as a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 4–5), this unit was occupied by *D. hemipeza* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Urera kaalae, Cyanea* sp., and *Lobelia* sp.

Drosophila hemipeza—Unit 3—Palikea consists of 208 ac (84 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,920–2,985 ft (585–910 m), this unit is privately and State-owned, and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. hemipeza* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Urera kaalae, Cyanea* sp., and *Lobelia* sp.

Drosophila hemipeza—Unit 4—Puu Kaua consists of 87 ac (35 ha) of lowland, diverse mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,865–2,855 ft (570–870 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. hemipeza* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Urera kaalae, Cyanea* sp., and *Lobelia* sp.

Drosophila montgomeryi—Unit 1—Kaluaa Gulch consists of 527 ac (213 ha) of diverse, mesic forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,720–2,785 ft (525–850 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH.

According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. montgomeryi* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Urera kaalae.*

Drosophila montgomeryi—Unit 2—Palikea consists of 208 ac (84 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,920–2,985 ft (585–910 m), this unit is both privately and State-owned, and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. montgomeryi* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Urera kaalae.*

Drosophila montgomeryi—Unit 3—Puu Kaua consists of 87 ac (35 ha) of lowland, diverse mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,865–2,855 ft (570–870 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. montgomeryi* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Urera kaalae.*

Drosophila obatai—Unit 1—Puu Pane consists of 33 ac (13 ha) of lowland, mesic, koa, and ohia forest within the northeastern Waianae Mountains of Oahu. Ranging in elevation between 1,760–2,535 ft (535–770 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 6), this unit was occupied by *D. obatai* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species.

This unit also encompasses the larval stage host plant associated with this species, *Pleomele forbesii.*

Drosophila obatai—Unit 2—Wailupe consists of 77 ac (31 ha) of lowland, mesic, koa, and ohia forest within the southeastern Koolau Mountains of Oahu. Ranging in elevation between 1,475–2,155 ft (445–655 m), this unit is privately and State-owned, and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 6), this unit was occupied by *D. obatai* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Pleomele forbesii.*

Drosophila substenoptera—Unit 1—Mt. Kaala consists of 116 ac (47 ha) of montane, wet, ohia forest within the northern Waianae Mountains of Oahu. Ranging in elevation between 2,750–4,030 ft (840–1,230 m), this unit is owned by the City and County of Honolulu and the State, and is largely managed as part of a State forest reserve and natural area reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 7), this unit was occupied by *D. substenoptera* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron* sp. and *Tetraplasandra* sp.

Drosophila substenoptera—Unit 2—Palikea consists of 208 ac (84 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,920–2,985 ft (585–910 m), this unit is privately and State-owned, and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. substenoptera* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron* sp. and *Tetraplasandra* sp.

Drosophila tarphytrichia—Unit 1—Kaluaa Gulch consists of 527 ac (213 ha) of diverse, mesic forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,720–2,785 ft (525–850 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. tarphytrichia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Charpenteira obovata.*

Drosophila tarphytrichia—Unit 2—Palikea consists of 208 ac (84 ha) of lowland, mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,920–2,985 ft (585–910 m), this unit is privately and State-owned, and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. tarphytrichia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Charpenteira obovata.*

Drosophila tarphytrichia—Unit 3—Puu Kaua consists of 87 ac (35 ha) of lowland, diverse mesic, koa, and ohia forest within the southern Waianae Mountains of Oahu. Ranging in elevation between 1,865–2,855 ft (570–870 m), this unit is privately owned and is part of a larger area called the Honouliuli Preserve, administered and managed by TNCH. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 1–10), this unit was occupied by *D. tarphytrichia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Charpenteira obovata.*

Hawaii (Big Island) Units

Drosophila heteroneura—Unit 1—Kau Forest consists of 125 ac (51 ha) of montane, wet, ohia forest, and is located on the southern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 5,215–5,510 ft (1,590–1,680 m), the unit is owned by the State, and is largely managed as part of a State forest reserve. According to the most recent survey data (K.

Kaneshiro, in litt. 2005a, p. 8), this unit was occupied by *D. heteroneura* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron trigynum, Clermontia* sp., and *Delissea parviflora.*

Drosophila heteroneura—Unit 2—Kona Refuge consists of 3,604 ac (1,459 ha) of montane, mesic, closed koa and ohia forest, and is located on the western flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 2,980–5,755 (910–1,755 m), this unit is owned by the Service, and is managed as part of the Kona Unit of the Hakalau Forest National Wildlife Refuge. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 8), this unit was occupied by *D. heteroneura* at the time of listing.

This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron trigynum, Clermontia* sp., and *Delissea parviflora.*

Drosophila heteroneura—Unit 3—Lower Kahuku consists of 687 ac (278 ha) of montane, mesic to wet, ohia forest, and is located on the southern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 3,705–4,685 ft (1,130–1,430 m), this unit is owned and managed by the National Park Service (NPS) (Hawaii Volcanoes National Park). According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 8), this unit was occupied by *D. heteroneura* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron trigynum, Clermontia* sp., and *Delissea parviflora.*

Drosophila heteroneura—Unit 4—Pit Crater consists of 46 ac (18 ha) of montane, mesic, open ohia forest with mixed grass species, and is located on the western flank of Hualalai and south of the Kaupulehu lava flow on the island of Hawaii. Ranging in elevation between 3,835–4,525 ft (1,170–1,380 m), this unit is privately owned and managed. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 8), this unit was occupied by *D. heteroneura* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron trigynum, Clermontia* sp., and *Delissea parviflora.*

Drosophila heteroneura—Unit 5—Waihaka Gulch consists of 120 ac (49 ha) of montane, wet, koa and ohia forest, and is located on the southern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 4,065–4,390 ft (1,240–1,340 m), the unit is owned by the State, and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 8), this unit was occupied by *D. heteroneura* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Cheirodendron trigynum, Clermontia* sp., and *Delissea parviflora.*

Drosophila mulli—Unit 1—Olaa Forest consists of 244 ac (99 ha) of montane, wet, ohia forest and is located to the northeast of Kilauea Caldera on the southeastern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 3,120–3,300 ft (950–1,005 m), this unit is owned by the State, and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 10), this unit was occupied by *D. mulli* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Pritchardia beccariana.*

Drosophila mulli—Unit 2—Stainback Forest consists of 76 ac (31 ha) of montane, wet, ohia forest, and is located to the northeast of Kilauea Caldera on the southeastern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 1,955–2,165 ft (595–660 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 10), this unit was occupied by *D. mulli* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Pritchardia beccariana.*

Drosophila mulli—Unit 3—Waiakea Forest consists of 373 ac (151 ha) of montane, wet, ohia forest, and is located to the northeast of Kilauea Caldera on the southeastern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 3,130–3,585 ft (955–1,095 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 10), this unit was occupied by *D. mulli* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Pritchardia beccariana.*

Drosophila ochrobasis—Unit 1—Kipuka 9 consists of 9 ac (4 ha) of montane, wet, ohia forest with native shrubs, and is located within the saddle road area on the northeastern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 5,075–5,125 ft (1,545–1,560 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 10), this unit was occupied by *D. ochrobasis* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Clermontia* sp., *Marattia douglasii,* and *Myrsine* sp.

Drosophila ochrobasis—Unit 2—Kipuka 14 consists of 15 ac (6 ha) of montane, wet, ohia forest with native shrubs, and is located within the saddle road area on the northeastern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 5,105–5,145 ft (1,555–1,570 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 12–13), this unit was occupied by *D. ochrobasis* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Clermontia* sp., *Marattia douglasii,* and *Myrsine* sp.

Drosophila ochrobasis—Unit 3—Kohala Mountains East consists of 193

ac (78 ha) of montane, wet, ohia forest with native shrubs and mixed grass species, and is located on the southeastern flank of the Kohala Mountains on the island of Hawaii. Ranging in elevation between 3,850–4,140 ft (1,175–1,260 m), this unit is owned by the State and is largely managed as part of a State forest reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 12–13), this unit was occupied by *D. ochrobasis* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Clermontia* sp., *Marattia douglasii,* and *Myrsine* sp.

Drosophila ochrobasis—Unit 4—Kohala Mountains West consists of 132 ac (54 ha) of montane, wet, ohia forest with native shrubs and mixed grass species, and is located on the southwestern flank of the Kohala Mountains on the island of Hawaii. Ranging in elevation between 4,945–5,325 ft (1,510–1,625 m), this unit is privately and State-owned, and is largely managed as part of a State forest reserve. *Drosophila ochrobasis* was not historically known from this area, but was first observed here during field surveys in 2006 (K. Magnacca, in litt. 2006, p. 1). Based upon those positive observations and the relatively intact, closed-canopy, native forest, including the fly's host plant species found within this unit, we have determined that it was occupied by *D. ochrobasis* at the time of the listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Clermontia* sp., *Marattia douglasii,* and *Myrsine* sp.

Drosophila ochrobasis—Unit 5—Upper Kahuku consists of 88 ac (36 ha) of montane, wet, ohia forest, and is located on the southern flank of Mauna Loa on the island of Hawaii. Ranging in elevation between 5,235–5,390 ft (1,595–1,645 m), the unit is owned by the State and the National Park Service (Hawaii Volcanoes National Park). The area within this unit is largely managed as part of a State forest reserve and as a national park. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, pp. 12–13), this unit was occupied by *D. ochrobasis* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plants associated with this species, *Clermontia* sp., *Marattia douglasii,* and *Myrsine* sp.

Kauai Unit

Drosophila musaphilia—Unit 1—Kokee consists of 794 ac (321 ha) of montane, mesic koa and ohia forest, and is located in the Kokee region of northwestern Kauai. Ranging in elevation between 3,310–3,740 ft (1,010–1,140 m), this unit is owned by the State and occurs on lands managed as part of a State park, forest reserve, and natural area reserve. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 11), this unit was occupied by *D. musaphilia* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Acacia koa.*

Maui Unit

Drosophila neoclavisetae—Unit 1—Puu Kukui consists of 584 ac (237 ha) of montane, wet, ohia forest within the west Maui mountains on the island of Maui. Ranging in elevation between 3,405–4,590 ft (1,040–1,400 m), this unit is both privately and State-owned. Much of the area within this unit occurs within the boundary of the Puu Kukui Watershed Preserve, lands jointly managed by TNCH, the State, and the Maui Land and Pineapple Company. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 11), this unit was occupied by *D. neoclavisetae* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Cyanea kunthiana, C. macrostegia* ssp. *macrostegia.*

Molokai Unit

Drosophila differens—Unit 1—Puu Kolekole consists of 988 ac (400 ha) of montane, wet, ohia forest within the eastern Molokai mountains on the island of Molokai. Ranging in elevation between 3,645–4,495 ft (1,110–1,370 m), this unit is privately owned and is managed by TNCH as part of the Kamakou and Pelekunu preserves. According to the most recent survey data (K. Kaneshiro, in litt. 2005a, p. 11), this unit was occupied by *D. differens* at the time of listing. This unit includes the known elevation range, moisture regime, and the native forest components used by foraging adults and identified as the PCEs for this species. This unit also encompasses the larval stage host plant associated with this species, *Clermontia* sp.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Court of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442F (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We

define ''Reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia* or their designated critical habitat will require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 et seq.) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are also be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the primary constituent elements to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia.* Generally, the conservation role of the critical habitat units is to support the populations of these species as identified in this revised proposed rule.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *Drosophila aglaia, D. differens, D. hemipeza, D. heteroneura, D. montgomeryi, D. mulli, D. musaphilia, D. neoclavisetae, D. obatai, D. ochrobasis, D. substenoptera,* and *D. tarphytrichia* include, but are not limited to:

(1) The following activities may result in adverse modification if they are likely to affect the PCEs of the 12 picture-wing flies: Overgrazing; control of feral ungulates; clearing or cutting of native live trees and shrubs, whether by burning or mechanical, chemical, or other means (e.g., woodcutting, bulldozing, construction, road building, mining, herbicide application); introducing or enabling the spread of nonnative species (e.g., nonnative plant species that may compete with native host plants, or nonnative arthropod pests that prey upon native host plants); and taking actions that pose a risk of fire.

(2) Construction where a permit under section 404 of the Clean Water Act would be required by the U.S. Army Corps of Engineers. Construction in wetlands, where a 404 permit would be required, could affect the habitat of *Drosophila heteroneura.*

(3) Recreational activities that appreciably degrade vegetation.

(4) The purposeful release or augmentation of any dipteran predator or parasitoid.

Exemptions and Exclusions

Application of Section 4(a)(3)(B) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consult with the military on the development and implementation of INRMPs for installations with listed species. INRMPs developed by military installations located within the range of this revised proposed critical habitat

designation for *Drosophila aglaia* and *D. substenoptera* were analyzed for exemption under the authority of section 4(a)(3) of the Act.

Approved INRMPs

West Range of Schofield Barracks Military Reservation

The U.S. Army completed its Oahu INRMP in 2000, and the INRMP was approved by the Service in 2001. Conservation measures included in the INRMP that benefit *Drosophila aglaia* and *D. substenoptera* include (1) outplanting of native plants which provides for the natural forest conditions necessary for adult fly foraging by both species; (2) feral ungulate control which prevents both direct loss of the larval stage host plants and adult foraging substrate of both species and prevents habitat alteration by feral ungulates; (3) wildland fire control which prevents both loss and alteration of habitat for *D. aglaia;* and (4) nonnative plant control which prevents habitat alteration for both species.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the U.S. Army Garrison Hawaii Oahu Training Areas Natural Resource Management (Final Report August 2000) and the Oahu INRMP 2002–2006 (Army 2000) will provide benefits to *Drosophila aglaia* and *D. substenoptera* occurring in habitats within or adjacent to the West Range of Schofield Barracks Military Reservation. The other 10 species of picture-wing flies do not occur on Army land. Therefore, this installation is exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 78 ac (31 ha) of habitat on Oahu in this revised proposed critical habitat designation because of this exemption.

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If we consider an exclusion, then we must determine whether excluding the area would result in the extinction of the species.

We are conducting an economic analysis of the impacts of this revised proposed critical habitat designation and related factors, which will be available for public review and comment when it is complete. Based on public comment on that document, this revised proposed designation itself, and the information in the final economic analysis, the Secretary may exclude from critical habitat additional areas beyond those identified in this assessment under the provisions of section 4(b)(2) of the Act. This is also addressed in our implementing regulations at 50 CFR 424.19.

Under section 4(b)(2) of the Act, we must consider all relevant impacts, including economic impacts. We consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. We also consider whether the landowners have developed any conservation plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this revised proposal, we have determined that the lands within the revised proposed designation of critical habitat for the 12 picture-wing flies are not owned or managed by the Department of Defense, there are currently no HCPs for these species, and the proposed designation does not include any Tribal lands or trust resources.

We anticipate no impact to national security, Tribal lands, partnerships, or HCPs from this revised proposed critical habitat designation. Based on the best available information, we believe that all of these units contain the features essential to the species. Therefore, we are not proposing to exclude any areas under section 4(b)(2) of the Act at this time. However, based on public comment on this revised proposed critical habitat designation and the economic analysis, and the information in the economic analysis itself, we may exclude areas from the final critical habitat designation under section 4(b)(2) of the Act.

Economic Analysis

We are preparing an analysis of the economic impacts of this revised proposed critical habitat for the 12 picture-wing flies from the Hawaiian Islands. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.fws.gov/pacificislands*, or by contacting the Pacific Islands Fish and Wildlife Office directly (see **ADDRESSES**). The draft economic analysis prepared for this revised proposed critical habitat designation will replace the draft economic analysis that was prepared for the original proposal and announced in the **Federal Register** on January 4, 2007 (72 FR 321). We may exclude areas from the final rule based on information in the new draft economic analysis.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are obtaining the expert opinions of at least three appropriate independent specialists regarding this revised proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have posted our proposed peer review plan on our Web site at *http://www.fws.gov/pacific/informationquality/index.htm*. We will send these peer reviewers copies of this revised proposed rule, immediately following publication in the **Federal Register**. We have invited these peer reviewers to comment during a public comment period on our specific assumptions and conclusions in this revised proposed designation of critical habitat.

We will consider all comments and information we receive during the comment period on this revised proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days after the date of this **Federal Register** publication. Send your request to the person named in **FOR FURTHER INFORMATION CONTACT**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Persons needing reasonable accommodations to attend and participate in the public hearings should contact the Pacific Islands Fish and Wildlife Office at 808–792–9400 as soon as possible. To allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding this revised proposal is available in alternative formats upon request.

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order (E.O.) 12866, this document is a significant rule in that it may raise novel legal and policy issues, but we do not anticipate that it will have an annual effect on the economy of $100 million or more or affect the economy in a material way. To determine the economic consequences of designating the specific area as critical habitat, we are preparing a draft economic analysis of this proposed action, which will be available for public comment. This economic analysis also will be used to determine compliance with E.O. 12866, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, E.O. 12630, and E.O. 13211. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule.

Further, E.O. 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (OMB Circular A–4, September 17, 2003). Under Circular A–4, once an agency determines that the Federal regulatory action is appropriate, the agency must consider alternative regulatory approaches. Because the determination of critical habitat is a statutory requirement under the Act, we must evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts under section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or a combination of both, constitutes our regulatory alternative analysis for designations.

We will announce the availability of the draft economic analysis in the **Federal Register** and in local newspapers so that it is available for public review and comments. The draft economic analysis will also be available on the Internet at *www.fws.gov/pacificislands* or by contacting the Pacific Islands Fish and Wildlife Office directly (see **ADDRESSES**).

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of this revised proposed designation in the **Federal Register** and reopen the public comment period for this revised proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or [T]ribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and [T]ribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from

participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments. The lands being proposed for critical habitat designation are owned by the State of Hawaii, City and County of Honolulu, private citizens, and the National Park Service and U.S. Fish and Wildlife Service. None of these entities fit the definition of ''small governmental jurisdiction.'' Therefore, a Small Government Agency Plan is not required. However, as we conduct our economic analysis, we will further evaluate this issue and revise this assessment if appropriate.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the 12 picture-wing flies in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for the 12 picture-wing flies does not pose significant takings implications for lands within or affected by the proposed designation.

Federalism

In accordance with E.O. 13132 (Federalism), this revised proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this revised proposed critical habitat designation with appropriate State resource agencies in Hawaii. The designation of critical habitat in areas currently occupied by 12 species of picture-wing flies imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in longπrange planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order # 12988 (Civil Justice Reform). We have issued this revised proposed critical habitat designation in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the 12 species of Hawaiian picture-wing flies.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

National Environmental Policy Act

It is our position that, outside the jurisdiction of the United States Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation, and no Tribal lands that are essential for the conservation, of the 12 picture-wing flies within the State of Hawaii. Therefore, we have not proposed designation of critical habitat for any of these species on Tribal lands.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. While this revised proposed rule to designate critical habitat for 12 species of Hawaiian picture-wing flies is a significant regulatory action under E.O. 12866 in that it may raise novel legal and policy issues, we do not expect it to significantly affect energy supplies, distribution, or use because these areas are not presently used for energy production and we are unaware of any future plans in this regard. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this rule is available upon request from the Field Supervisor, Pacific Islands Fish and Wildlife Office (see **ADDRESSES**).

Author(s)

The primary author of this document is staff of the Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), revise the entries for ''Fly, Hawaiian picture-wing'' (*Drosophila aglaia*), ''Fly, Hawaiian picture-wing'' (*Drosophila differens*), ''Fly, Hawaiian picture-wing'' (*Drosophila hemipeza*), ''Fly, Hawaiian picture-wing'' (*Drosophila heteroneura*), ''Fly, Hawaiian picture-wing'' (*Drosophila montgomeryi*), ''Fly, Hawaiian picture-wing'' (*Drosophila mulli*), ''Fly, Hawaiian picture-wing'' (*Drosophila musaphilia*), ''Fly, Hawaiian picture-wing'' (*Drosophila neoclavisetae*), ''Fly, Hawaiian picture-wing'' (*Drosophila obatai*), ''Fly, Hawaiian picture-wing'' (*Drosophila ochrobasis*), ''Fly, Hawaiian picture-wing'' (*Drosophila substenoptera*), and ''Fly, Hawaiian picture-wing'' (*Drosophila tarphytrichia*), under INSECTS in the List of Endangered and Threatened Wildlife, to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
INSECTS							
*	*	*	*	*	*		*
Fly, Hawaiian picture-wing.	*Drosophila aglaia*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila differens*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila hemipeza*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila heteroneura.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila montgomeryi.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila mulli*	U.S.A. (HI)	NA	T	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila musaphilia.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila neoclavisetae.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila obatai*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila ochrobasis.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila substenoptera.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
Fly, Hawaiian picture-wing.	*Drosophila tarphytrichia.*	U.S.A. (HI)	NA	E	756	17.95(i)	NA
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (i) by adding entries for ''Hawaiian picture-wing fly (*Drosophila aglaia*),'' ''Hawaiian picture-wing fly (*Drosophila differens*),'' ''Hawaiian picture-wing fly (*Drosophila hemipeza*),'' ''Hawaiian picture-wing fly (*Drosophila heteroneura*),'' ''Hawaiian picture-wing fly (*Drosophila montgomeryi*),''

''Hawaiian picture-wing fly (*Drosophila mulli*),'' ''Hawaiian picture-wing fly (*Drosophila musaphilia*),'' ''Hawaiian picture-wing fly (*Drosophila neoclavisetae*),'' ''Hawaiian picture-wing fly (*Drosophila obatai*),'' ''Hawaiian picture-wing fly (*Drosophila ochrobasis*),'' ''Hawaiian picture-wing fly (*Drosophila substenoptera*),'' and ''Hawaiian picture-wing fly (*Drosophila tarphytrichia*),'' in the same alphabetical order in which these species appear in that table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Hawaiian picture-wing fly (*Drosophila aglaia*)

(1) Critical habitat units are depicted for County of Honolulu, island of Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila aglaia* are:

(i) Dry to mesic, lowland, *Diospyros* sp., ohia and koa forest between the elevations of 1,400–2,900 ft (425–885 m); and

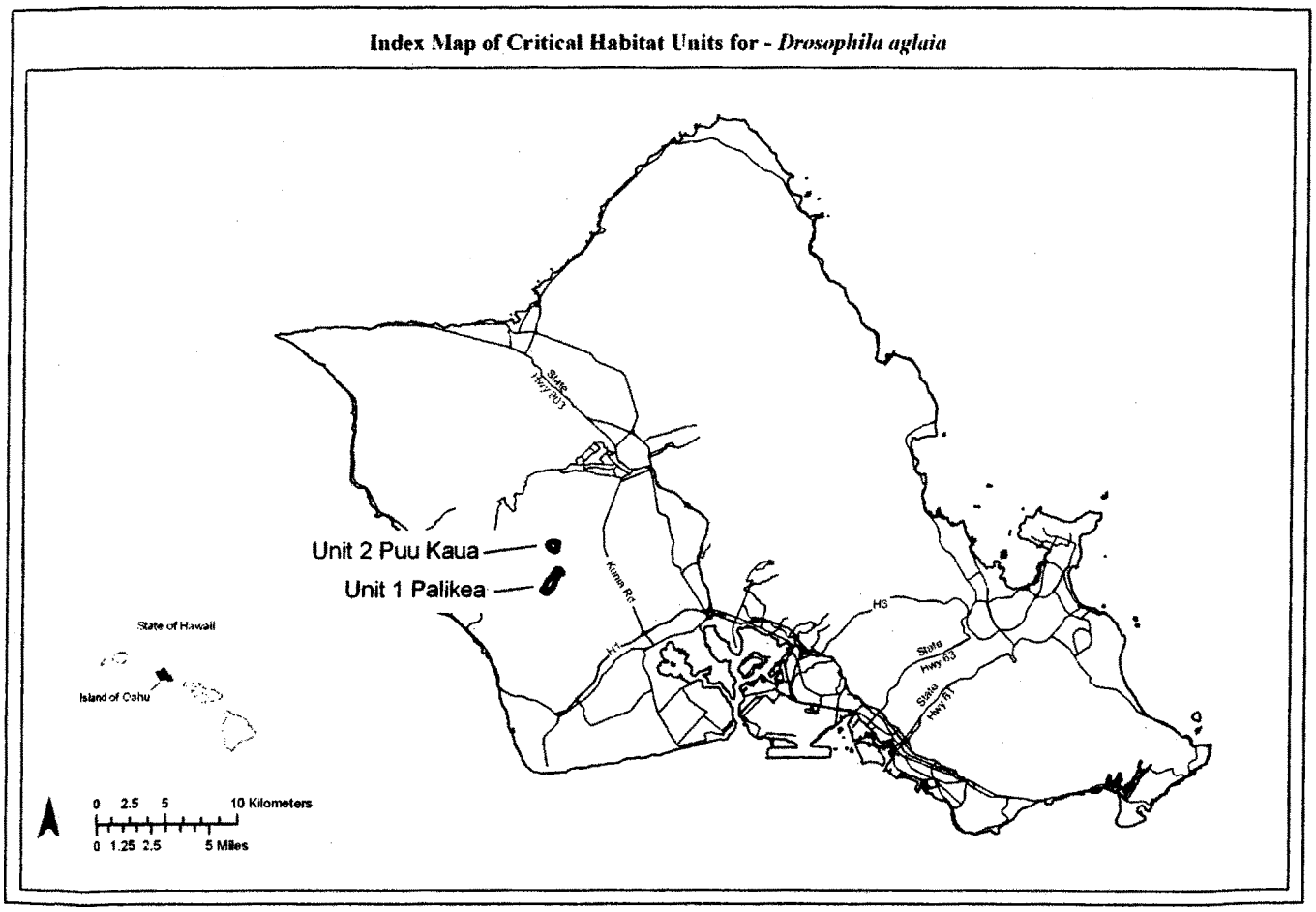
(ii) The larval host plant *Urera glabra.*

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila aglaia* follows:

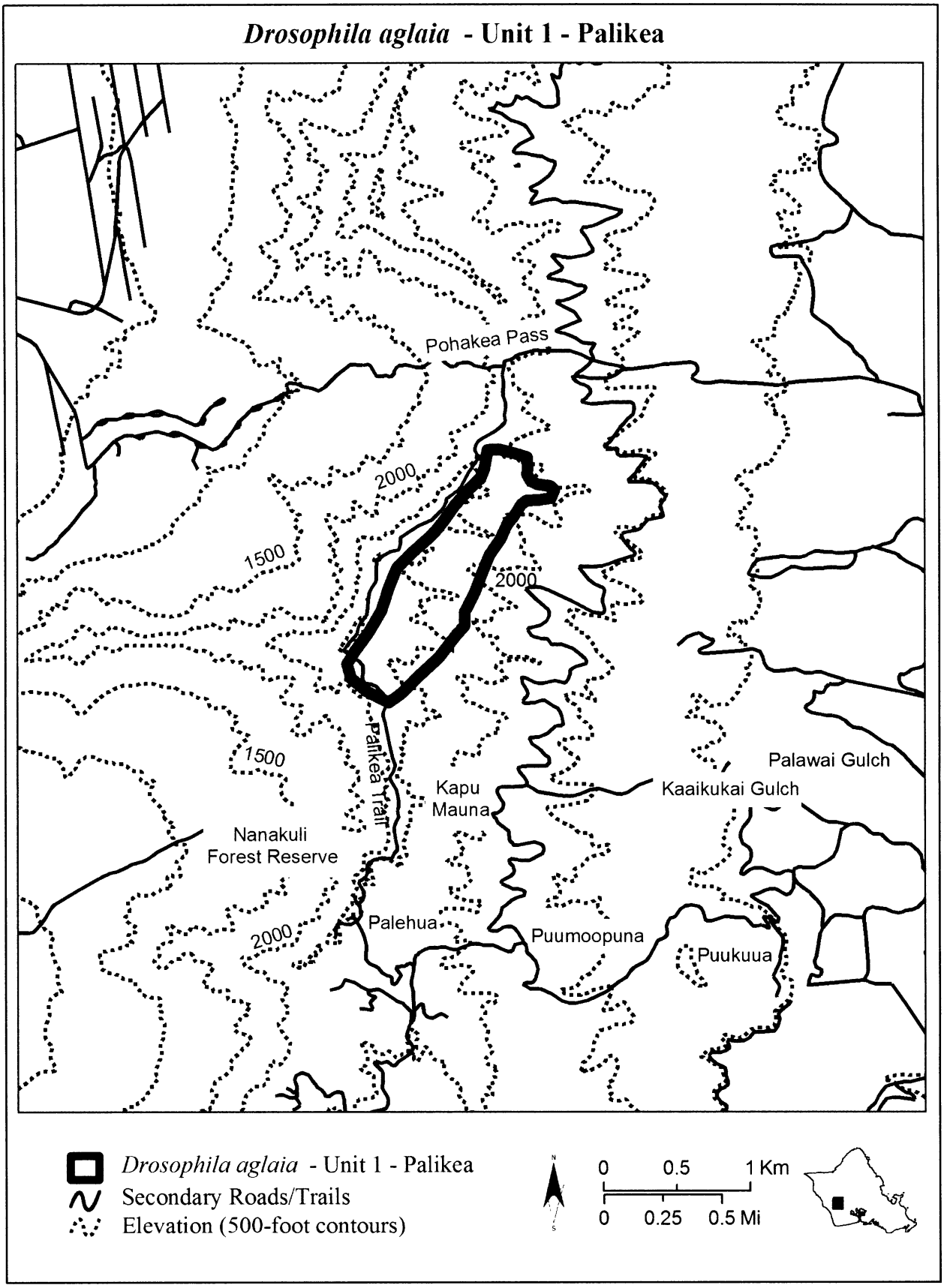
BILLING CODE 4310–55–P



(6) *Drosophila aglaia*—Unit 1—Palikea, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593529, 2367854; 593448, 2367801; 593302, 2367874; 593242, 2367927; 593193, 2367967; 593165, 2368065; 593217, 2368150; 593314, 2368283; 593399, 2368425; 593448, 2368578; 593505, 2368716; 593622, 2368833; 593703, 2368906; 593764, 2368963; 593832, 2369044; 593901, 2369145; 594002, 2369262; 594079, 2369331; 594104, 2369396; 594120, 2369485; 594124, 2369521; 594148, 2369525; 594213, 2369525; 594310, 2369497; 594395, 2369473; 594399, 2369392; 594396, 2369356; 594417, 2369313; 594461, 2369290; 594551, 2369278; 594579, 2369250; 594559, 2369197; 594472, 2369183; 594391, 2369179; 594354, 2369153; 594302, 2369072; 594257, 2369015; 594213, 2368914; 594136, 2368809; 594083, 2368672; 594035, 2368550; 593966, 2368417; 593966, 2368324; 593909, 2368259; 593792, 2368105; 593675, 2368000.

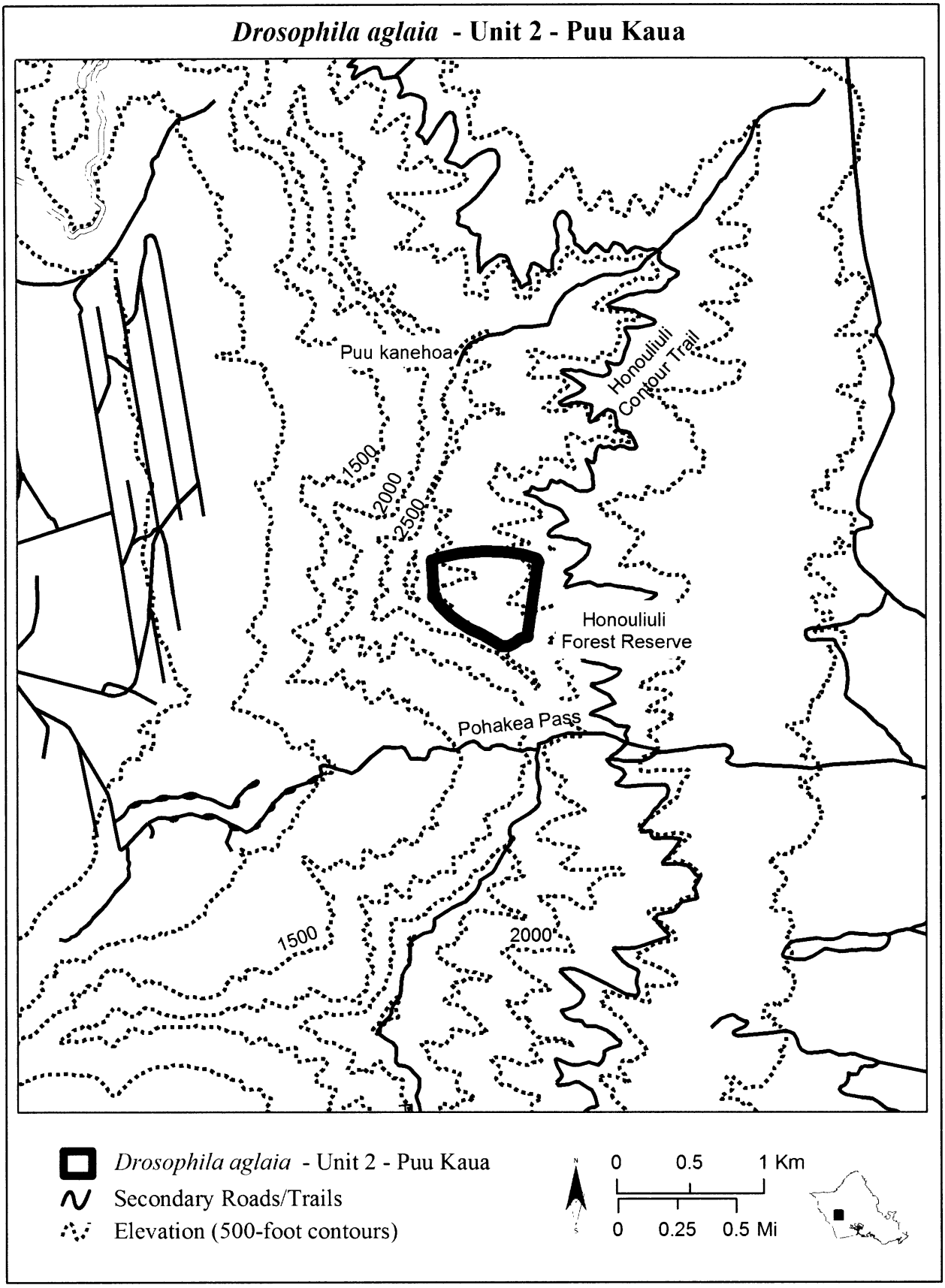
(ii) Note: Map of *Drosophila aglaia*—Unit 1—Palikea follows:


Drosophila aglaia - Unit 1 - Palikea
Pohakea Pass
2000
1500
2000
1500
Palikea Trail
Kapu
Mauna
Palawai Gulch
Kaaikukai Gulch
Nanakuli
Forest Reserve
Palehua
2000
Puumoopuna
Puukuua
Drosophila aglaia - Unit 1 - Palikea
Secondary Roads/Trails
Elevation (500-foot contours)
N
S
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila aglaia*—Unit 2—Puu Kaua, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 594166, 2370854; 594166, 2370853; 594164, 2370854; 594122, 2370843; 594090, 2370815; 594040, 2370789; 593996, 2370789; 593930, 2370827; 593852, 2370875; 593778, 2370907; 593716, 2370947; 593642, 2370999; 593602, 2371041; 593574, 2371067; 593558, 2371095; 593539, 2371118; 593531, 2371121; 593534, 2371173; 593519, 2371375; 593533, 2371375; 593552, 2371390; 593628, 2371404; 593716, 2371426; 593794, 2371431; 593876, 2371437; 593974, 2371435; 594036, 2371431; 594138, 2371415; 594190, 2371399; 594232, 2371385; 594246, 2371359; 594239, 2371354; 594170, 2370879; 594172, 2370877; 594170, 2370855.

(ii) Note: Map of *Drosophila aglaia*—Unit 2—Puu Kaua follows:


Drosophila aglaia - Unit 2 - Puu Kaua
Puu kanehoa
Honouliuli Contour Trail
1500
2000
2500
Honouliuli Forest Reserve
Pohakea Pass
1500
2000
Drosophila aglaia - Unit 2 - Puu Kaua
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

BILLING CODE 4310–55–C

Hawaiian picture-wing fly (*Drosophila differens*)

(1) Critical habitat is depicted for County of Maui, island of Molokai, Hawaii, on the map below.

(2) The primary constituent elements of critical habitat for *Drosophila differens* are:

(i) Wet, montane, ohia forest between the elevations of 3,650–4,500 ft (1,115–1,370 m); and

(ii) The larval host plants *Clermontia arborescens* ssp. *waihiae, C. granidiflora* ssp. *munroi, C. oblongifolia* ssp. *brevipes, C. kakeana,* and *C. pallida.*

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

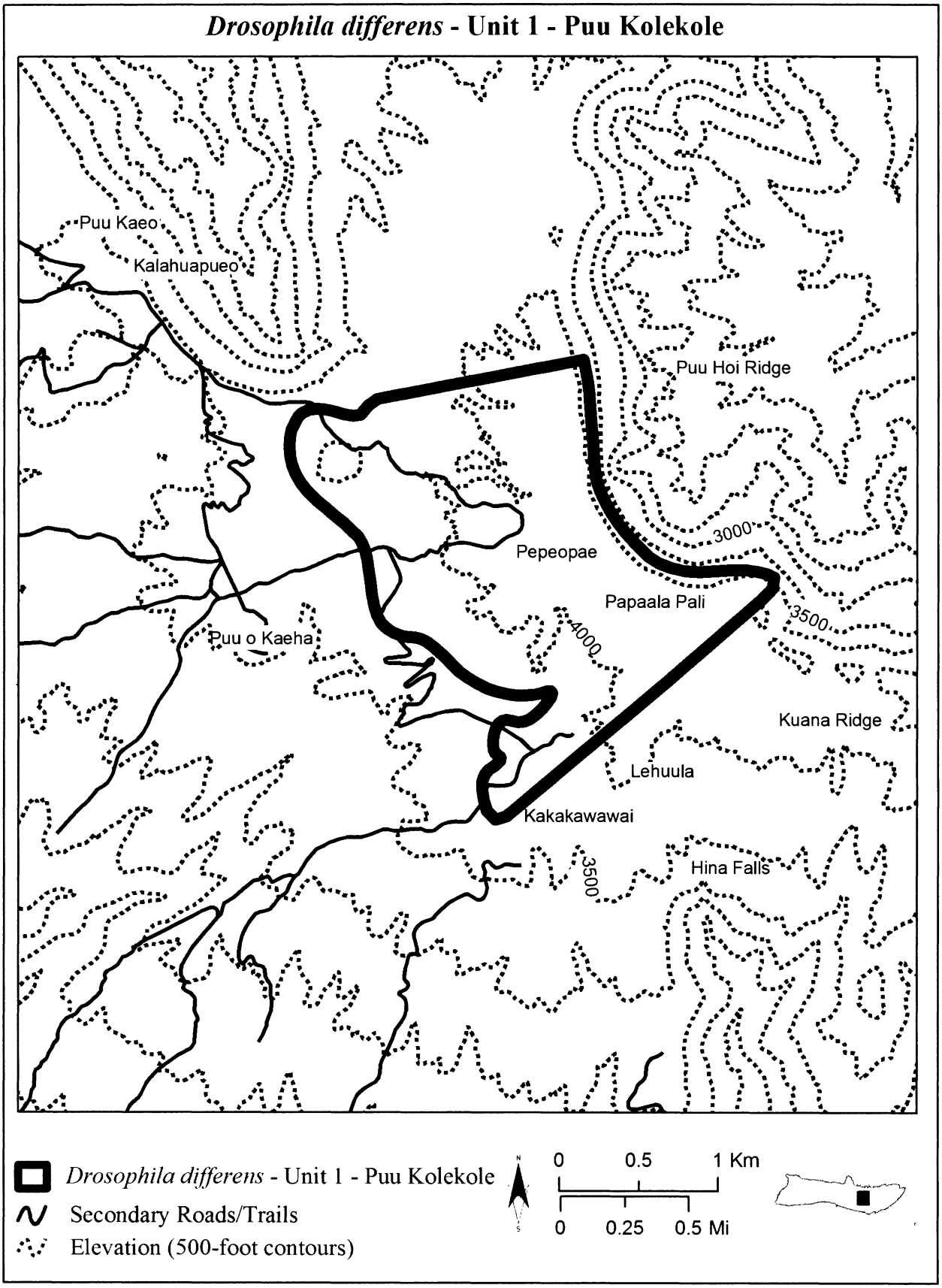
(4) Critical habitat map unit. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) *Drosophila differens*—Unit 1—Puu Kolekole, Maui County, island of Molokai, Hawaii.

(i) Land bounded by the following coordinates: 718527, 2337536; 718533, 2337451; 718538, 2337370; 718543, 2337298; 718547, 2337236; 718551, 2337182; 718555, 2337138; 718560, 2337098; 718571, 2337055; 718586, 2337010; 718607, 2336962; 718632, 2336912; 718662, 2336860; 718698, 2336807; 718739, 2336754; 718784, 2336700; 718835, 2336646; 718892, 2336593; 718958, 2336551; 719034, 2336520; 719119, 2336502; 719215, 2336497; 719320, 2336503; 719420, 2336509; 719506, 2336508; 719579, 2336500; 719639, 2336484; 719685, 2336462; 719675, 2336394; 719613, 2336327; 718980, 2335781; 718332, 2335236; 718002, 2334953; 717930, 2334932; 717877, 2334988; 717855, 2335060; 717846, 2335123; 717848, 2335175; 717862, 2335217; 717888, 2335249; 717921, 2335272; 717946, 2335291; 717961, 2335308; 717965, 2335322; 717958, 2335333; 717942, 2335342; 717928, 2335356; 717919, 2335377; 717915, 2335404; 717916, 2335438; 717923, 2335478; 717935, 2335515; 717952, 2335542; 717974, 2335558; 718001, 2335564; 718034, 2335559; 718070, 2335550; 718107, 2335553; 718144, 2335567; 718182, 2335593; 718221, 2335630; 718257, 2335675; 718280, 2335710; 718286, 2335733; 718277, 2335745; 718253, 2335744; 718213, 2335731; 718166, 2335721; 718115, 2335717; 718060, 2335719; 718001, 2335728; 717937, 2335742; 717873, 2335764; 717812, 2335793; 717753, 2335829; 717697, 2335873; 717643, 2335924; 717591, 2335977; 717543, 2336020; 717499, 2336052; 717458, 2336073; 717420, 2336083; 717385, 2336085; 717351, 2336089; 717319, 2336098; 717288, 2336110; 717258, 2336127; 717230, 2336148; 717204, 2336180; 717183, 2336223; 717165, 2336280; 717151, 2336348; 717140, 2336429; 717130, 2336510; 717118, 2336579; 717103, 2336636; 717085, 2336680; 717065, 2336713; 717041, 2336739; 717009, 2336769; 716968, 2336806; 716919, 2336847; 716862, 2336894; 716800, 2336946; 716745, 2337000; 716702, 2337055; 716669, 2337112; 716647, 2337171; 716635, 2337231; 716632, 2337289; 716634, 2337341; 716644, 2337388; 716660, 2337430; 716683, 2337468; 716713, 2337497; 716751, 2337516; 716797, 2337523; 716850, 2337520; 716912, 2337507; 716976, 2337488; 717031, 2337481; 717077, 2337486; 717126, 2337542; 717183, 2337585; 718403, 2337817; 718484, 2337833; 718487, 2337824; 718499, 2337760; 718510, 2337691; 718519, 2337616.

(ii) Note: Map of *Drosophila differens*—Unit 1—Puu Kolekole follows:

BILLING CODE 4310–55–P


Drosophila differens - Unit 1 - Puu Kolekole
Puu Kaeo
Kalahuapueo
Puu Hoi Ridge
3000
Pepeopae
Papaala Pali
3500
4000
Puu o Kaeha
Kuana Ridge
Lehuula
Kakakawawai
3500
Hina Falls
Drosophila differens - Unit 1 - Puu Kolekole
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

Hawaiian picture-wing fly (*Drosophila hemipeza*)

(1) Critical habitat units are depicted for County of Honolulu, island of Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila hemipeza* are:

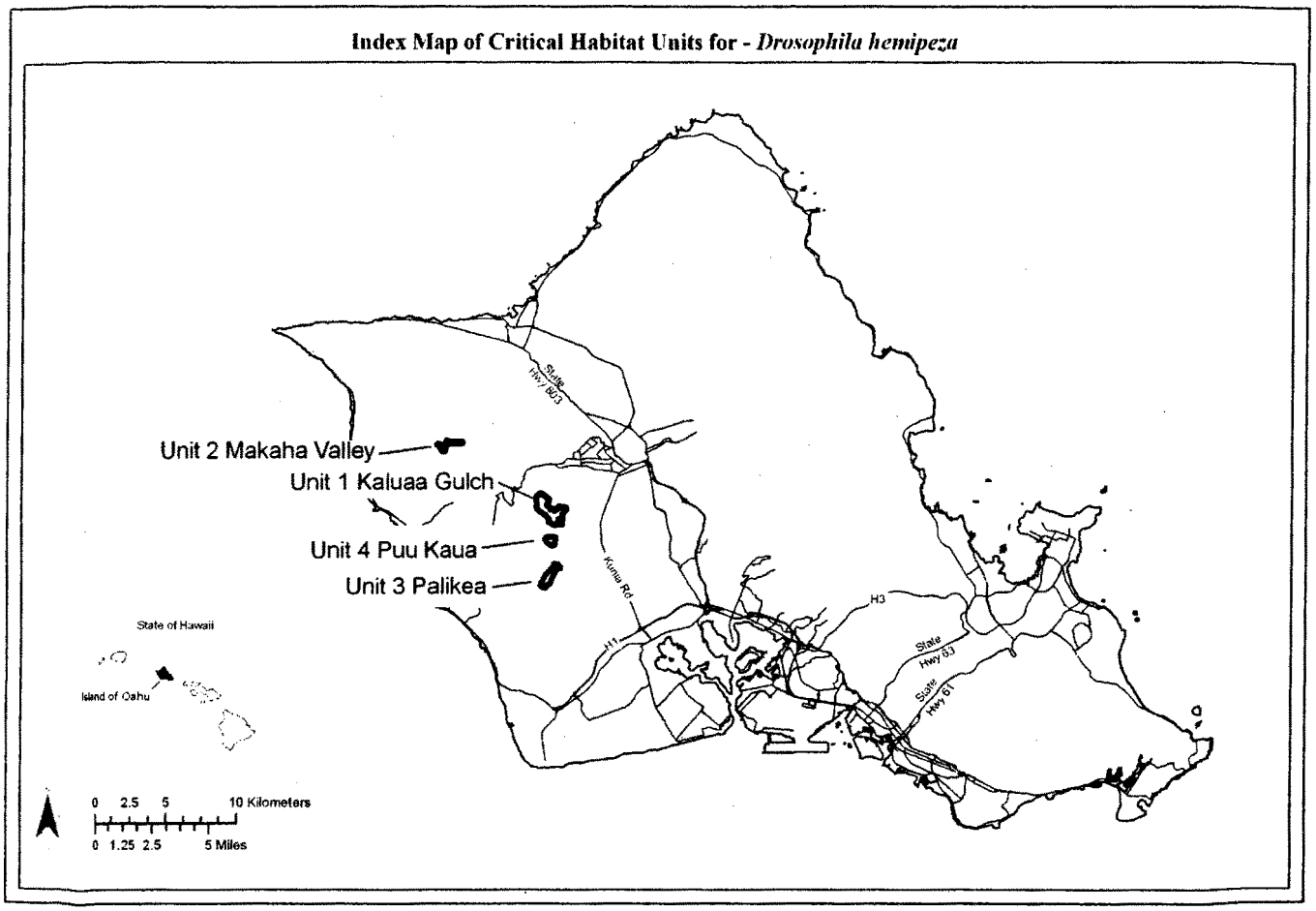
(i) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,500–2,900 ft (460–885 m); and

(ii) The larval host plants *Cyanea angustifolia, C. calycina, C. grimesiana* ssp. *grimesiana, C. grimesiana* ssp. *obatae, C. membranacea, C. pinnatifida, C. superba* ssp. *superba, Lobelia hypoleuca, L. niihauensis, L. yuccoides,* and *Urera kaalae.*

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila hemipeza* follows:



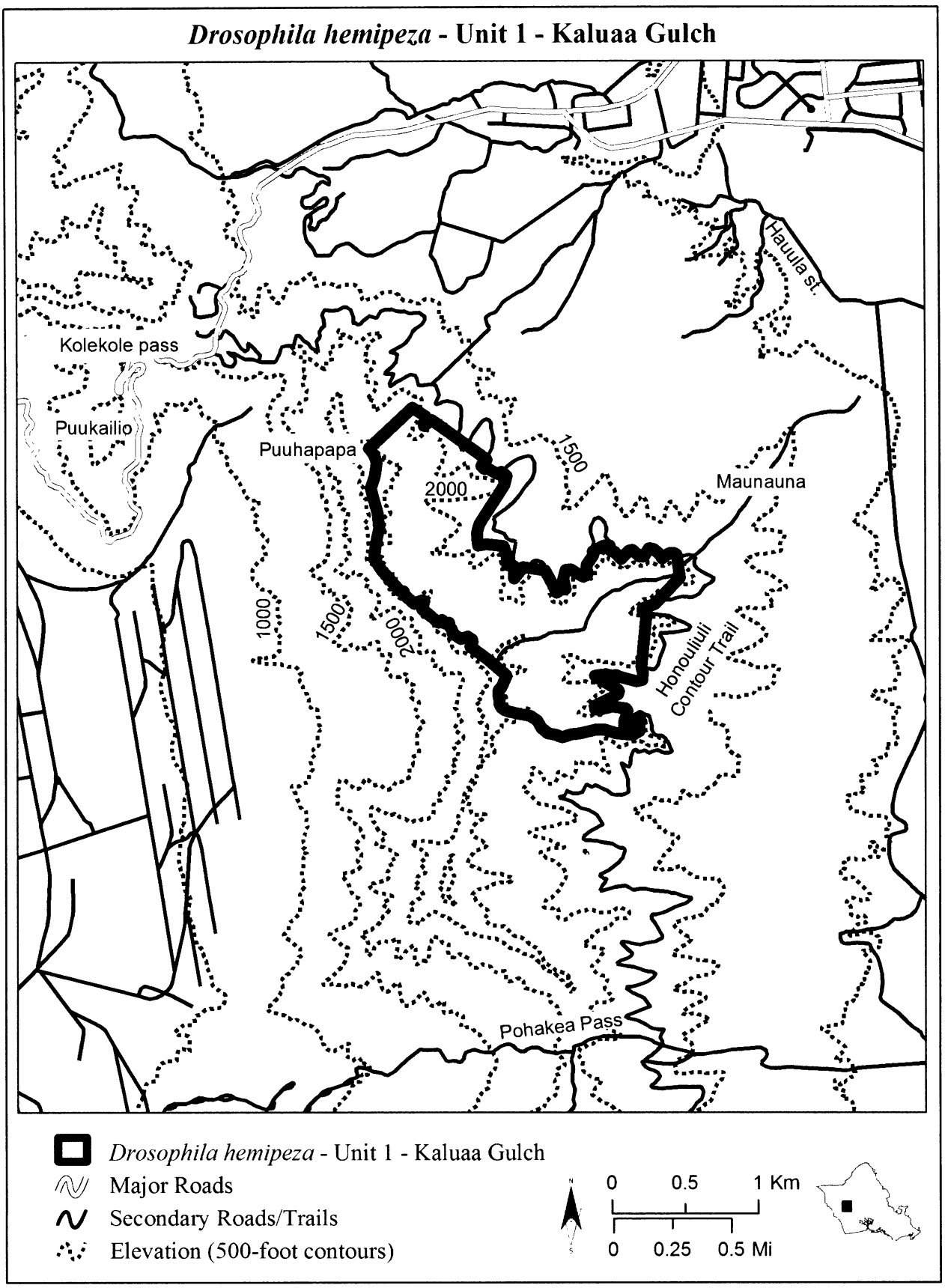
(6) *Drosophila hemipeza*—Unit 1—Kaluaa Gulch, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593240, 2374436; 593231, 2374371; 593281, 2374410; 593315, 2374385; 593612, 2374173; 593656, 2374138; 593621, 2374096; 593641, 2374077; 593676, 2374072; 593703, 2374057; 593734, 2374039; 593758, 2374058; 593793, 2374029; 593779, 2373964; 593731, 2373894; 593660, 2373784; 593609, 2373702; 593592, 2373648; 593592, 2373594; 593598, 2373553; 593657, 2373561; 593770, 2373549; 593792, 2373496; 593797, 2373417; 593842, 2373411; 593842, 2373326; 593905, 2373404; 594053, 2373383; 594103, 2373292; 594134, 2373228; 594156, 2373250; 594194, 2373256; 594178, 2373323; 594196, 2373386; 594229, 2373390; 594312, 2373340; 594341, 2373350; 594339, 2373421; 594383, 2373487; 594381, 2373513; 594460, 2373552; 594496, 2373553; 594497, 2373518; 594526, 2373509; 594572, 2373460; 594632, 2373519; 594649, 2373523; 594699, 2373475; 594728, 2373476; 594762, 2373532; 594791, 2373529; 594828, 2373501; 594852, 2373465; 594903, 2373501; 594933, 2373500; 594952, 2373489; 594974, 2373334; 594800, 2373150; 594718, 2373120; 594718, 2373102; 594744, 2373091; 594710, 2372721; 594720, 2372686; 594716, 2372633; 594678, 2372623; 594566, 2372651; 594536, 2372666; 594506, 2372663; 594467, 2372672; 594395, 2372663; 594406, 2372650; 594546, 2372567; 594558, 2372553; 594551, 2372535; 594389, 2372452; 594395, 2372434; 594415, 2372428; 594511, 2372449; 594603, 2372437; 594614, 2372421; 594607, 2372385; 594593, 2372353; 594591, 2372317; 594618, 2372322; 594661, 2372357; 594700, 2372384; 594696, 2372334; 594697, 2372333; 594697, 2372283; 594652, 2372257; 594541, 2372266; 594454, 2372294; 594400, 2372294; 594293, 2372267; 594231, 2372261; 594168, 2372241; 594126, 2372258; 594075, 2372267; 594030, 2372303; 593999,

2372354; 593948, 2372388; 593889, 2372397; 593812, 2372413; 593781, 2372425; 593756, 2372442; 593742, 2372467; 593742, 2372490; 593736, 2372521; 593736, 2372560; 593757, 2372587; 593790, 2372662; 593663, 2372772; 593543, 2372859; 593558, 2372894; 593555, 2372910; 593526, 2372928; 593476, 2372912; 593422, 2372953; 593420, 2372976; 593403, 2372997; 593400, 2373025; 593373, 2373016; 593352, 2373044; 593328, 2373025; 593215, 2373118; 593230, 2373171; 593214, 2373176; 593163, 2373154; 593095, 2373213; 593091, 2373238; 593064, 2373243; 593019, 2373295; 592937, 2373388; 592889, 2373462; 592897, 2373535; 592908, 2373597; 592923, 2373668; 592914, 2373772; 592889, 2373866; 592868, 2373941; 592867, 2373950; 592894, 2374029; 592908, 2374120; 592894, 2374162; 592860, 2374213; 592854, 2374216; 593151, 2374494.

(ii) Note: Map of *Drosophila hemipeza*—Unit 1—Kaluaa Gulch follows:

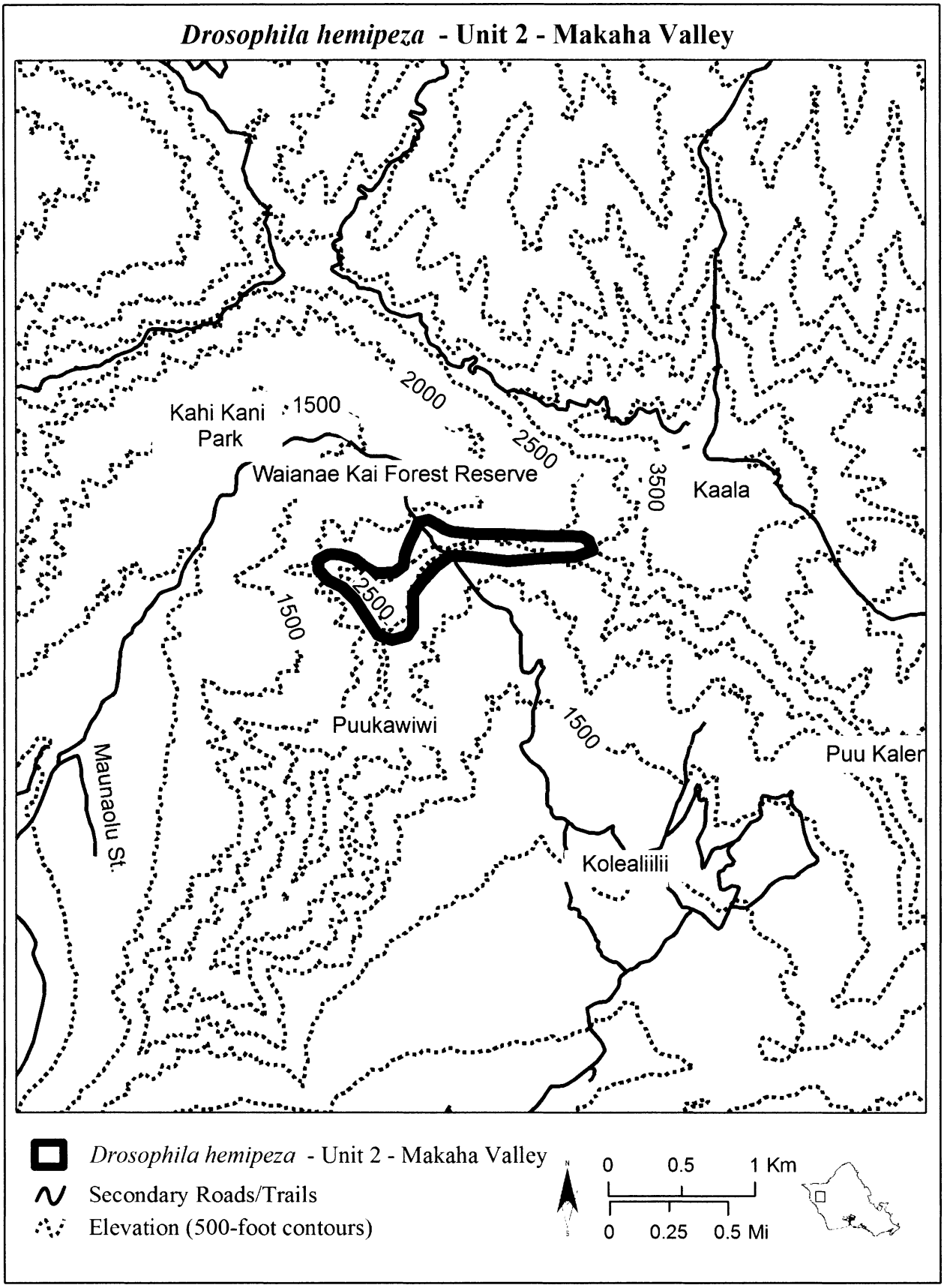
BILLING CODE 4310–55–P


Drosophila hemipeza - Unit 1 - Kaluaa Gulch
Kolekole pass
Puukailio
Puuhapapa
2000
1500
Maunauna
Hauula st.
1000
1500
2000
Honouliuli Contour Trail
Pohakea Pass
Drosophila hemipeza - Unit 1 - Kaluaa Gulch
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila hemipeza*—Unit 2—Makaha Valley, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 586712, 2378108; 586877, 2378091; 587049, 2378091; 587173, 2378087; 587333, 2378079; 587506, 2378079; 587592, 2378075; 587641, 2378046; 587641, 2378038; 587666, 2377980; 587543, 2377935; 587399, 2377931; 587243, 2377919; 587090, 2377906; 586794, 2377943; 586696, 2377943; 586597, 2377869; 586507, 2377767; 586449, 2377684; 586449, 2377458; 586408, 2377397; 586305, 2377368; 586206, 2377405; 586054, 2377643; 585968, 2377726; 585869, 2377775; 585803, 2377849; 585803, 2377915; 585869, 2377952; 585894, 2377956; 585956, 2377952; 586050, 2377923; 586120, 2377869; 586194, 2377824; 586317, 2377828; 586383, 2377878; 586391, 2377956; 586420, 2378034; 586461, 2378116; 586482, 2378174; 586552, 2378190; 586630, 2378149; 586655, 2378128.

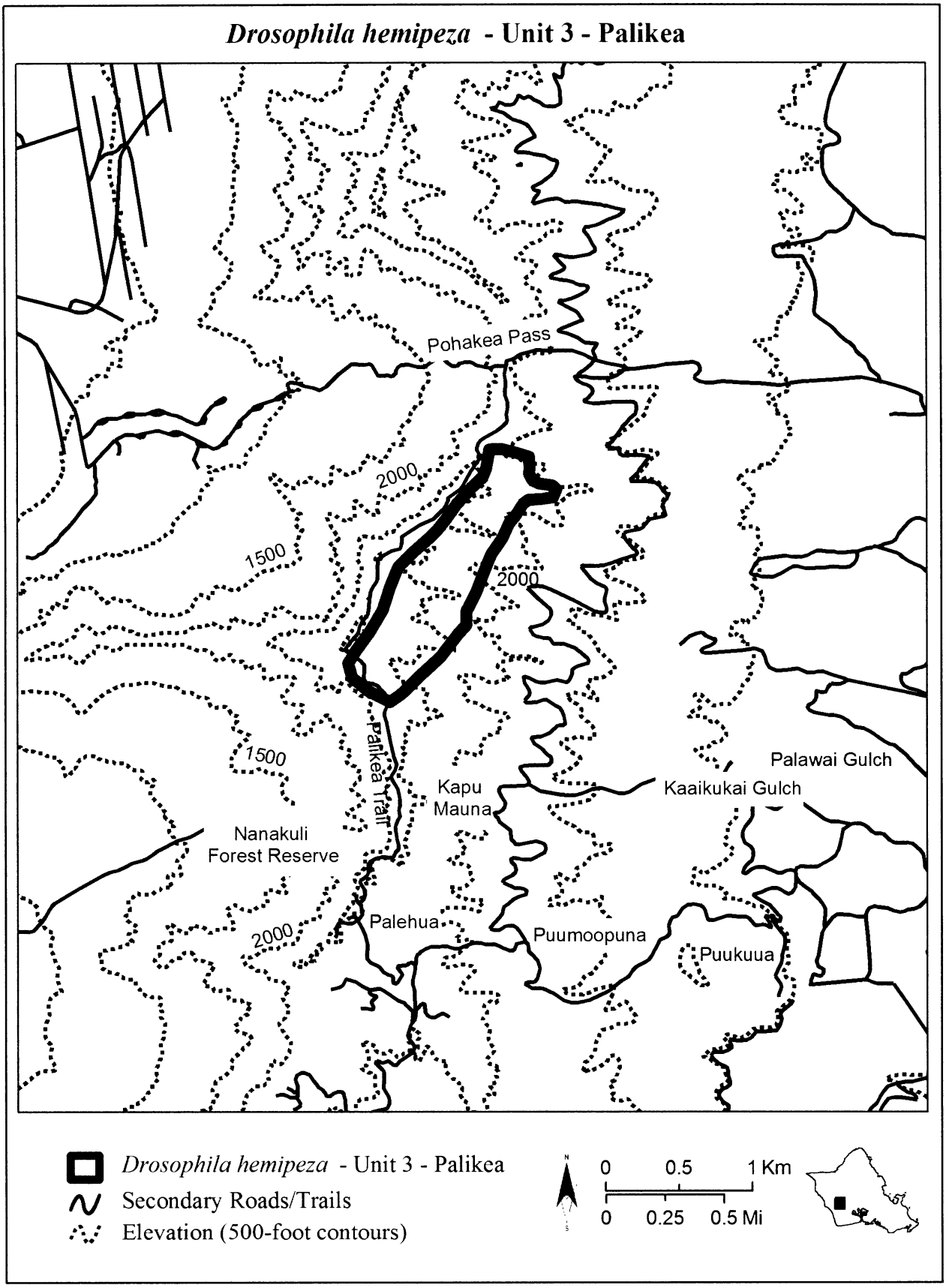
(ii) Note: Map of *Drosophila hemipeza*—Unit 2—Makaha Valley follows:


Drosophila hemipeza - Unit 2 - Makaha Valley
Kahi Kani Park
1500
2000
2500
3500
Waianae Kai Forest Reserve
Kaala
2500
1500
Puukawiwi
1500
Puu Kaler
Maunaolu St.
Kolealiilii
Drosophila hemipeza - Unit 2 - Makaha Valley
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(8) *Drosophila hemipeza*—Unit 3—Palikea, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593529, 2367854; 593448, 2367801; 593302, 2367874; 593242, 2367927; 593193, 2367967; 593165, 2368065; 593217, 2368150; 593314, 2368283; 593399, 2368425; 593448, 2368578; 593505, 2368716; 593622, 2368833; 593703, 2368906; 593764, 2368963; 593832, 2369044; 593901, 2369145; 594002, 2369262; 594079, 2369331; 594104, 2369396; 594120, 2369485; 594124, 2369521; 594148, 2369525; 594213, 2369525; 594310, 2369497; 594395, 2369473; 594399, 2369392; 594396, 2369356; 594417, 2369313; 594461, 2369290; 594551, 2369278; 594579, 2369250; 594559, 2369197; 594472, 2369183; 594391, 2369179; 594354, 2369153; 594302, 2369072; 594257, 2369015; 594213, 2368914; 594136, 2368809; 594083, 2368672; 594035, 2368550; 593966, 2368417; 593966, 2368324; 593909, 2368259; 593792, 2368105; 593675, 2368000.

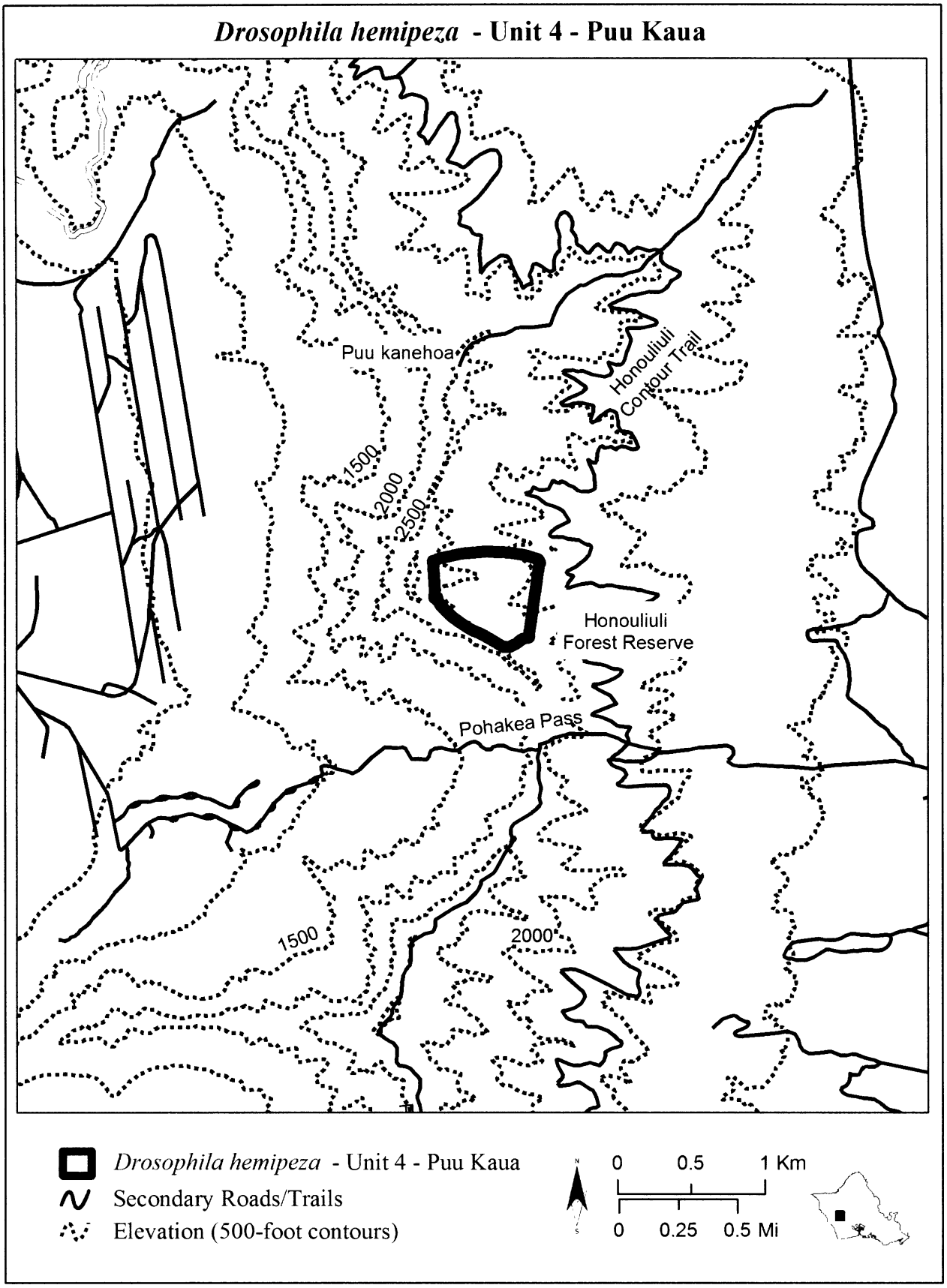
(ii) Note: Map of *Drosophila hemipeza*—Unit 3—Palikea follows:


Drosophila hemipeza - Unit 3 - Palikea
Pohakea Pass
2000
1500
2000
1500
Palikea Trail
Kapu
Mauna
Palawai Gulch
Kaaikukai Gulch
Nanakuli
Forest Reserve
Palehua
2000
Puumoopuna
Puukuua
Drosophila hemipeza - Unit 3 - Palikea
Secondary Roads/Trails
Elevation (500-foot contours)
N
S
0
0.5
1 Km
0
0.25
0.5 Mi

(9) *Drosophila hemipeza*—Unit 4—Puu Kaua, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 594166, 2370854; 594166, 2370853; 594164, 2370854; 594122, 2370843; 594090, 2370815; 594040, 2370789; 593996, 2370789; 593930, 2370827; 593852, 2370875; 593778, 2370907; 593716, 2370947; 593642, 2370999; 593602, 2371041; 593574, 2371067; 593558, 2371095; 593539, 2371118; 593531, 2371121; 593534, 2371173; 593519, 2371375; 593533, 2371375; 593552, 2371390; 593628, 2371404; 593716, 2371426; 593794, 2371431; 593876, 2371437; 593974, 2371435; 594036, 2371431; 594138, 2371415; 594190, 2371399; 594232, 2371385; 594246, 2371359; 594239, 2371354; 594170, 2370879; 594172, 2370877; 594170, 2370855.

(ii) Note: Map of *Drosophila hemipeza*—Unit 4—Puu Kaua follows:


Drosophila hemipeza - Unit 4 - Puu Kaua
Puu kanehoa
Honouliuli Contour Trail
1500
2000
2500
Honouliuli Forest Reserve
Pohakea Pass
1500
2000
Drosophila hemipeza - Unit 4 - Puu Kaua
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

Hawaiian picture-wing fly (*Drosophila heteroneura*)

(1) Critical habitat units are depicted for County of Hawaii, island of Hawaii, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila heteroneura* are:

(i) Mesic to wet, montane, ohia and koa forest between the elevations of 3,000—6,000 ft (915–1,830 m); and

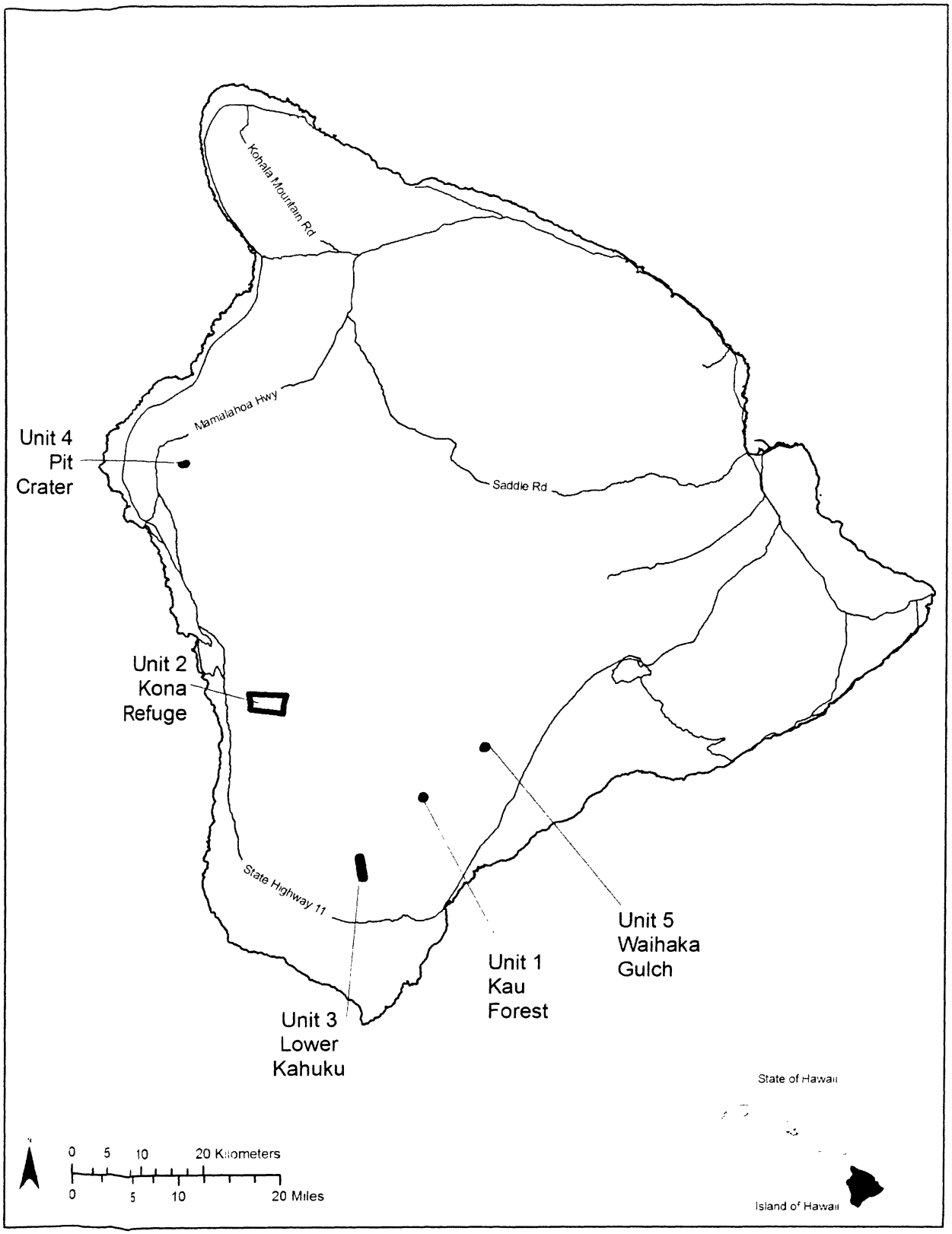
(ii) The larval host plants *Cheirodendron trigynum* ssp. *trigynum, Clermontia clermontioides, C. clermontioides* ssp. *rockiana, C. hawaiiensis, C. kohalae, C. lindseyana, C. montis-loa, C. parviflora, C. peleana, C. pyrularia,* and *Delissea parviflora.*

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila heteroneura* follows:

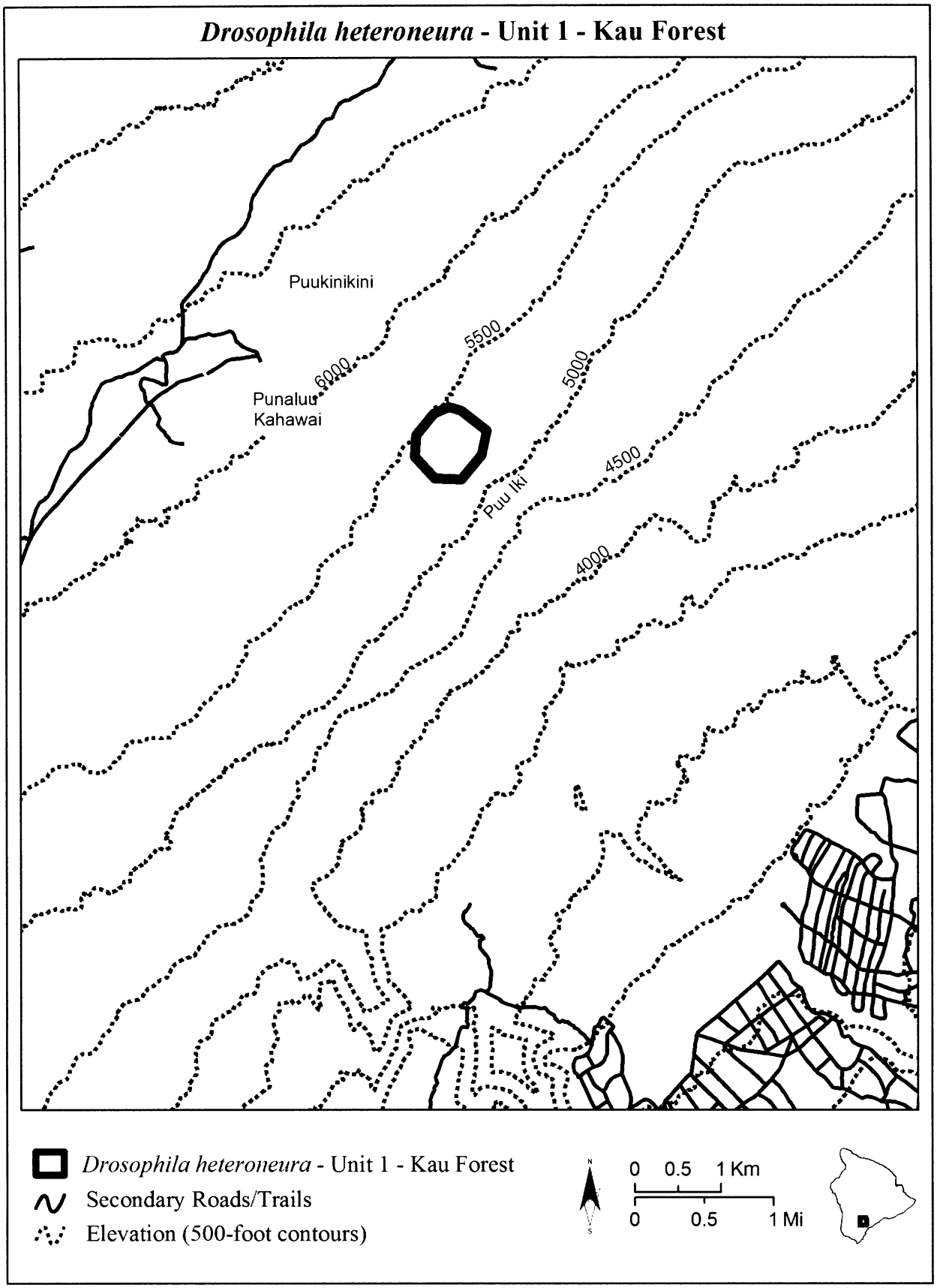
Index Map of Critical Habitat Units for - *Drosophila heteroneura*



(6) *Drosophila heteroneura*—Unit 1—Kau Forest, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 859357, 2130685; 859117, 2130401; 858810, 2130412; 858577, 2130667; 858596, 2130918; 858800, 2131167; 858976, 2131240; 859117, 2131196; 859416, 2130970.

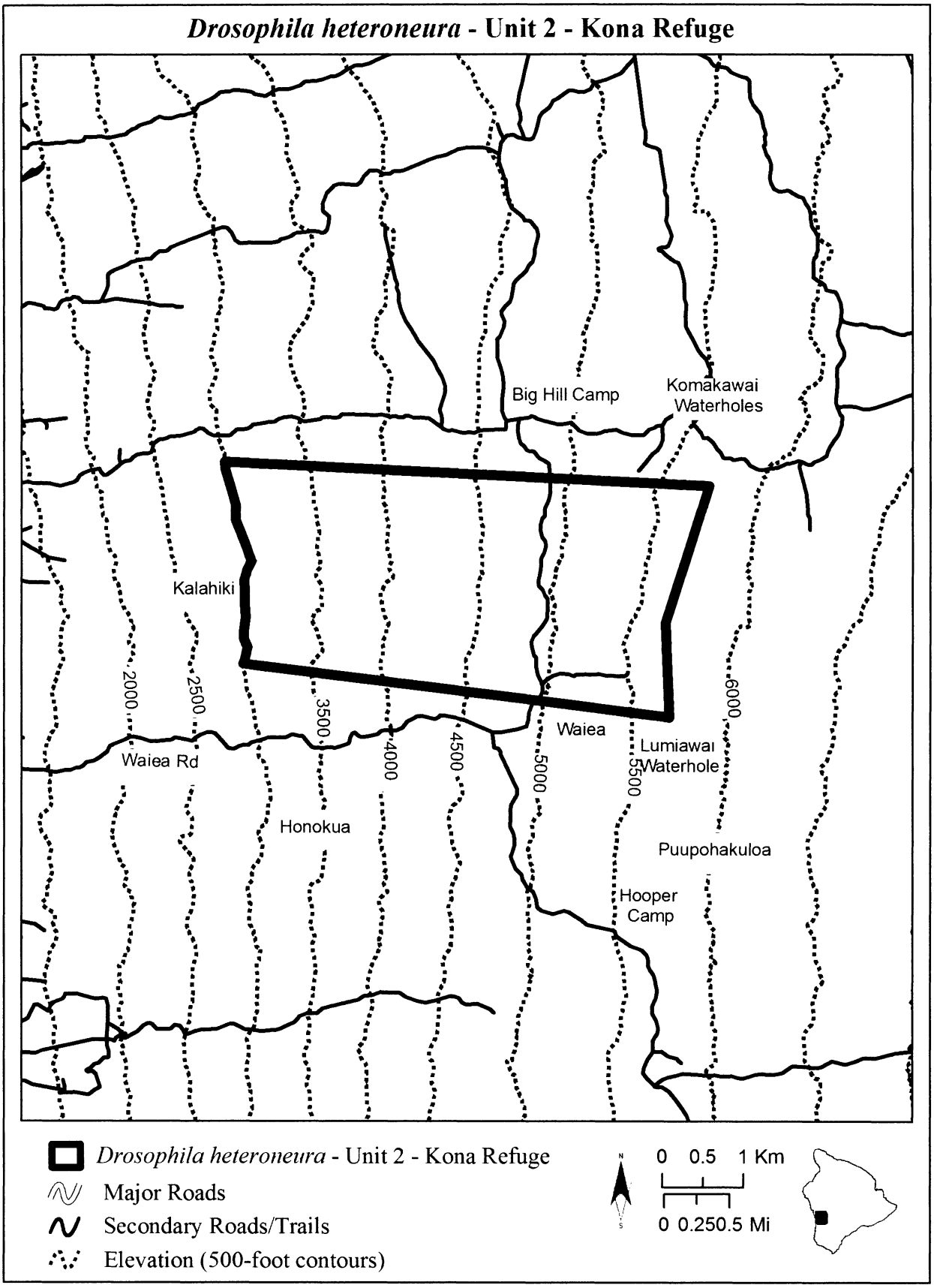
(ii) Note: Map of *Drosophila heteroneura*—Unit 1—Kau Forest follows:


Drosophila heteroneura - Unit 1 - Kau Forest
Puukinikini
Punaluu
Kahawai
6000
5500
5000
4500
4000
Puu Iki
Drosophila heteroneura - Unit 1 - Kau Forest
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.5 1 Mi

(7) *Drosophila heteroneura*—Unit 2—Kona Refuge, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 836880, 2145492; 836927, 2144316; 836473, 2144373; 835378, 2144516; 831663, 2144980; 831685, 2145029; 831718, 2145184; 831669, 2145289; 831669, 2145387; 831694, 2145557; 831685, 2145727; 831685, 2145882; 831677, 2146020; 831710, 2146149; 831767, 2146247; 831685, 2146482; 831572, 2146766; 831572, 2146953; 831515, 2147156; 831442, 2147391; 831438, 2147486; 837419, 2147183.

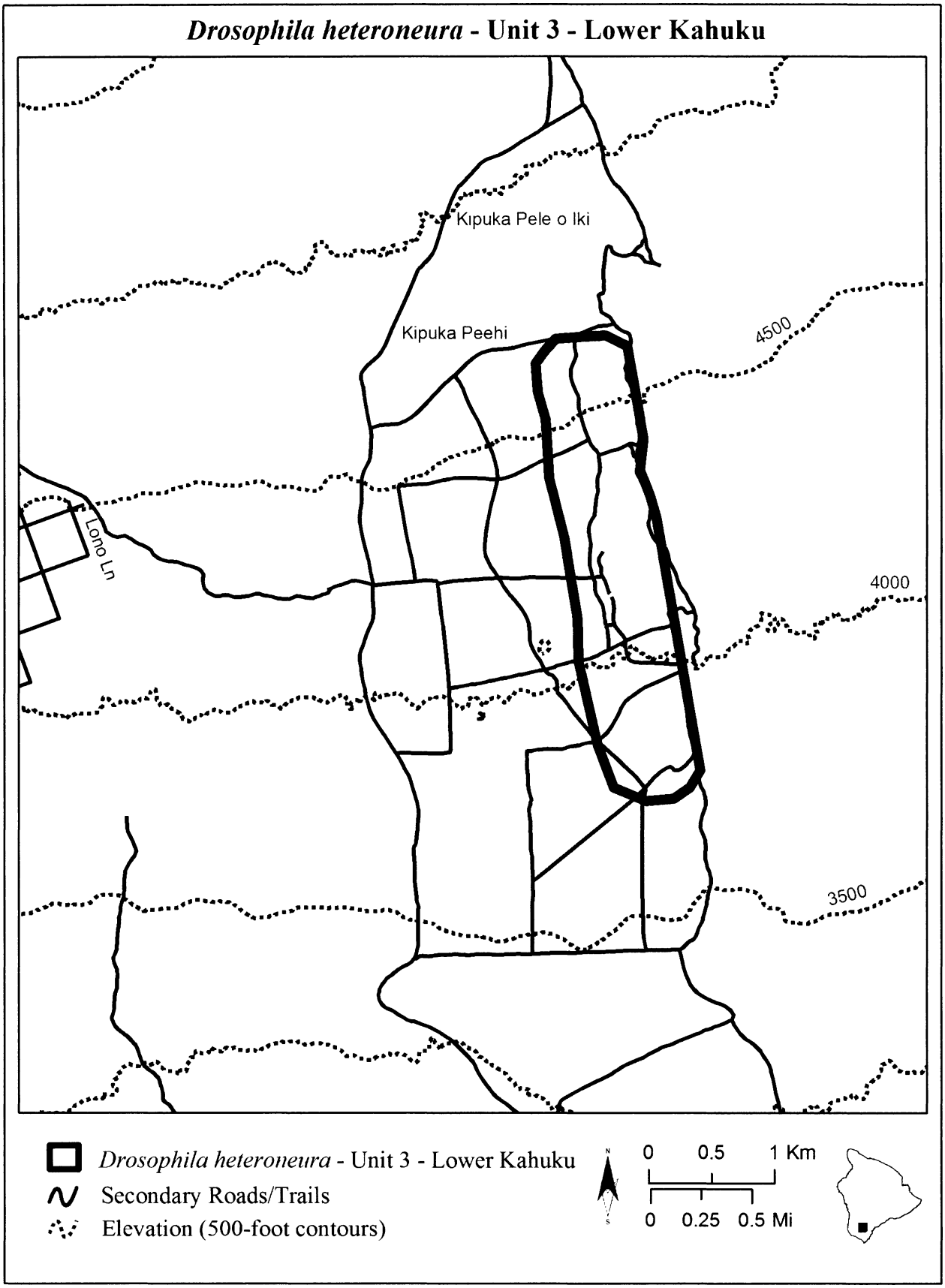
(ii) Note: Map of *Drosophila heteroneura*—Unit 2—Kona Refuge follows:


Drosophila heteroneura - Unit 2 - Kona Refuge
Big Hill Camp
Komakawai Waterholes
Kalahiki
2000
2500
3500
4000
4500
5000
5500
6000
Waiea
Waiea Rd
Lumiawai Waterhole
Honokua
Puupohakuloa
Hooper Camp
Drosophila heteroneura - Unit 2 - Kona Refuge
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.250.5 Mi

(8) *Drosophila heteroneura*—Unit 3—Lower Kahuku, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 849578, 2119874; 849925, 2117860; 849842, 2117726; 849716, 2117636; 849492, 2117618; 849240, 2117726; 849114, 2118058; 848962, 2118723; 848953, 2119065; 848845, 2119720; 848728, 2120187; 848701, 2120646; 848638, 2120870; 848620, 2121095; 848692, 2121194; 848782, 2121292; 849007, 2121310; 849177, 2121319; 849350, 2121233; 849475, 2120505; 849474, 2120484; 849447, 2120250; 849528, 2120044.

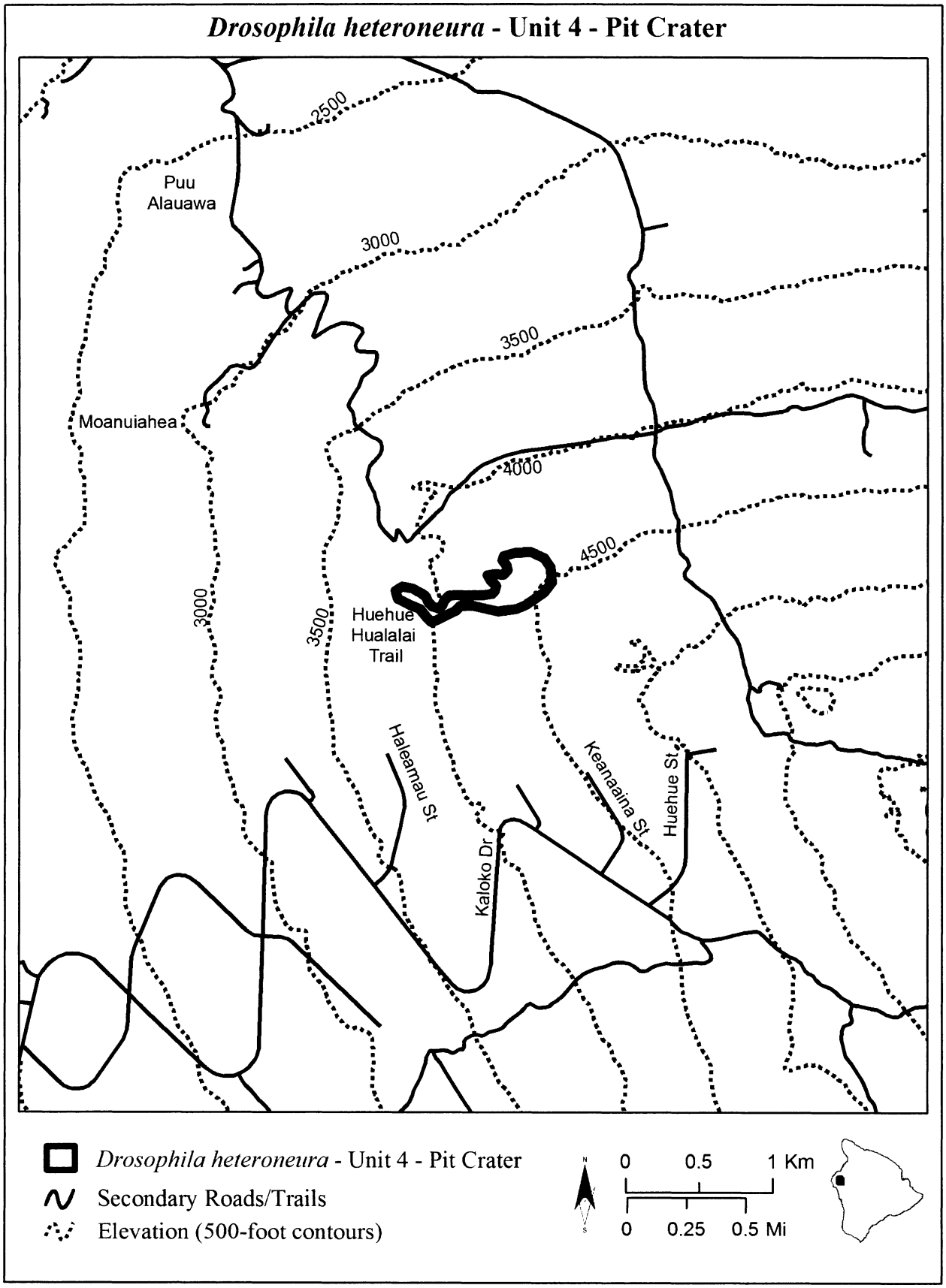
(ii) Note: Map of *Drosophila heteroneura*—Unit 3—Lower Kahuku follows:


Drosophila heteroneura - Unit 3 - Lower Kahuku
Kipuka Pele o Iki
Kipuka Peehi
4500
4000
3500
Lono Ln
Drosophila heteroneura - Unit 3 - Lower Kahuku
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(9) *Drosophila heteroneura*—Unit 4—Pit Crater, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 821660, 2184453; 821670, 2184348; 821617, 2184279; 821490, 2184191; 821428, 2184164; 821304, 2184150; 821131, 2184187; 821052, 2184187; 821012, 2184150; 820889, 2184086; 820850, 2184076; 820824, 2184102; 820778, 2184164; 820705, 2184193; 820626, 2184233; 820610, 2184289; 820657, 2184318; 820673, 2184316; 820707, 2184310; 820723, 2184306; 820747, 2184293; 820790, 2184269; 820818, 2184247; 820832, 2184215; 820861, 2184180; 820905, 2184168; 820929, 2184191; 820939, 2184221; 820974, 2184255; 821024, 2184261; 821109, 2184261; 821206, 2184261; 821264, 2184269; 821282, 2184285; 821292, 2184322; 821254, 2184360; 821232, 2184396; 821276, 2184404; 821341, 2184400; 821369, 2184431; 821363, 2184463; 821333, 2184499; 821345, 2184528; 821426, 2184550; 821531, 2184554; 821619, 2184513.

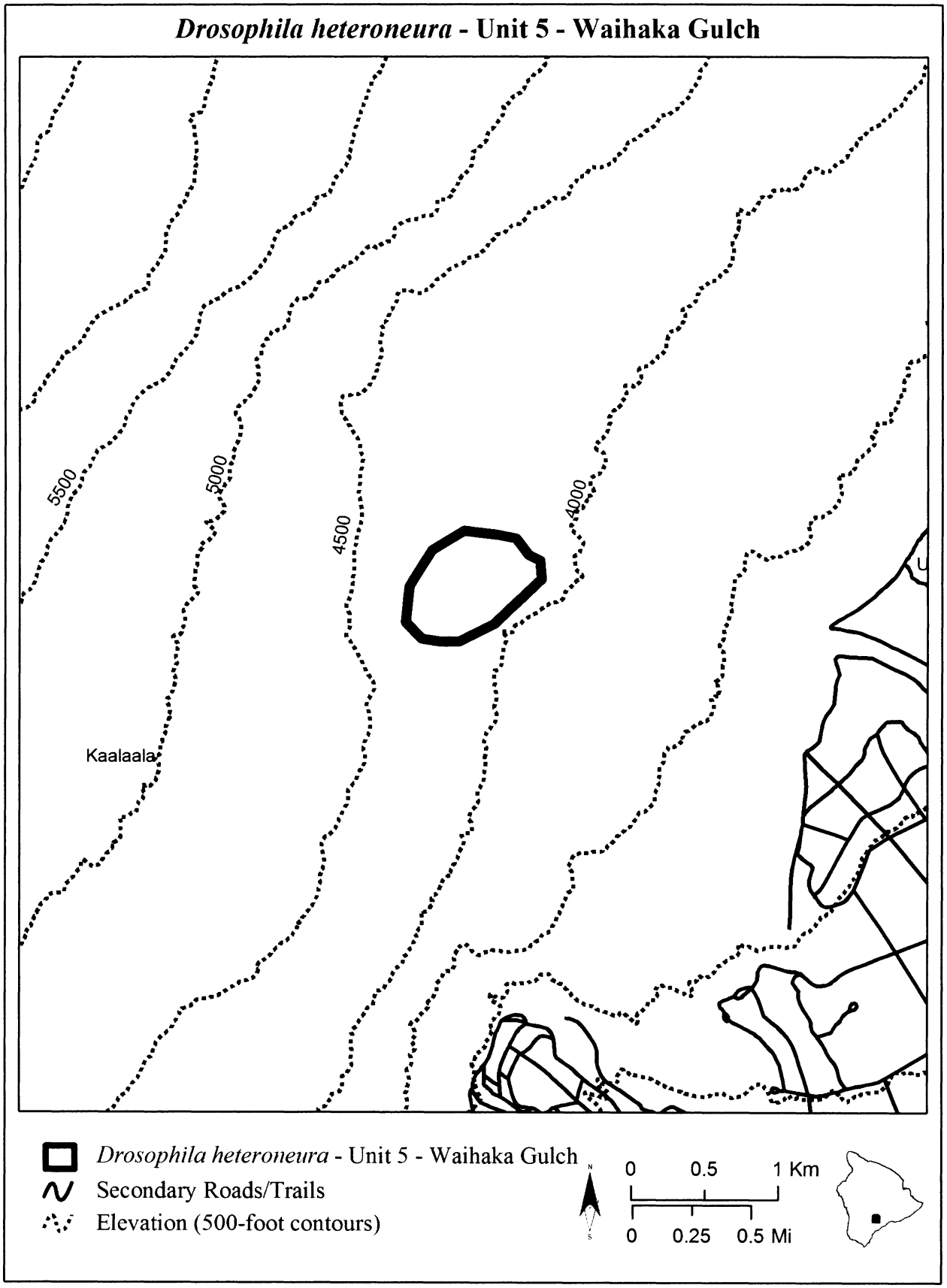
(ii) Note: Map of *Drosophila heteroneura*—Unit 4—Pit Crater follows:


Drosophila heteroneura - Unit 4 - Pit Crater
2500
Puu
Alauawa
3000
3500
Moanuiahea
4000
4500
3000
3500
Huehue
Hualalai
Trail
Haleamau St
Kaloko Dr
Keanaaina St
Huehue St
Drosophila heteroneura - Unit 4 - Pit Crater
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(10) *Drosophila heteroneura*—Unit 5—Waihaka Gulch, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 868924, 2138585; 868686, 2138463; 868564, 2138464; 868434, 2138482; 868325, 2138598; 868350, 2138841; 868378, 2138886; 868503, 2139088; 868720, 2139220; 868946, 2139193; 869076, 2139167; 869160, 2139055; 869238, 2139018; 869248, 2138892.

(ii) Note: Map of *Drosophila heteroneura*—Unit 5—Waihaka Gulch follows:



BILLING CODE 4310–55–C

Hawaiian picture-wing fly (*Drosophila montgomeryi*)

(1) Critical habitat units are depicted for County of Honolulu, Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila montgomeryi* are:

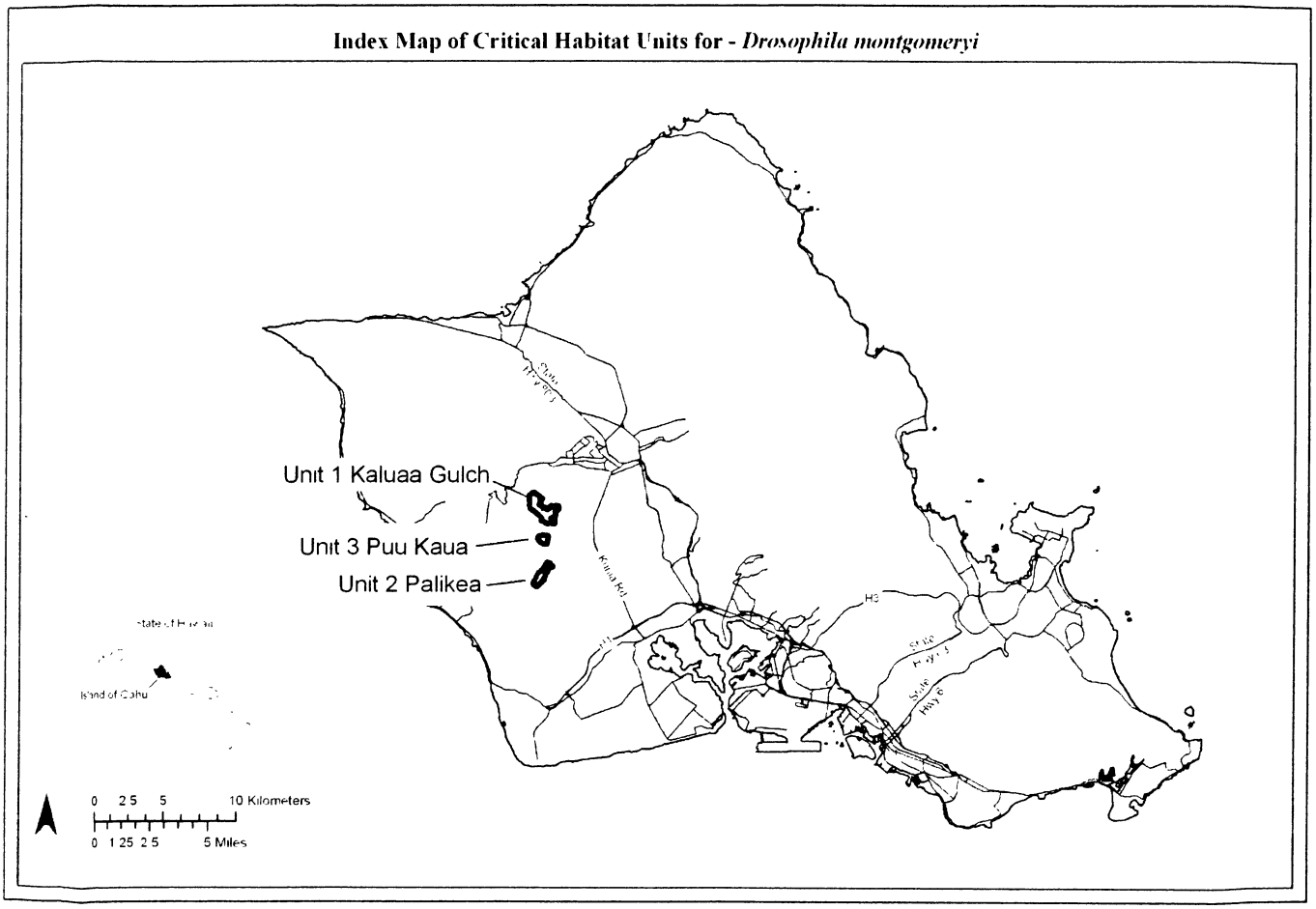
(i) Mesic, lowland, diverse ohia and koa forest between the elevations of 1,900–2,900 ft (580–885 m); and

(ii) The larval host plant *Urera kaalae*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila montgomery i* follows:



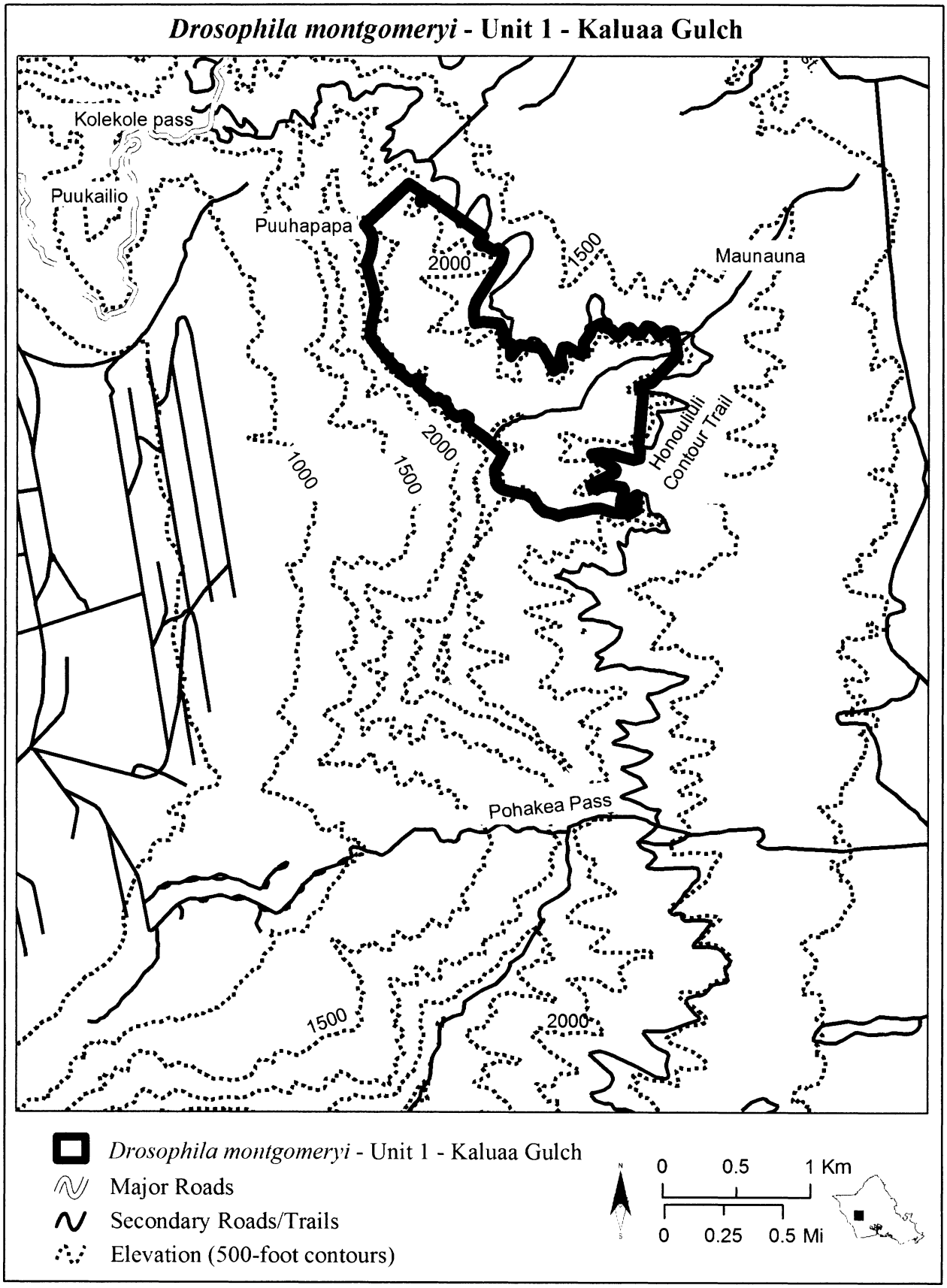
(6) *Drosophila montgomeryi*—Unit 1—Kaluaa Gulch, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593240, 2374436; 593231, 2374371; 593281, 2374410; 593315, 2374385; 593612, 2374173; 593656, 2374138; 593621, 2374096; 593641, 2374077; 593676, 2374072; 593703, 2374057; 593734, 2374039; 593758, 2374058; 593793, 2374029; 593779, 2373964; 593731, 2373894; 593660, 2373784; 593609, 2373702; 593592, 2373648; 593592, 2373594; 593598, 2373553; 593657, 2373561; 593770, 2373549; 593792, 2373496; 593797, 2373417; 593842, 2373411; 593842, 2373326; 593905, 2373404; 594053, 2373383; 594103, 2373292; 594134, 2373228; 594156, 2373250; 594194, 2373256; 594178, 2373323; 594196, 2373386; 594229, 2373390; 594312, 2373340; 594341, 2373350; 594339, 2373421; 594383, 2373487; 594381, 2373513; 594460, 2373552; 594496, 2373553; 594497, 2373518; 594526, 2373509; 594572, 2373460; 594632, 2373519; 594649, 2373523; 594699, 2373475; 594728, 2373476; 594762, 2373532; 594791, 2373529; 594828, 2373501; 594852, 2373465; 594903, 2373501; 594933, 2373500; 594952, 2373489; 594974, 2373334; 594800, 2373150; 594718, 2373120; 594718, 2373102; 594744, 2373091; 594710, 2372721; 594720, 2372686; 594716, 2372633; 594678, 2372623; 594566, 2372651; 594536, 2372666; 594506, 2372663; 594467, 2372672; 594395, 2372663; 594406, 2372650; 594546, 2372567; 594558, 2372553; 594551, 2372535; 594389, 2372452; 594395, 2372434; 594415, 2372428; 594511, 2372449; 594603, 2372437; 594614, 2372421; 594607, 2372385; 594593, 2372353; 594591, 2372317; 594618, 2372322; 594661, 2372357; 594700, 2372384; 594696, 2372334; 594697, 2372333; 594697, 2372283; 594652, 2372257; 594541, 2372266; 594454, 2372294; 594400, 2372294; 594293, 2372267; 594231, 2372261; 594168, 2372241; 594126, 2372258; 594075, 2372267; 594030, 2372303; 593999, 2372354; 593948, 2372388; 593889, 2372397; 593812, 2372413; 593781, 2372425; 593756, 2372442; 593742, 2372467; 593742, 2372490; 593736, 2372521; 593736, 2372560; 593757, 2372587; 593790,

2372662; 593663, 2372772; 593543, 2372859; 593558, 2372894; 593555, 2372910; 593526, 2372928; 593476, 2372912; 593422, 2372953; 593420, 2372976; 593403, 2372997; 593400, 2373025; 593373, 2373016; 593352, 2373044; 593328, 2373025; 593215, 2373118; 593230, 2373171; 593214, 2373176; 593163, 2373154; 593095, 2373213; 593091, 2373238; 593064, 2373243; 593019, 2373295; 592937, 2373388; 592889, 2373462; 592897, 2373535; 592908, 2373597; 592923, 2373668; 592914, 2373772; 592889, 2373866; 592868, 2373941; 592867, 2373950; 592894, 2374029; 592908, 2374120; 592894, 2374162; 592860, 2374213; 592854, 2374216; 593151, 2374494.

(ii) Note: Map of *Drosophila montgomeryi*—Unit 1—Kaluaa Gulch follows:

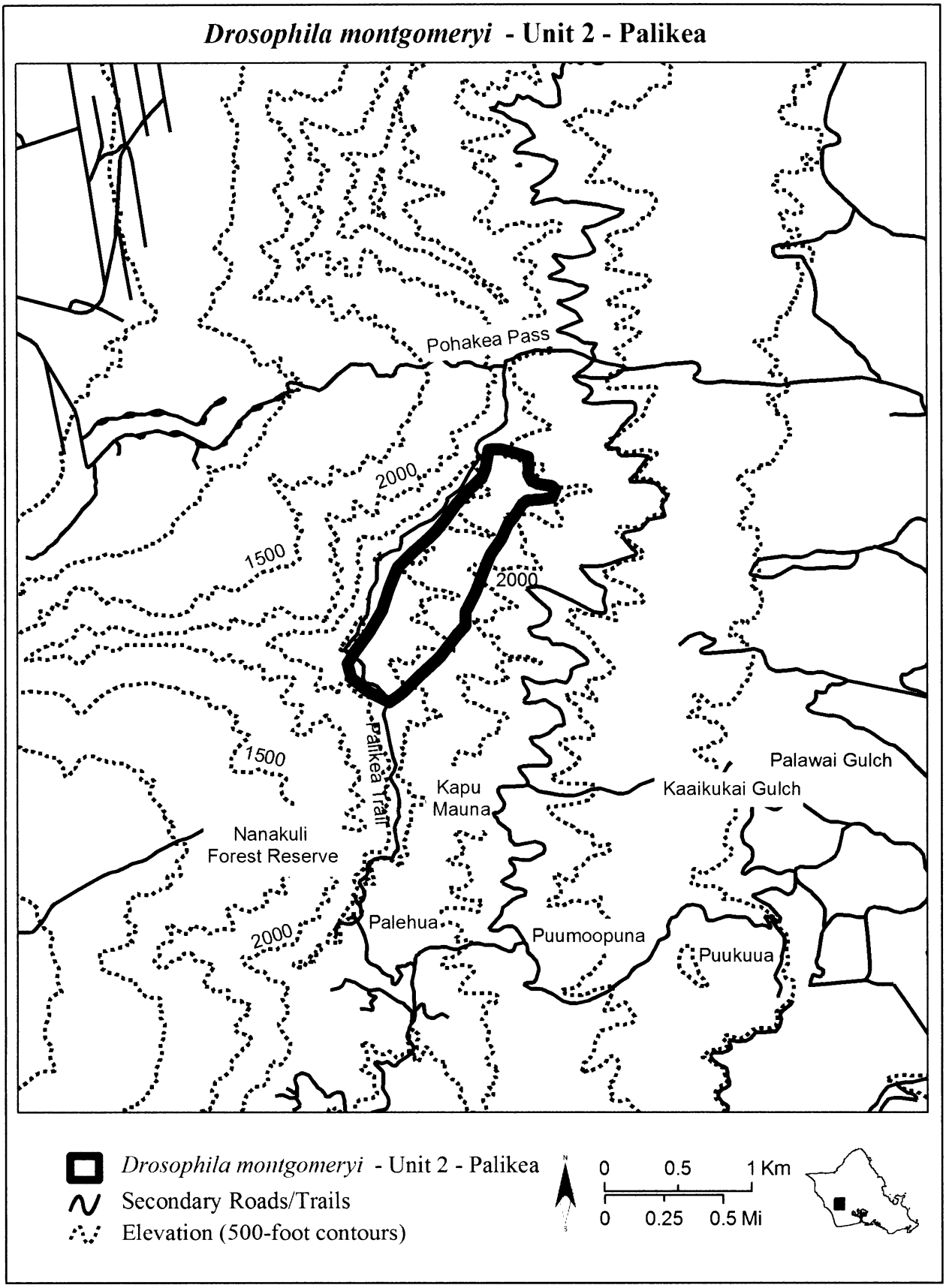
BILLING CODE 4310–55–P


Drosophila montgomeryi - Unit 1 - Kaluaa Gulch
Kolekole pass
Puukailio
Puuhapapa
2000
1500
Maunauna
Honouliuli Contour Trail
2000
1500
1000
Pohakea Pass
1500
2000
Drosophila montgomeryi - Unit 1 - Kaluaa Gulch
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila montgomeryi*—Unit 2—Palikea, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593529, 2367854; 593448, 2367801; 593302, 2367874; 593242, 2367927; 593193, 2367967; 593165, 2368065; 593217, 2368150; 593314, 2368283; 593399, 2368425; 593448, 2368578; 593505, 2368716; 593622, 2368833; 593703, 2368906; 593764, 2368963; 593832, 2369044; 593901, 2369145; 594002, 2369262; 594079, 2369331; 594104, 2369396; 594120, 2369485; 594124, 2369521; 594148, 2369525; 594213, 2369525; 594310, 2369497; 594395, 2369473; 594399, 2369392; 594396, 2369356; 594417, 2369313; 594461, 2369290; 594551, 2369278; 594579, 2369250; 594559, 2369197; 594472, 2369183; 594391, 2369179; 594354, 2369153; 594302, 2369072; 594257, 2369015; 594213, 2368914; 594136, 2368809; 594083, 2368672; 594035, 2368550; 593966, 2368417; 593966, 2368324; 593909, 2368259; 593792, 2368105; 593675, 2368000.

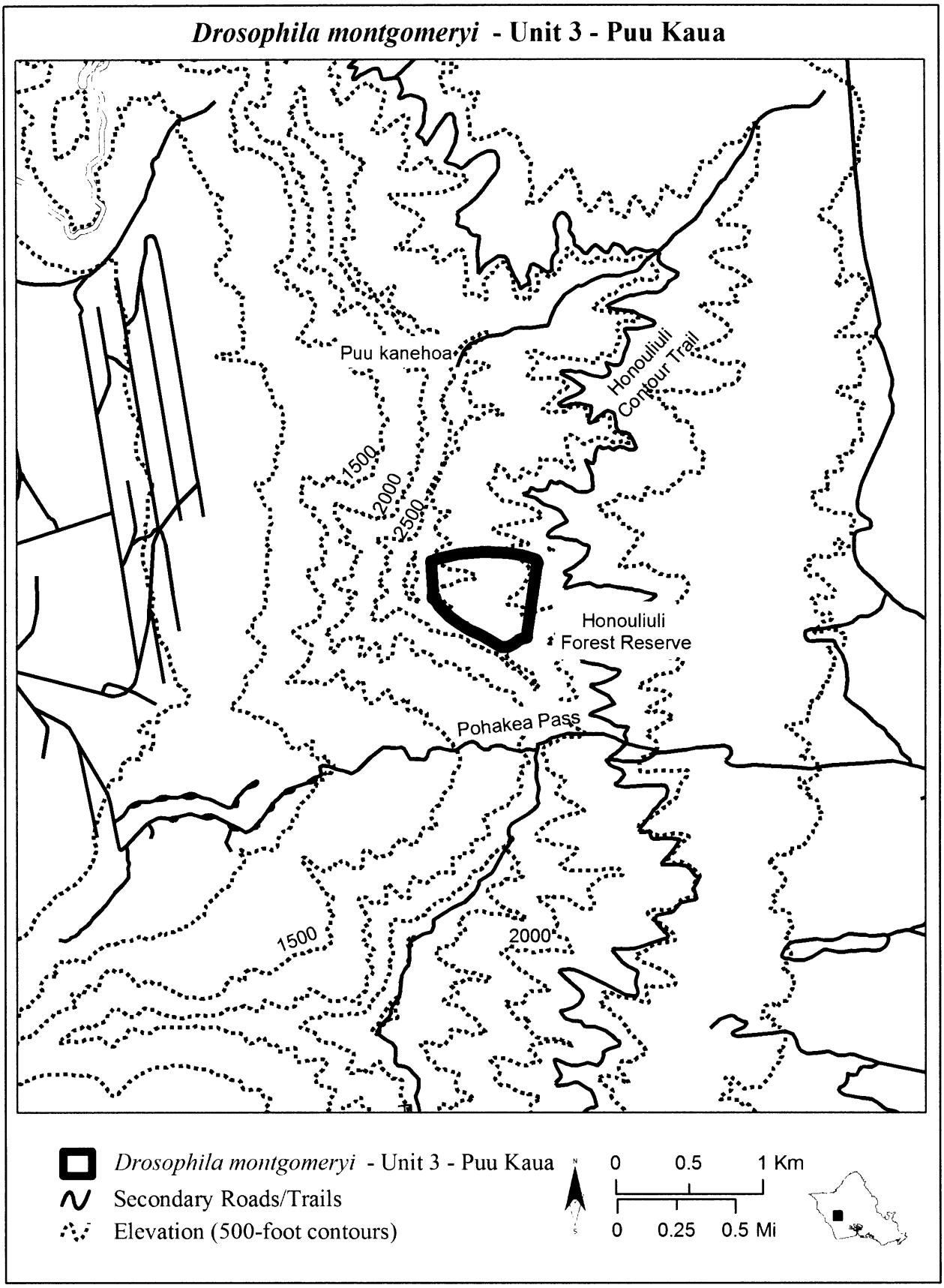
(ii) Note: Map of *Drosophila montgomeryi*—Unit 2—Palikea follows:


Drosophila montgomeryi - Unit 2 - Palikea
Pohakea Pass
2000
1500
2000
1500
Palikea Trail
Kapu
Mauna
Palawai Gulch
Kaaikukai Gulch
Nanakuli
Forest Reserve
Palehua
2000
Puumoopuna
Puukuua
Drosophila montgomeryi - Unit 2 - Palikea
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(8) D*rosophila montgomeryi*—Unit 3—Puu Kaua, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 594166, 2370854; 594166, 2370853; 594164, 2370854; 594122, 2370843; 594090, 2370815; 594040, 2370789; 593996, 2370789; 593930, 2370827; 593852, 2370875; 593778, 2370907; 593716, 2370947; 593642, 2370999; 593602, 2371041; 593574, 2371067; 593558, 2371095; 593539, 2371118; 593531, 2371121; 593534, 2371173; 593519, 2371375; 593533, 2371375; 593552, 2371390; 593628, 2371404; 593716, 2371426; 593794, 2371431; 593876, 2371437; 593974, 2371435; 594036, 2371431; 594138, 2371415; 594190, 2371399; 594232, 2371385; 594246, 2371359; 594239, 2371354; 594170, 2370879; 594172, 2370877; 594170, 2370855.

(ii) Note: Map of *Drosophila montgomeryi*—Unit 3—Puu Kaua follows:


Drosophila montgomeryi - Unit 3 - Puu Kaua
Puu kanehoa
Honouliuli Contour Trail
1500
2000
2500
Honouliuli Forest Reserve
Pohakea Pass
1500
2000
Drosophila montgomeryi - Unit 3 - Puu Kaua
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

Hawaiian Picture-Wing Fly (*Drosophila Mulli*)

(1) Critical habitat units are depicted for County of Hawaii, island of Hawaii, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila mulli* are:

(i) Wet, montane, ohia forest between the elevations of 2,150–3,250 ft (655–990 m); and

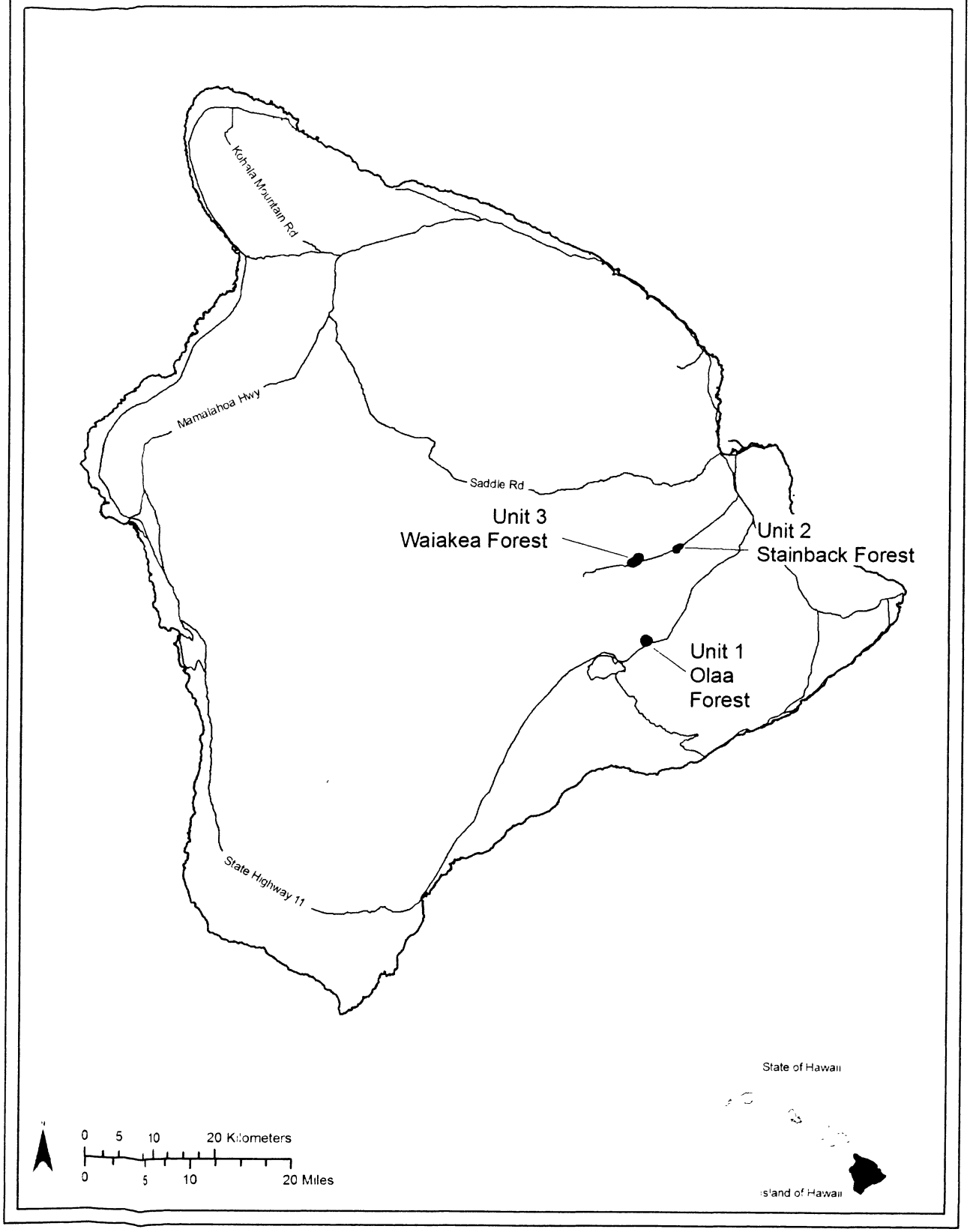
(ii) The larval host plant *Pritchardia beccariana*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila mulli* follows:

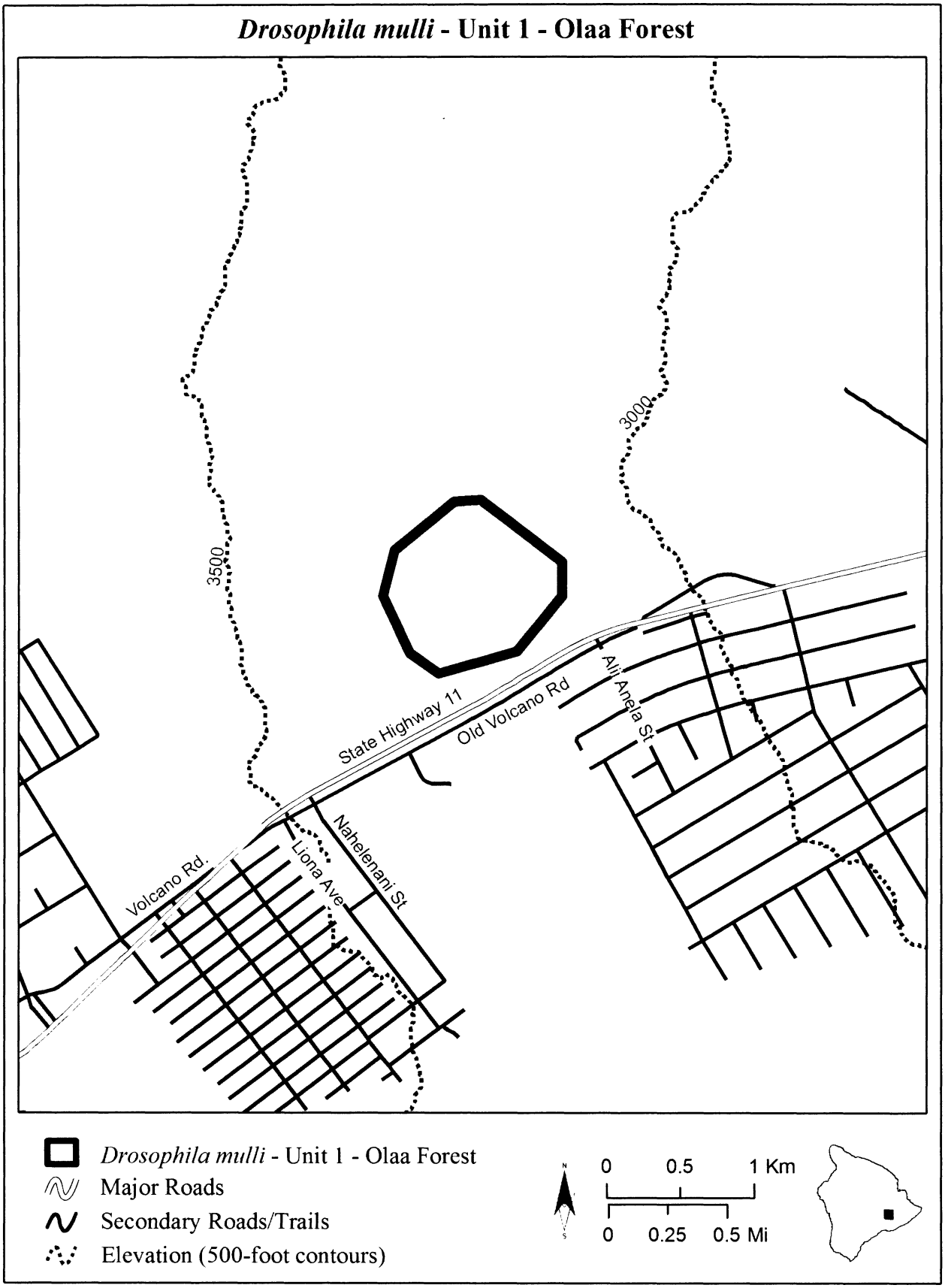
Index Map of Critical Habitat Units for - *Drosophila mulli*



(6) *Drosophila mulli*—Unit 1—Olaa Forest, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 898754, 2154890; 898225, 2154740; 898030, 2154878; 897846, 2155268; 897927, 2155578; 898328, 2155910; 898508, 2155922; 899064, 2155498; 899064, 2155268.

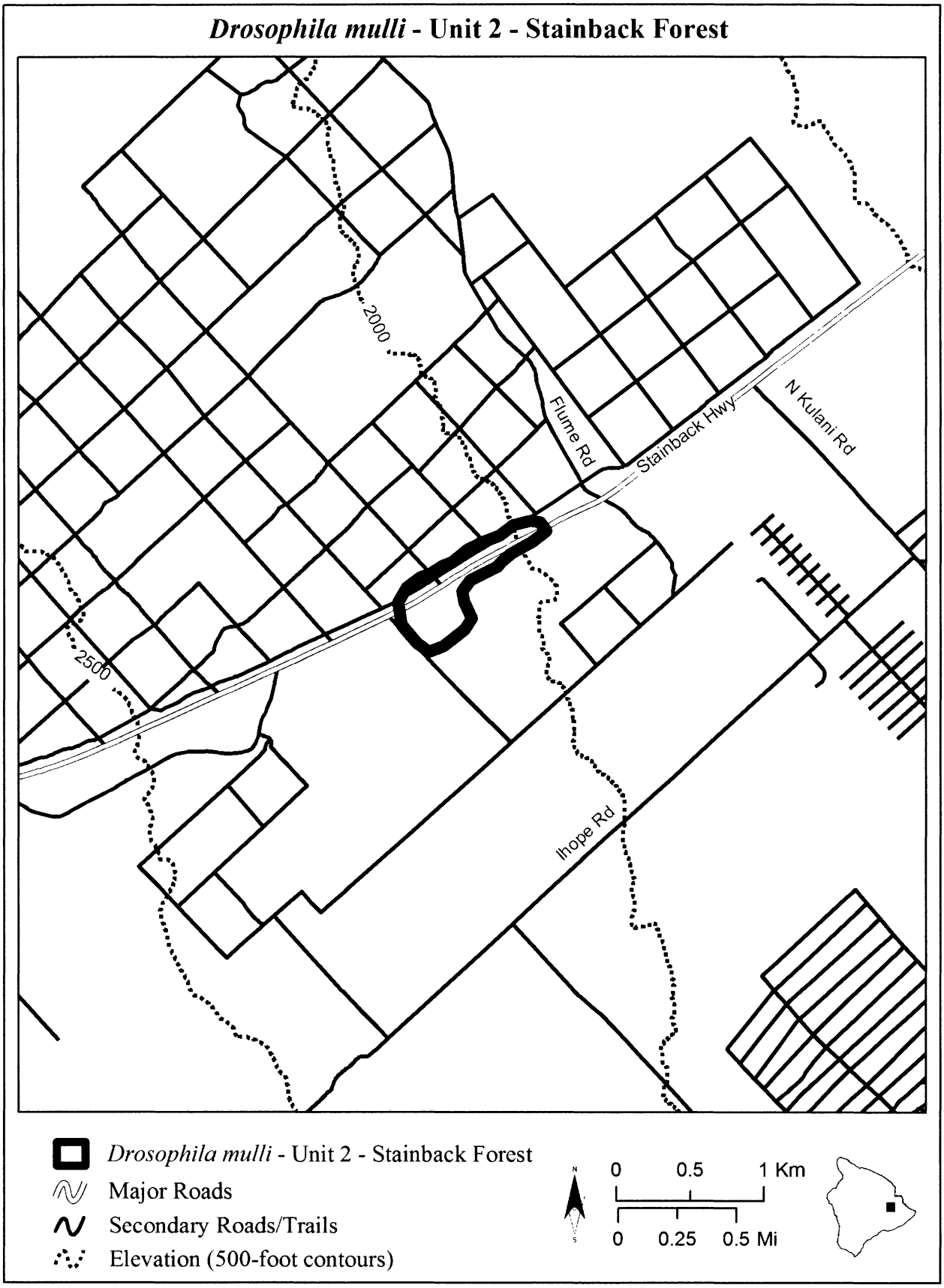
(ii) Note: Map of *Drosophila mulli*—Unit 1—Olaa Forest follows:


Drosophila mulli - Unit 1 - Olaa Forest
3000
3500
State Highway 11
Old Volcano Rd
Ali'i Anela St
Nahelenani St
Liona Ave
Volcano Rd.
Drosophila mulli - Unit 1 - Olaa Forest
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
N
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila mulli*—Unit 2—Stainback Forest, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 903259, 2169945; 903159, 2169907; 903080, 2169965; 902974, 2170089; 902953, 2170247; 903012, 2170346; 903101, 2170415; 903166, 2170439; 903245, 2170490; 903324, 2170521; 903420, 2170603; 903509, 2170651; 903636, 2170699; 903732, 2170771; 903849, 2170799; 903914, 2170789; 903955, 2170730; 903869, 2170662; 903866, 2170658; 903718, 2170579; 903653, 2170521; 903622, 2170487; 903441, 2170394; 903386, 2170322; 903399, 2170250; 903451, 2170133; 903403, 2170058.

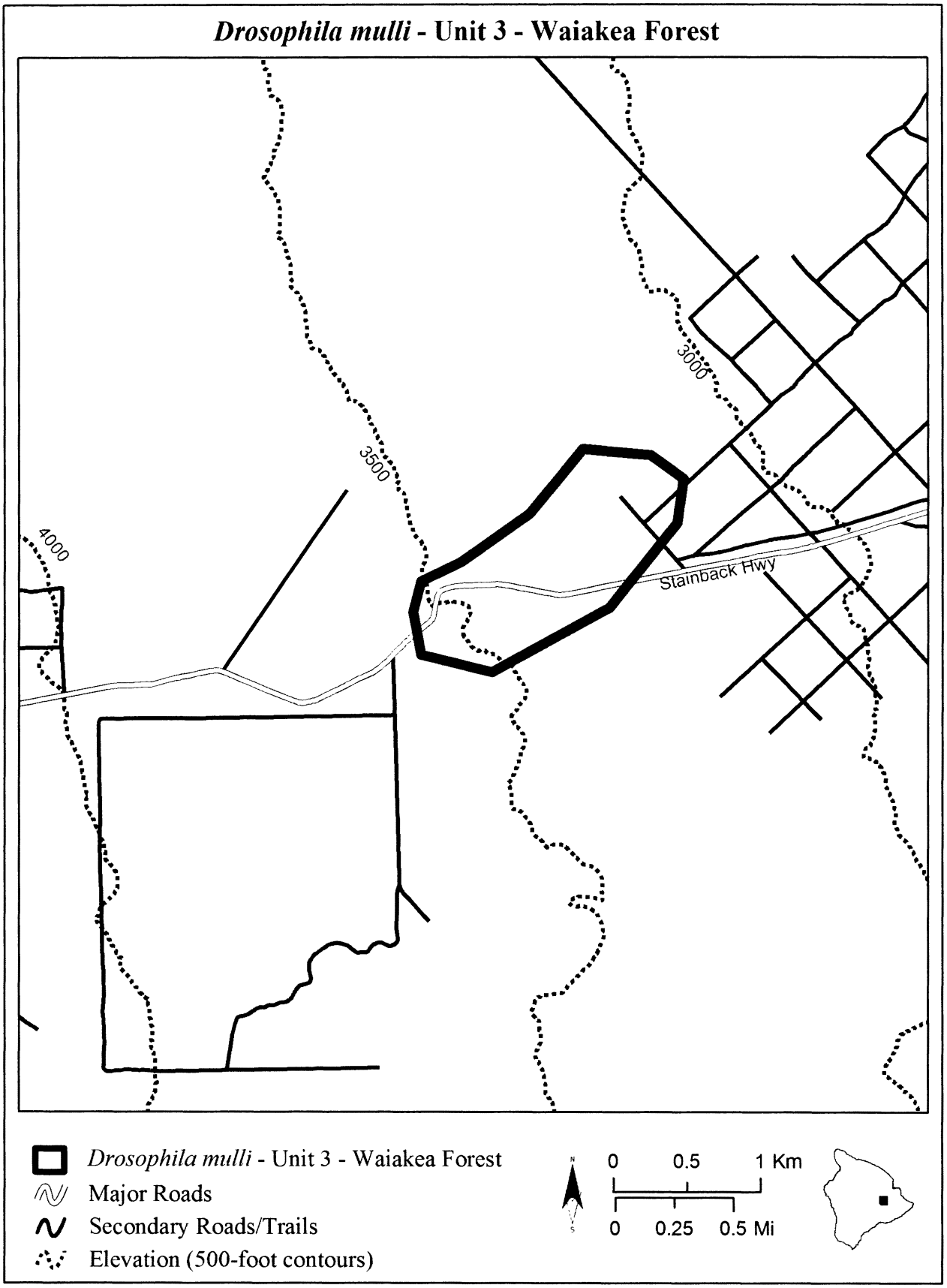
(ii) Note: Map of *Drosophila mulli*—Unit 2—Stainback Forest follows:


Drosophila mulli - Unit 2 - Stainback Forest
2000
2500
Flume Rd
Stainback Hwy
N Kulani Rd
Ihope Rd
Drosophila mulli - Unit 2 - Stainback Forest
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
N
S
0
0.5
1 Km
0
0.25
0.5 Mi

(8) *Drosophila mulli*—Unit 3—Waiakea Forest, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 897021, 2168026; 896225, 2167587; 895745, 2167704; 895687, 2167996; 895745, 2168207; 896014, 2168335; 896480, 2168668; 896841, 2169108; 897302, 2169068; 897522, 2168908; 897482, 2168607.

(ii) Note: Map of *Drosophila mulli*—Unit 3—Waiakea Forest follows:



BILLING CODE 4310–55–C

Hawaiian picture-wing fly (*Drosophila musaphilia*)

(1) Critical habitat is depicted for County of Kauai, island of Kauai, Hawaii, on the map below.

(2) The primary constituent elements of critical habitat for *Drosophila musaphilia* are:

(i) Mesic, montane, ohia and koa forest between the elevations of 2,600–3,700 ft (790–1,130 m); and

(ii) The larval host plant *Acacia koa*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

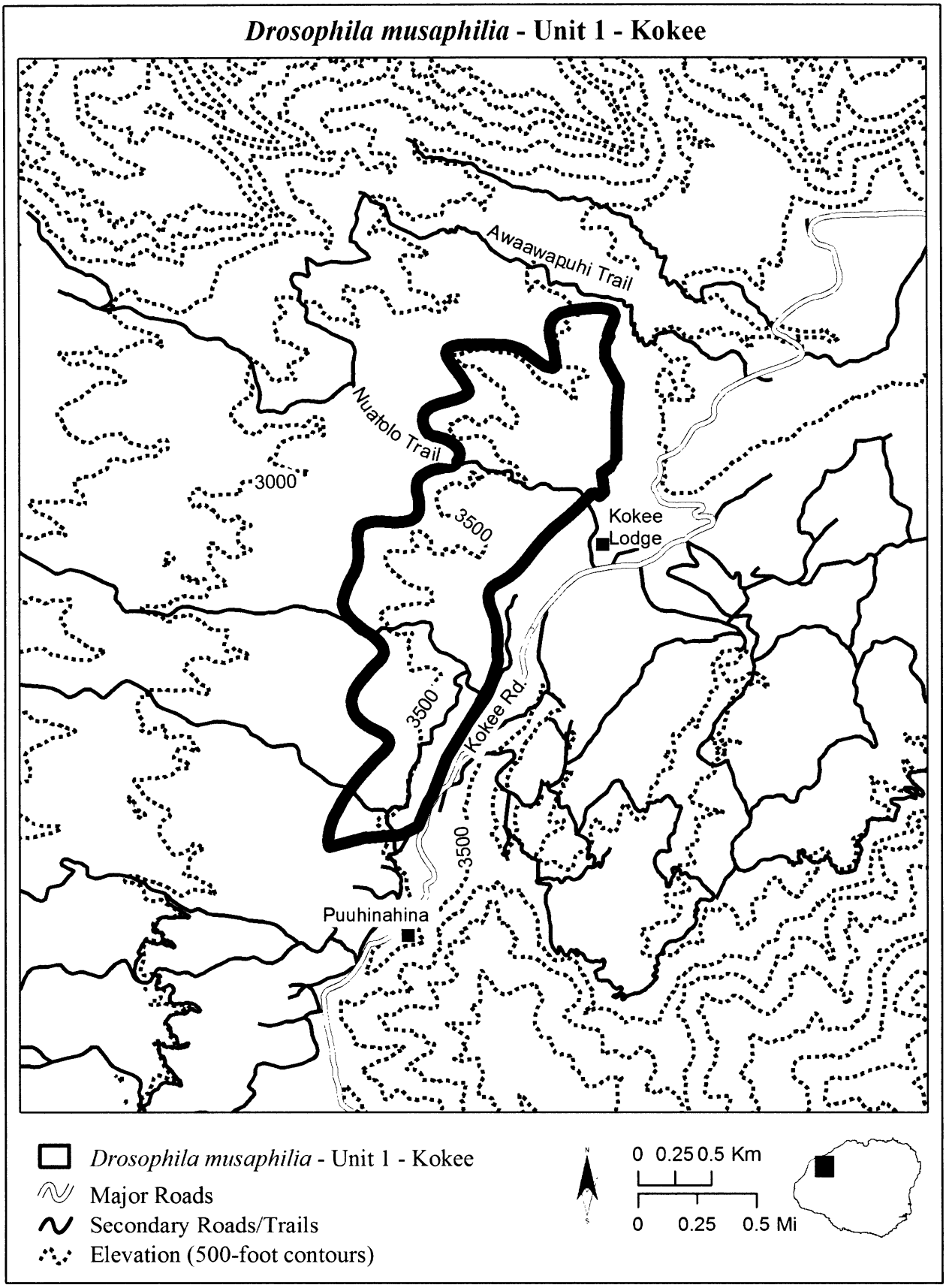
(4) Critical habitat map unit. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) *Drosophila musaphilia*—Unit 1—Kokee, Kauai County, island of Kauai, Hawaii.

(i) Land bounded by the following coordinates: 432035, 2448683; 432126, 2448510; 432111, 2448312; 432111, 2448119; 432106, 2447977; 432010, 2447906; 432025, 2447779; 431992, 2447749; 431962, 2447768; 431938, 2447766; 431926, 2447752; 431895, 2447719; 431861, 2447686; 431825, 2447651; 431786, 2447616; 431745, 2447581; 431701, 2447544; 431658, 2447505; 431616, 2447462; 431575, 2447417; 431535, 2447368; 431496, 2447318; 431457, 2447271; 431418, 2447231; 431379, 2447198; 431339, 2447172; 431299, 2447153; 431267, 2447131; 431247, 2447103; 431239, 2447068; 431244, 2447027; 431260, 2446979; 431278, 2446930; 431292, 2446881; 431300, 2446834; 431303, 2446788; 431302, 2446743; 431300, 2446700; 431301, 2446659; 431306, 2446621; 431252, 2446466; 431186, 2446345; 431181, 2446332; 430955, 2445963; 430860, 2445709; 430831, 2445664; 430760, 2445497; 430648, 2445441; 430416, 2445421; 430405, 2445422; 430396, 2445420; 430159, 2445358; 430153, 2445371; 430148, 2445402; 430150, 2445437; 430157, 2445475; 430170, 2445517; 430188, 2445562; 430212, 2445610; 430240, 2445660; 430270, 2445707; 430302, 2445754; 430335, 2445799; 430371, 2445842; 430407, 2445883; 430441, 2445921; 430474, 2445956; 430506, 2445988; 430535, 2446017; 430559, 2446044; 430567, 2446070; 430558, 2446095; 430533, 2446120; 430492, 2446144; 430441, 2446167; 430398, 2446193; 430363, 2446221; 430337, 2446252; 430320, 2446284; 430311, 2446319; 430309, 2446353; 430315, 2446388; 430327, 2446423; 430347, 2446457; 430373, 2446492; 430401, 2446525; 430430, 2446558; 430459, 2446589; 430489, 2446619; 430518, 2446649; 430531, 2446681; 430524, 2446716; 430497, 2446755; 430451, 2446797; 430387, 2446842; 430330, 2446887; 430288, 2446930; 430262, 2446971; 430250, 2447010; 430253, 2447047; 430263, 2447083; 430274, 2447118; 430288, 2447153; 430304, 2447187; 430323, 2447220; 430339, 2447254; 430350, 2447291; 430356, 2447331; 430358, 2447373; 430354, 2447418; 430351, 2447461; 430354, 2447496; 430361, 2447524; 430374, 2447545; 430392, 2447558; 430416, 2447567; 430445, 2447573; 430479, 2447576; 430518, 2447577; 430563, 2447574; 430609, 2447572; 430649, 2447573; 430684, 2447578; 430714, 2447587; 430737, 2447599; 430755, 2447616; 430767, 2447639; 430772, 2447667; 430772, 2447701; 430766, 2447740; 430756, 2447783; 430755, 2447821; 430762, 2447853; 430778, 2447879; 430802, 2447900; 430834, 2447916; 430864, 2447928; 430893, 2447937; 430920, 2447943; 430945, 2447947; 430968, 2447947; 430989, 2447952; 431007, 2447961; 431022, 2447974; 431035, 2447992; 431045, 2448014; 431049, 2448036; 431046, 2448057; 431036, 2448077; 431019, 2448096; 430996, 2448113; 430971, 2448128; 430946, 2448140; 430921, 2448149; 430896, 2448155; 430871, 2448158; 430849, 2448165; 430830, 2448179; 430815, 2448200; 430804, 2448228; 430796, 2448263; 430799, 2448299; 430816, 2448330; 430848, 2448356; 430894, 2448377; 430956, 2448393; 431018, 2448407; 431064, 2448423; 431094, 2448440; 431109, 2448459; 431107, 2448479; 431094, 2448502; 431076, 2448530; 431054, 2448563; 431027, 2448601; 430996, 2448643; 430967, 2448687; 430957, 2448722; 430966, 2448749; 430994, 2448766; 431042, 2448775; 431103, 2448778; 431162, 2448779; 431218, 2448779; 431269, 2448779; 431317, 2448777; 431361, 2448775; 431403, 2448767; 431443, 2448754; 431480, 2448736; 431515, 2448712; 431548, 2448685; 431579, 2448661; 431607, 2448643; 431633, 2448630; 431657, 2448622; 431678, 2448620; 431692, 2448631; 431697, 2448656; 431694, 2448695; 431683, 2448749; 431665, 2448816; 431657, 2448878; 431666, 2448928; 431692, 2448967; 431735, 2448994; 431795, 2449009; 431857, 2449019; 431913, 2449024; 431963, 2449027; 432008, 2449026; 432046, 2449022; 432076, 2449012; 432094, 2448996; 432100, 2448974; 432095, 2448945; 432078, 2448910; 432060, 2448872; 432053, 2448837; 432063, 2448834; 432035, 2448784.

(ii) Note: Map of *Drosophila musaphilia*—Unit 1—Kokee follows:

BILLING CODE 4310–55–P


Drosophila musaphilia - Unit 1 - Kokee
Awaawapuhi Trail
Nuatolo Trail
3000
3500
Kokee Lodge
Kokee Rd.
3500
3500
Puuhinahina
Drosophila musaphilia - Unit 1 - Kokee
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.25 0.5 Km
0 0.25 0.5 Mi

Hawaiian Picture-Wing Fly (*Drosophila Neoclavisetae*)

(1) Critical habitat is depicted for County of Maui, island of Maui, Hawaii, on the map below.

(2) The primary constituent elements of critical habitat for *Drosophila neoclavisetae* are:

(i) Wet, montane, ohia forest between the elevations of 3,500–4,500 ft (1,070–1,370 m); and

(ii) The larval host plants *Cyanea kunthiana* and *C. macrostegia* ssp. *macrostegia*.

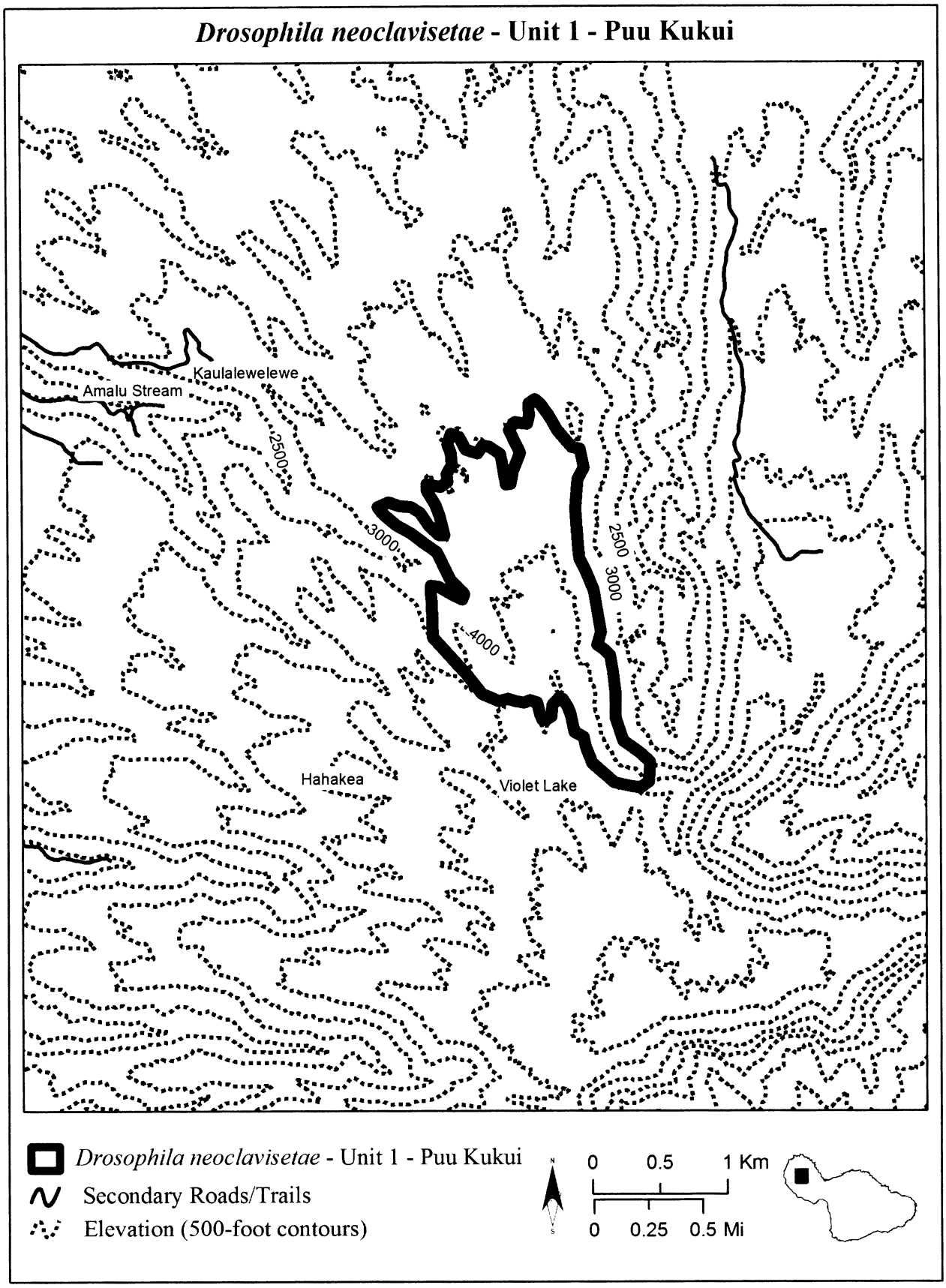
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map unit. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) *Drosophila neoclavisetae*—Unit 1—Puu Kukui, Maui County, island of Maui, Hawaii.

(i) Land bounded by the following coordinates: 750380, 2316357; 750447, 2316239; 750554, 2316115; 750610, 2316104; 750638, 2315964; 750593, 2315879; 750577, 2315666; 750593, 2315407; 750605, 2315295; 750650, 2315205; 750711, 2315059; 750751, 2314806; 750762, 2314750; 750734, 2314654; 750790, 2314615; 750829, 2314576; 750852, 2314452; 750869, 2314300; 750869, 2314227; 750869, 2314115; 750925, 2313946; 751049, 2313856; 751122, 2313789; 751122, 2313766; 751116, 2313643; 751054, 2313598; 750981, 2313609; 750857, 2313637; 750695, 2313778; 750650, 2313896; 750633, 2313974; 750565, 2314008; 750537, 2314137; 750515, 2314194; 750481, 2314250; 750453, 2314261; 750402, 2314210; 750397, 2314126; 750357, 2314098; 750329, 2314098; 750312, 2314143; 750290, 2314227; 750239, 2314244; 750194, 2314227; 750133, 2314238; 750076, 2314255; 750009, 2314238; 749885, 2314289; 749773, 2314435; 749520, 2314710; 749515, 2314969; 749509, 2315036; 749509, 2315093; 749565, 2315087; 749649, 2315036; 749739, 2314991; 749756, 2315031; 749655, 2315132; 749599, 2315244; 749554, 2315340; 749458, 2315407; 749368, 2315480; 749254, 2315543; 749183, 2315602; 749145, 2315636; 749117, 2315676; 749197, 2315711; 749279, 2315683; 749363, 2315677; 749430, 2315632; 749498, 2315536; 749571, 2315469; 749610, 2315469; 749576, 2315610; 749548, 2315688; 749481, 2315801; 749481, 2315846; 749582, 2315823; 749633, 2315862; 749627, 2315919; 749666, 2315986; 749661, 2316076; 749633, 2316138; 749661, 2316216; 749722, 2316188; 749767, 2316098; 749857, 2316070; 749897, 2316126; 749942, 2316121; 750026, 2316065; 750043, 2315964; 750065, 2315840; 750099, 2315846; 750116, 2315941; 750172, 2316076; 750088, 2316244; 750133, 2316301; 750223, 2316289; 750239, 2316346; 750234, 2316436; 750279, 2316469; 750318, 2316436.

(ii) Note: Map of *Drosophila neoclavisetae*—Unit 1—Puu Kukui follows:



BILLING CODE 4310–55–C

Hawaiian Picture-Wing Fly (*Drosophila Obatai*)

(1) Critical habitat is depicted for County of Honolulu, island of Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila obatai* are:

(i) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,500–2,500 ft (460–760 m); and

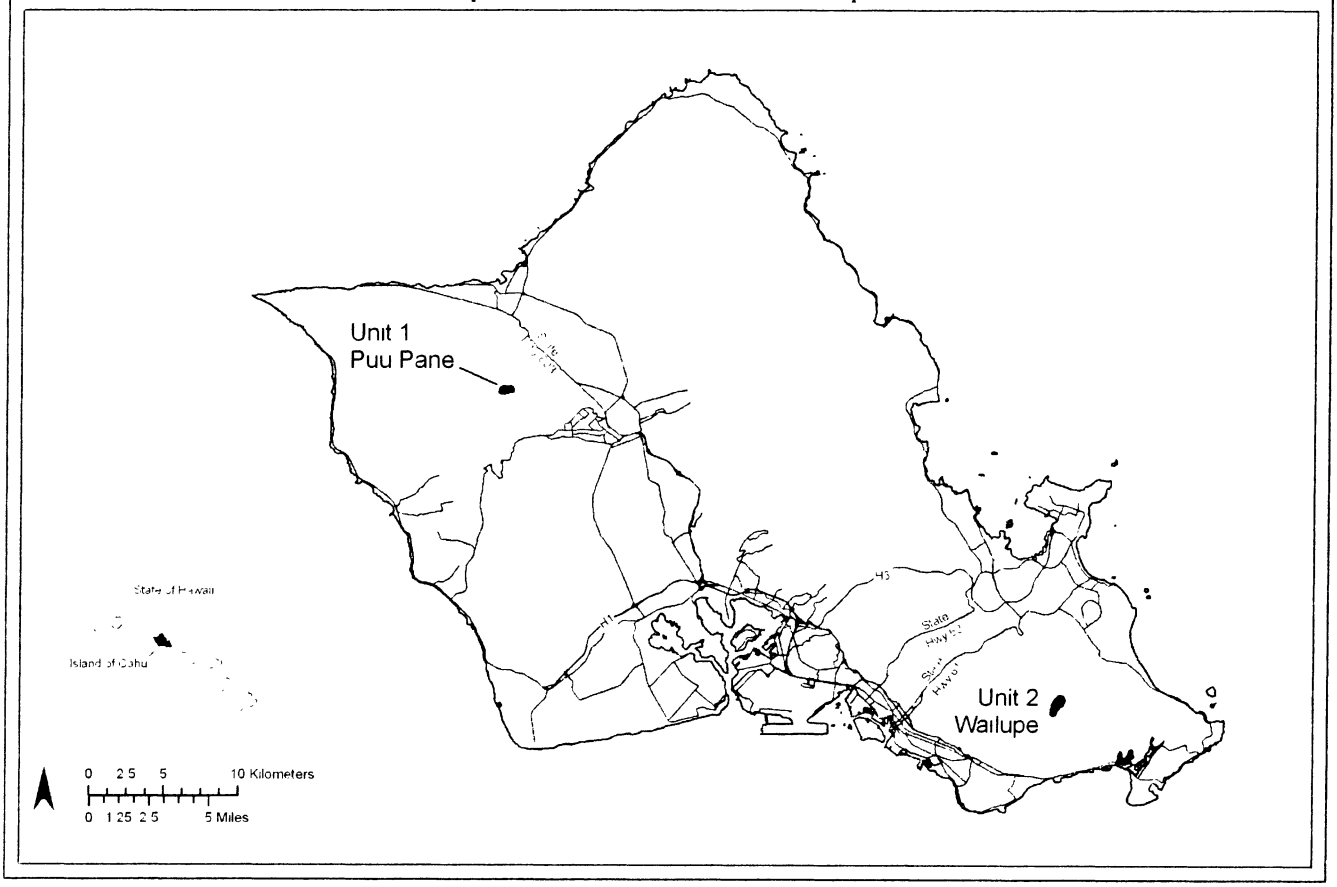
(ii) The larval host plant *Pleomele forbesii*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of the critical habitat units for *Drosophila obatai* follows:

Index Map of Critical Habitat Units for - *Drosophila obatai*

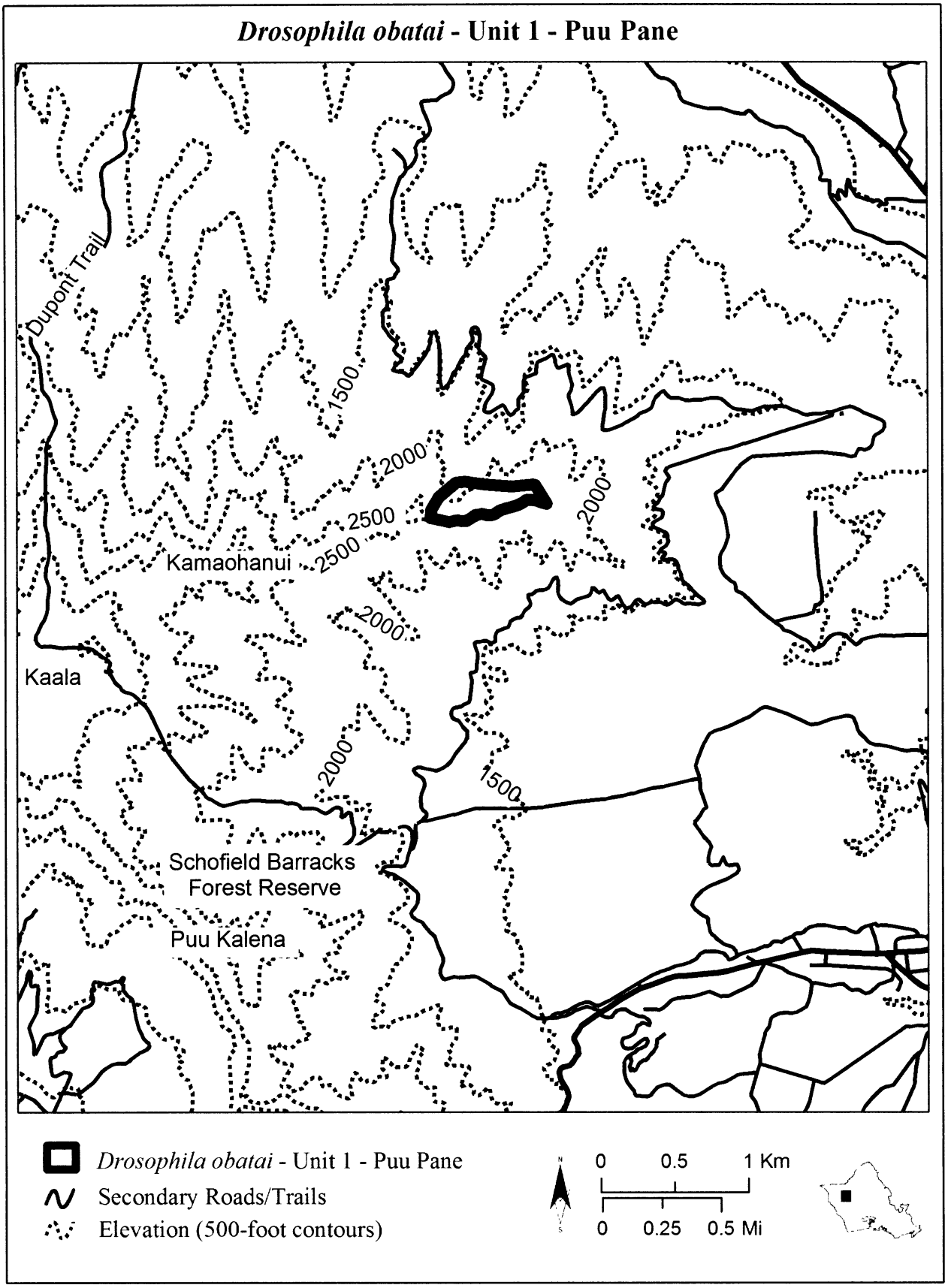


(6) *Drosophila obatai*—Unit 1—Puu Pane, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 591489, 2379704; 591662, 2379690; 591807, 2379704; 591822, 2379699; 591901, 2379571; 591871, 2379579; 591830, 2379596; 591830, 2379596; 591830, 2379596; 591830, 2379596; 591830, 2379596; 591830, 2379596; 591830, 2379596; 591791, 2379600; 591791, 2379600; 591791, 2379601; 591791, 2379600; 591791, 2379600; 591791, 2379600; 591766, 2379597; 591766, 2379597; 591766, 2379597; 591766, 2379597; 591766, 2379597; 591766, 2379597; 591741, 2379583; 591741, 2379583; 591710, 2379565; 591672, 2379554; 591672, 2379554; 591635, 2379542; 591614, 2379537; 591614, 2379537; 591614, 2379537; 591582, 2379526; 591582, 2379526; 591582, 2379526; 591582, 2379526; 591582, 2379526; 591545, 2379500; 591523, 2379495; 591496, 2379495; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591461, 2379505; 591444, 2379502; 591444, 2379502; 591444, 2379502; 591444, 2379502; 591444, 2379502; 591432, 2379498; 591421, 2379497; 591421, 2379497; 591421, 2379497; 591421, 2379497; 591421, 2379497; 591420, 2379497; 591420, 2379497; 591420, 2379497; 591420, 2379497; 591420, 2379497; 591405, 2379487; 591405, 2379487; 591405, 2379487; 591405, 2379486; 591405, 2379486; 591405, 2379486; 591403, 2379483; 591354, 2379454; 591283, 2379460; 591240, 2379449; 591113, 2379474; 591116, 2379531; 591169, 2379618; 591284, 2379716; 591345, 2379723.

(ii) Note: Map of *Drosophila obatai*—Unit 1—Puu Pane follows:

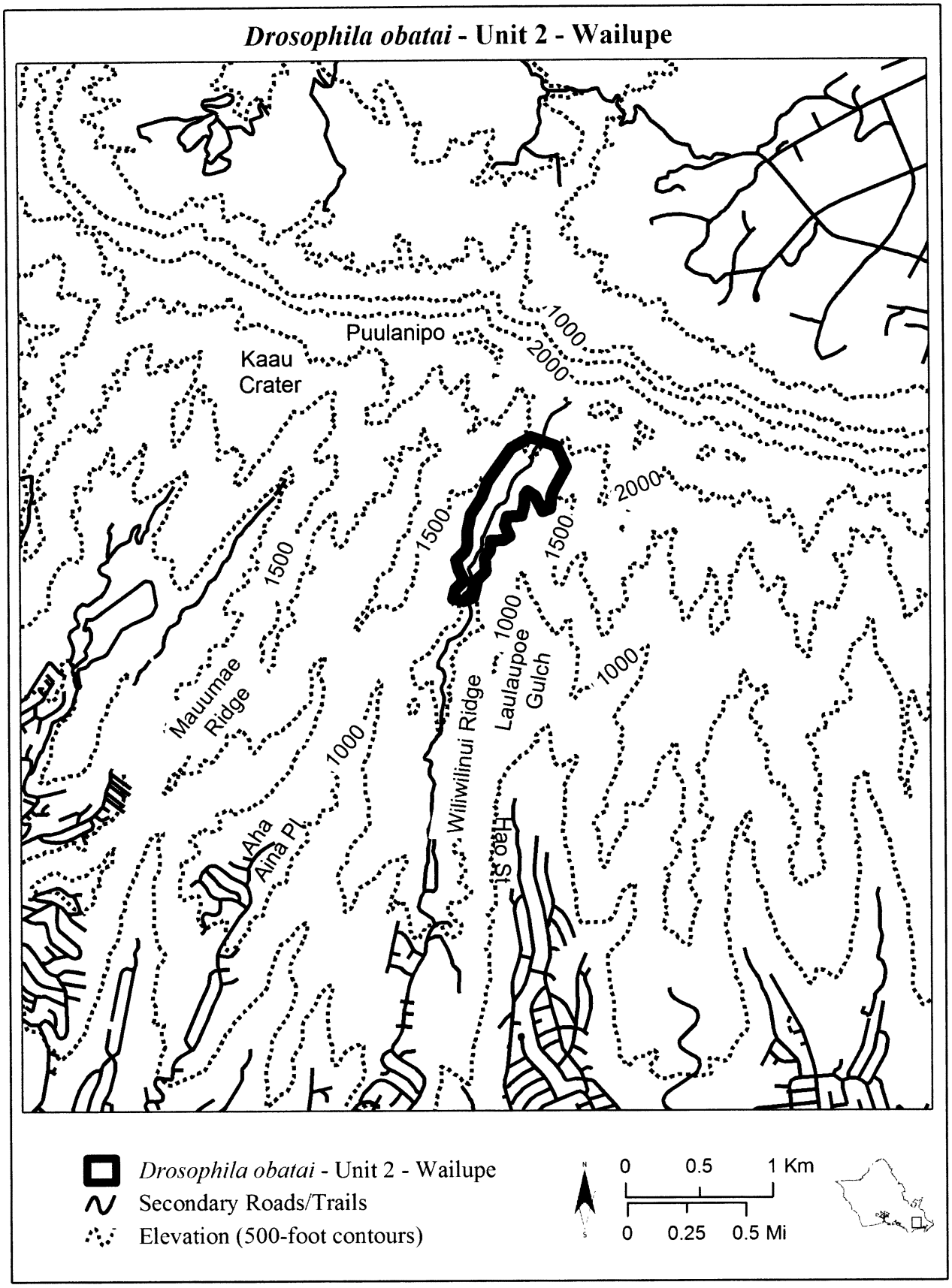
BILLING CODE 4310–55–P


Drosophila obatai - Unit 1 - Puu Pane
Dupont Trail
1500
2000
2500
2500
2000
Kamaohanui
2000
Kaala
2000
1500
Schofield Barracks
Forest Reserve
Puu Kalena
Drosophila obatai - Unit 1 - Puu Pane
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila obatai*—Unit 2—Wailupe, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 629222, 2358352; 629208, 2358307; 629199, 2358225; 629147, 2358205; 629100, 2358307; 629048, 2358343; 629028, 2358316; 629023, 2358250; 629005, 2358174; 628908, 2358169; 628890, 2358110; 628922, 2358034; 628883, 2358011; 628795, 2358007; 628791, 2357939; 628753, 2357885; 628759, 2357799; 628705, 2357743; 628676, 2357619; 628606, 2357592; 628536, 2357607; 628552, 2357673; 628610, 2357731; 628574, 2357806; 628559, 2357874; 628619, 2357932; 628637, 2357973; 628635, 2358074; 628660, 2358185; 628735, 2358298; 628775, 2358411; 628936, 2358634; 629070, 2358711; 629243, 2358647; 629307, 2358506.

(ii) Note: Map of *Drosophila obatai*—Unit 2—Wailupe follows:


Drosophila obatai - Unit 2 - Wailupe
Puulanipo
Kaau Crater
1000
2000
2000
1500
1500
1500
1000
1000
1000
Mauumae Ridge
Wilwilinui Ridge
Laulaupoe Gulch
Aha Aina Pl.
Hao St.
Drosophila obatai - Unit 2 - Wailupe
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

Hawaiian picture-wing fly (*Drosophila ochrobasis*)

(1) Critical habitat units are depicted for County of Hawaii, island of Hawaii, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila ochrobasis* are:

(i) Mesic to wet, montane, ohia, koa, and *Cheirodendron* sp. forest between the elevations of 3,400–5,400 ft (1,035–1,645 m); and

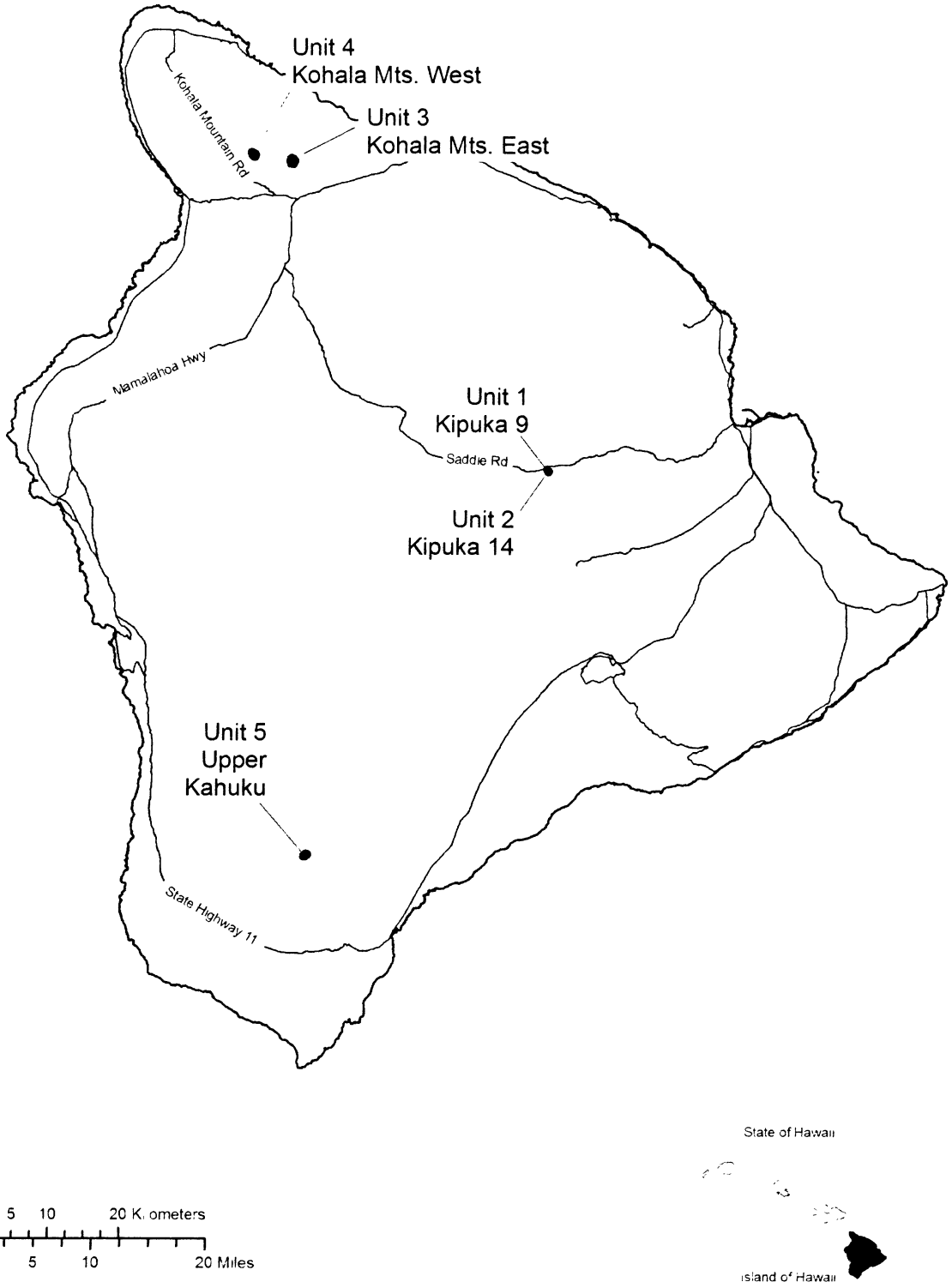
(ii) The larval host plants *Clermontia calophylla, C. clermontioides, C. clermontioides* ssp. *rockiana, C. drepanomorpha, C. hawaiiensis, C. kohalae, C. lindseyana, C. montis-loa, C. parviflora, C. peleana, C. pyrularia, C. waimeae, Marattia douglasii, Myrsine lanaiensis, M. lessertiana,* and *M. sandwicensis.*

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for Drosophila ochrobasis follows:

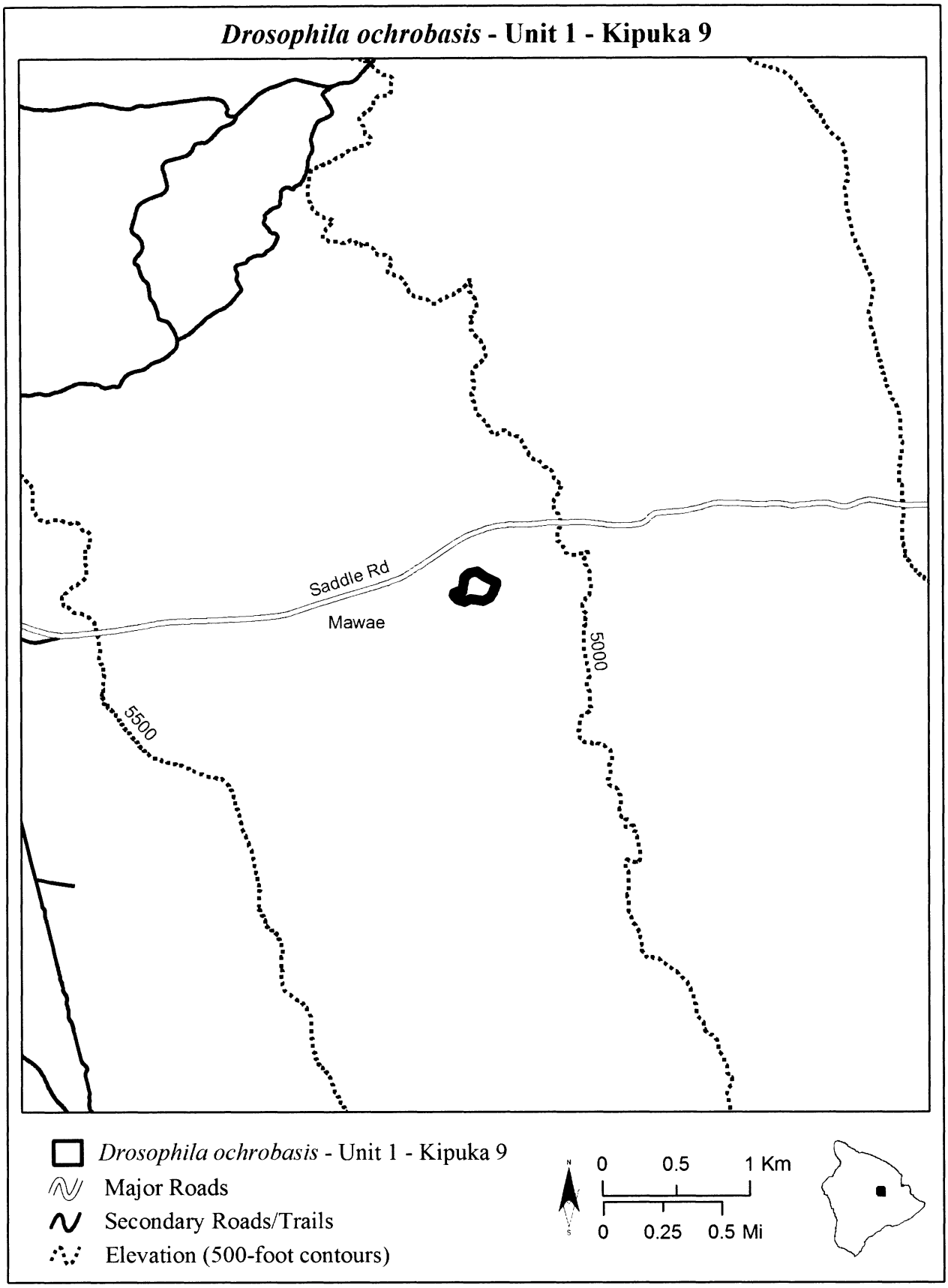
Index Map of Critical Habitat Units for - *Drosophila ochrobasis*



(6) *Drosophila ochrobasis*—Unit 1—Kipuka 9, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 884112, 2179392; 884090, 2179333; 884069, 2179303; 884023, 2179281; 883971, 2179292; 883936, 2179295; 883896, 2179273; 883855, 2179287; 883825, 2179319; 883828, 2179335; 883861, 2179349; 883869, 2179346; 883885, 2179346; 883888, 2179373; 883893, 2179409; 883896, 2179441; 883934, 2179473; 883985, 2179484; 884036, 2179444; 884112, 2179409.

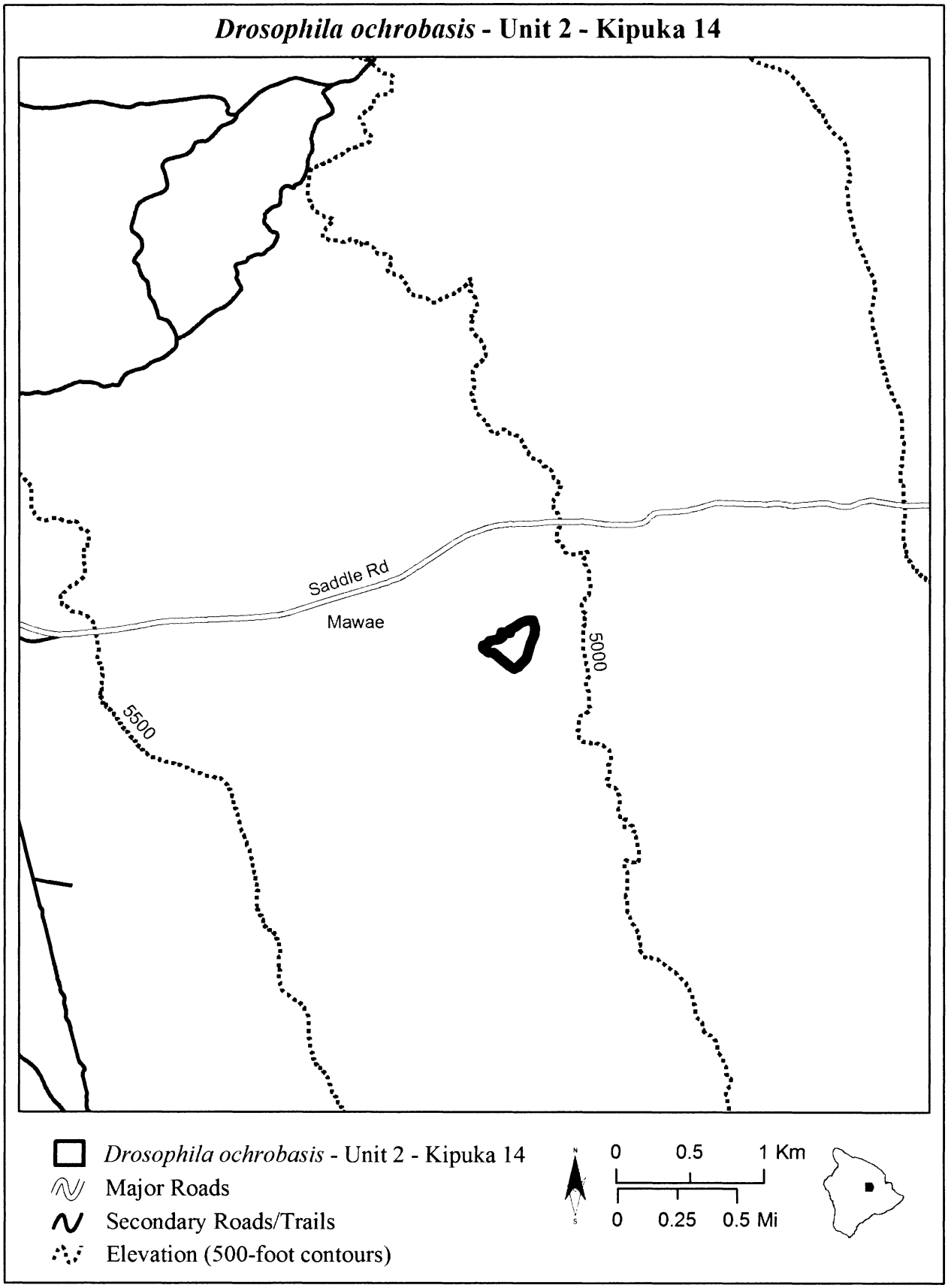
(ii) Note: Map of *Drosophila ochrobasis*—Unit 1—Kipuka 9 follows:


Drosophila ochrobasis - Unit 1 - Kipuka 9
Saddle Rd
Mawae
5000
5500
Drosophila ochrobasis - Unit 1 - Kipuka 9
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila ochrobasis*—Unit 2—Kipuka 14, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 884379, 2179103; 884375, 2179051; 884351, 2178992; 884320, 2178889; 884264, 2178832; 884236, 2178818; 884211, 2178834; 884141, 2178891; 884099, 2178924; 884064, 2178929; 884026, 2178959; 884026, 2178976; 884052, 2178983; 884071, 2179008; 884101, 2179013; 884137, 2179021; 884160, 2179035; 884148, 2179051; 884151, 2179065; 884210, 2179063; 884208, 2179084; 884242, 2179101; 884280, 2179131; 884323, 2179146; 884365, 2179146.

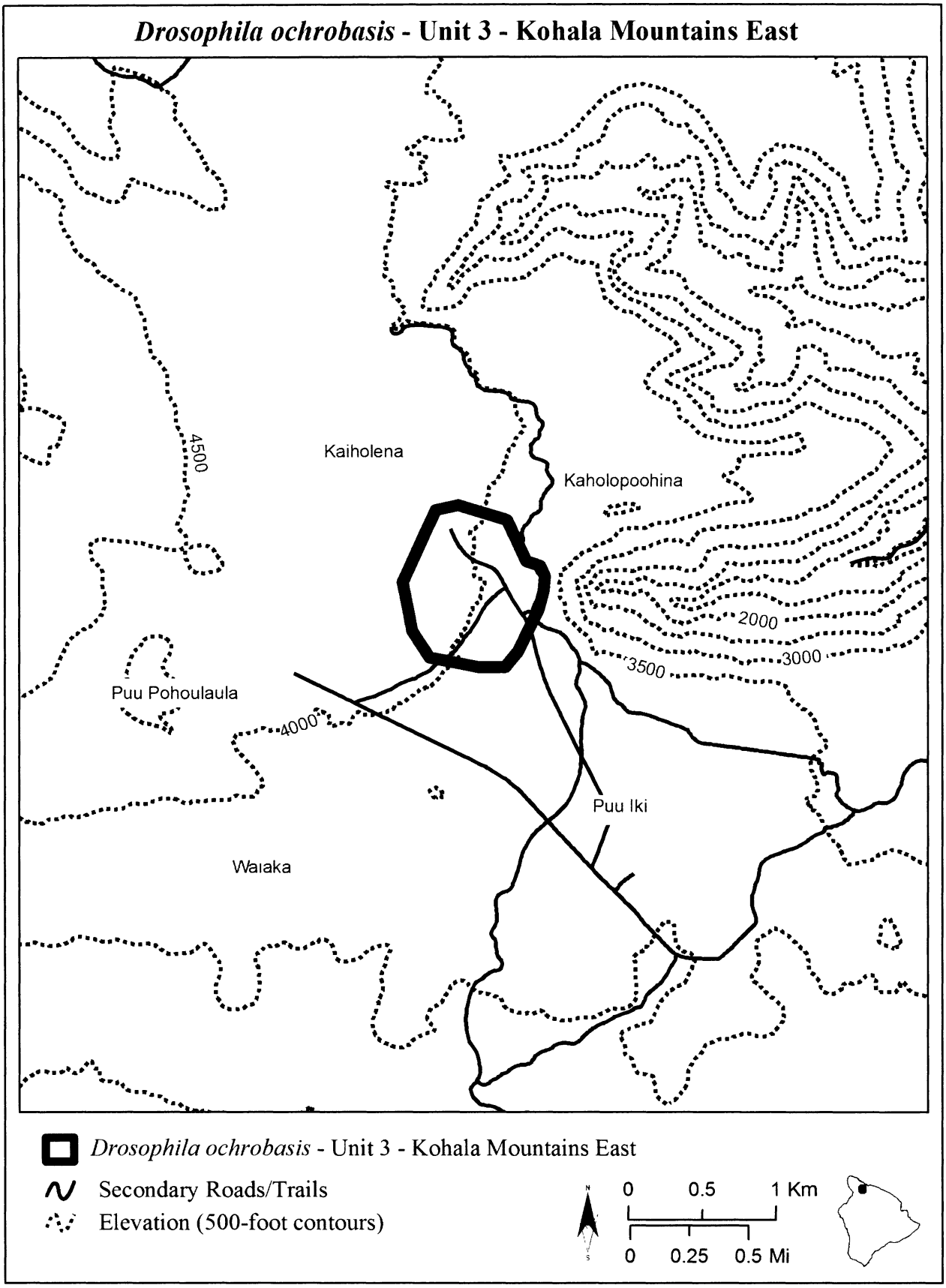
(ii) Note: Map of *Drosophila ochrobasis*—Unit 2—Kipuka 14 follows:


Drosophila ochrobasis - Unit 2 - Kipuka 14
Saddle Rd
Mawae
5000
5500
Drosophila ochrobasis - Unit 2 - Kipuka 14
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(8) *Drosophila ochrobasis*—Unit 3—Kohala Mountains East, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 848091, 2222077; 847912, 2222077; 847578, 2222142; 847461, 2222323; 847396, 2222654; 847508, 2222900; 847620, 2223146; 847773, 2223179; 848104, 2223079; 848172, 2222934; 848235, 2222798; 848327, 2222764; 848361, 2222693; 848350, 2222595; 848317, 2222476; 848177, 2222184.

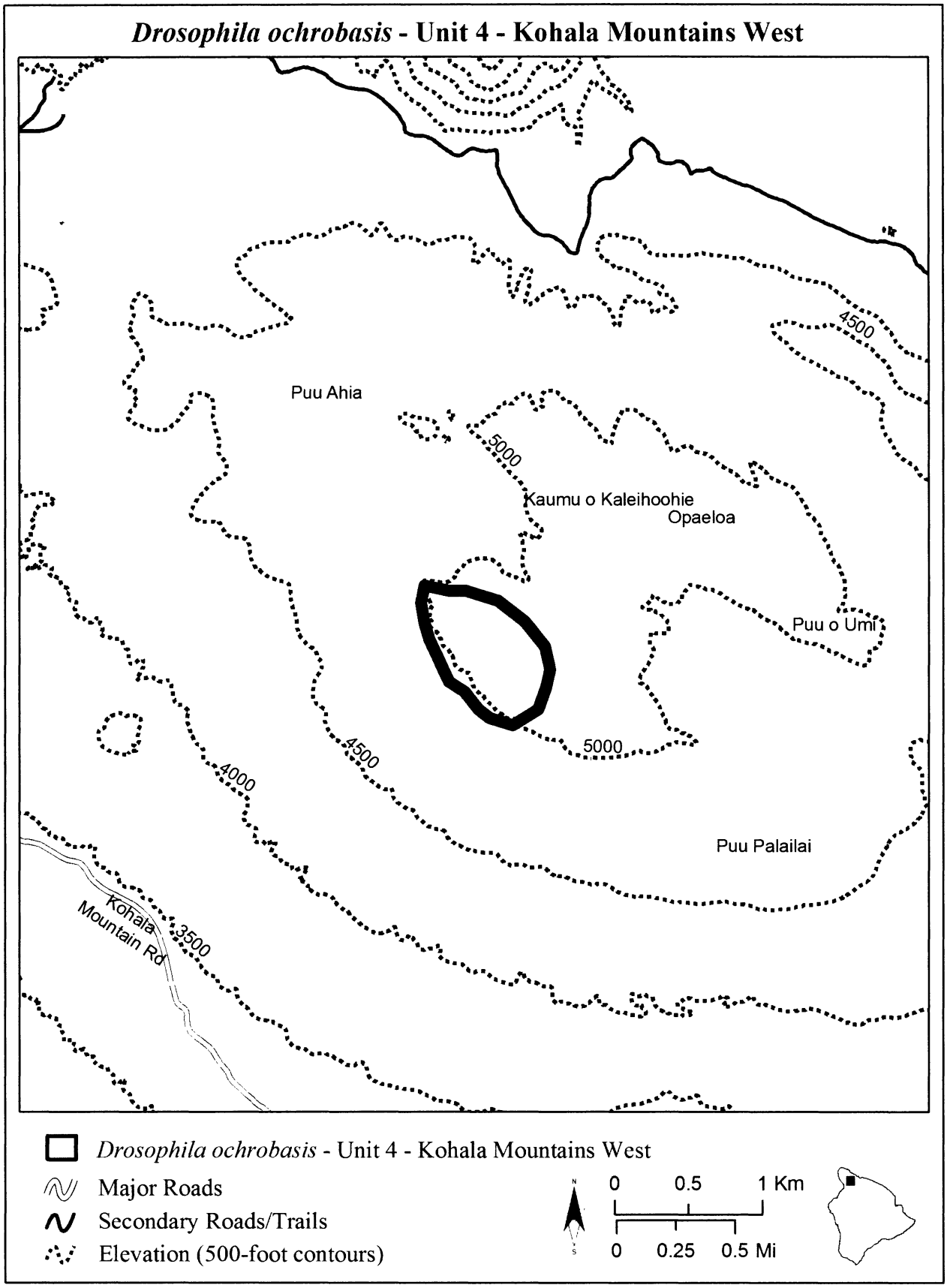
(ii) Note: Map of *Drosophila ochrobasis*—Unit 3—Kohala Mountains East follows:


Drosophila ochrobasis - Unit 3 - Kohala Mountains East
Kaiholena
Kaholopoohina
4500
2000
3000
3500
4000
Puu Pohoulaula
Puu Iki
Waiaka
Drosophila ochrobasis - Unit 3 - Kohala Mountains East
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(9) *Drosophila ochrobasis*—Unit 4—Kohala Mountains West, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 841990, 2224000; 842156, 2223966; 842268, 2223966; 842486, 2223897; 842666, 2223757; 842803, 2223586; 842840, 2223426; 842812, 2223314; 842758, 2223157; 842584, 2223047; 842430, 2223096; 842355, 2223157; 842260, 2223278; 842154, 2223345; 842020, 2223634; 841988, 2223746; 841967, 2223882.

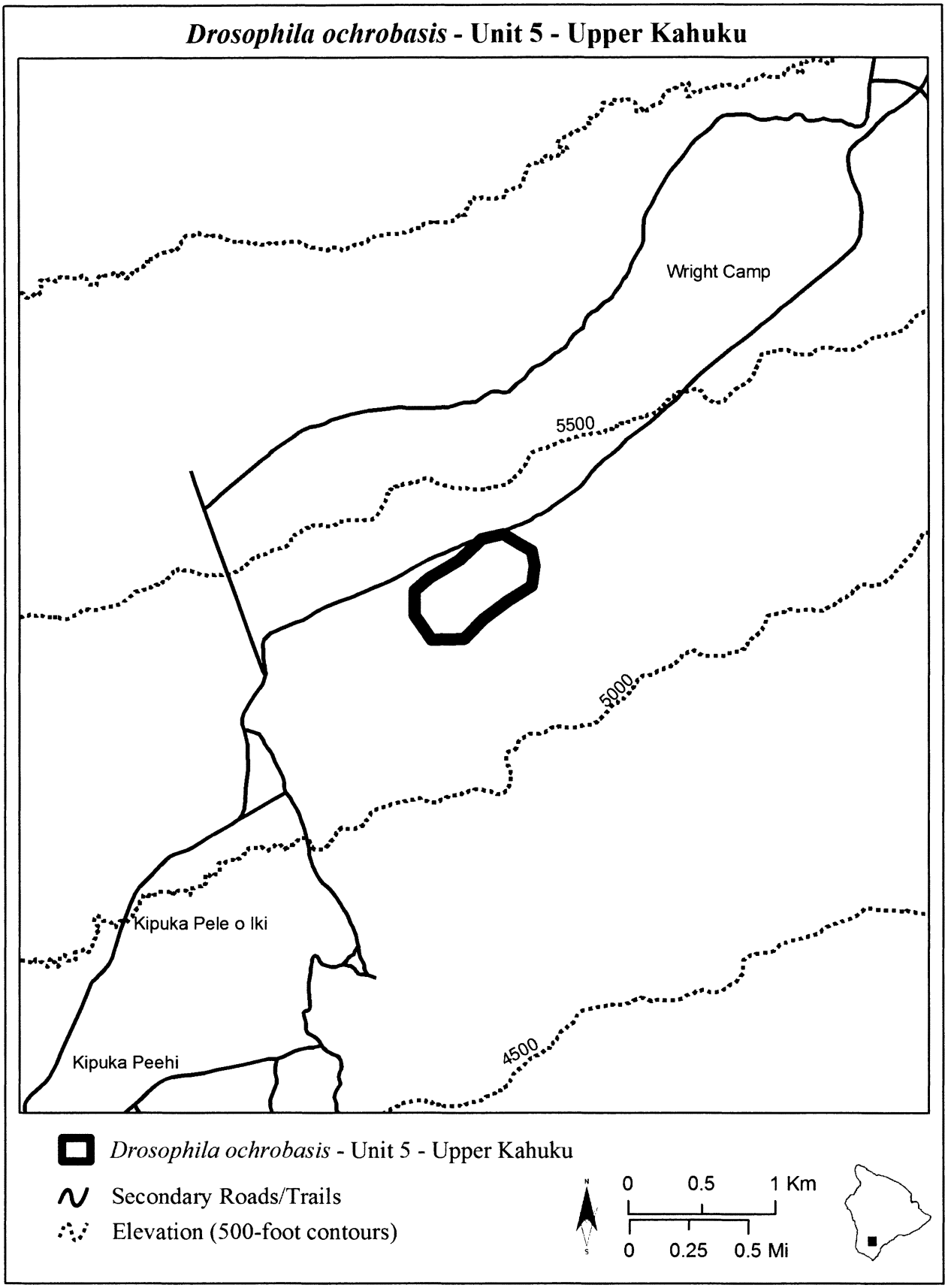
(ii) Note: Map of *Drosophila ochrobasis*—Unit 4—Kohala Mountains West follows:


Drosophila ochrobasis - Unit 4 - Kohala Mountains West
Puu Ahia
5000
4500
Kaumu o Kaleihoohie
Opaeloa
Puu o Umi
5000
4500
4000
Puu Palailai
Kohala Mountain Rd
3500
Drosophila ochrobasis - Unit 4 - Kohala Mountains West
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(10) *Drosophila ochrobasis*—Unit 5—Upper Kahuku, Hawaii County, island of Hawaii, Hawaii.

(i) Land bounded by the following coordinates: 850211, 2124185; 849989, 2124179; 849874, 2124347; 849874, 2124516; 849975, 2124603; 850177, 2124724; 850332, 2124866; 850474, 2124900; 850589, 2124832; 850669, 2124785; 850690, 2124684; 850669, 2124549; 850508, 2124448; 850339, 2124320.

(ii) Note: Map of *Drosophila ochrobasis*—Unit 5—Upper Kahuku follows:



BILLING CODE 4310–55–C

Hawaiian picture-wing flies (*Drosophila substenoptera*)

(1) Critical habitat is depicted for County of Honolulu, island of Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila substenoptera* are:

(i) Mesic to wet, lowland to montane, ohia and koa forest between the elevations of 1,300–4,000 ft (395—1,220 m); and

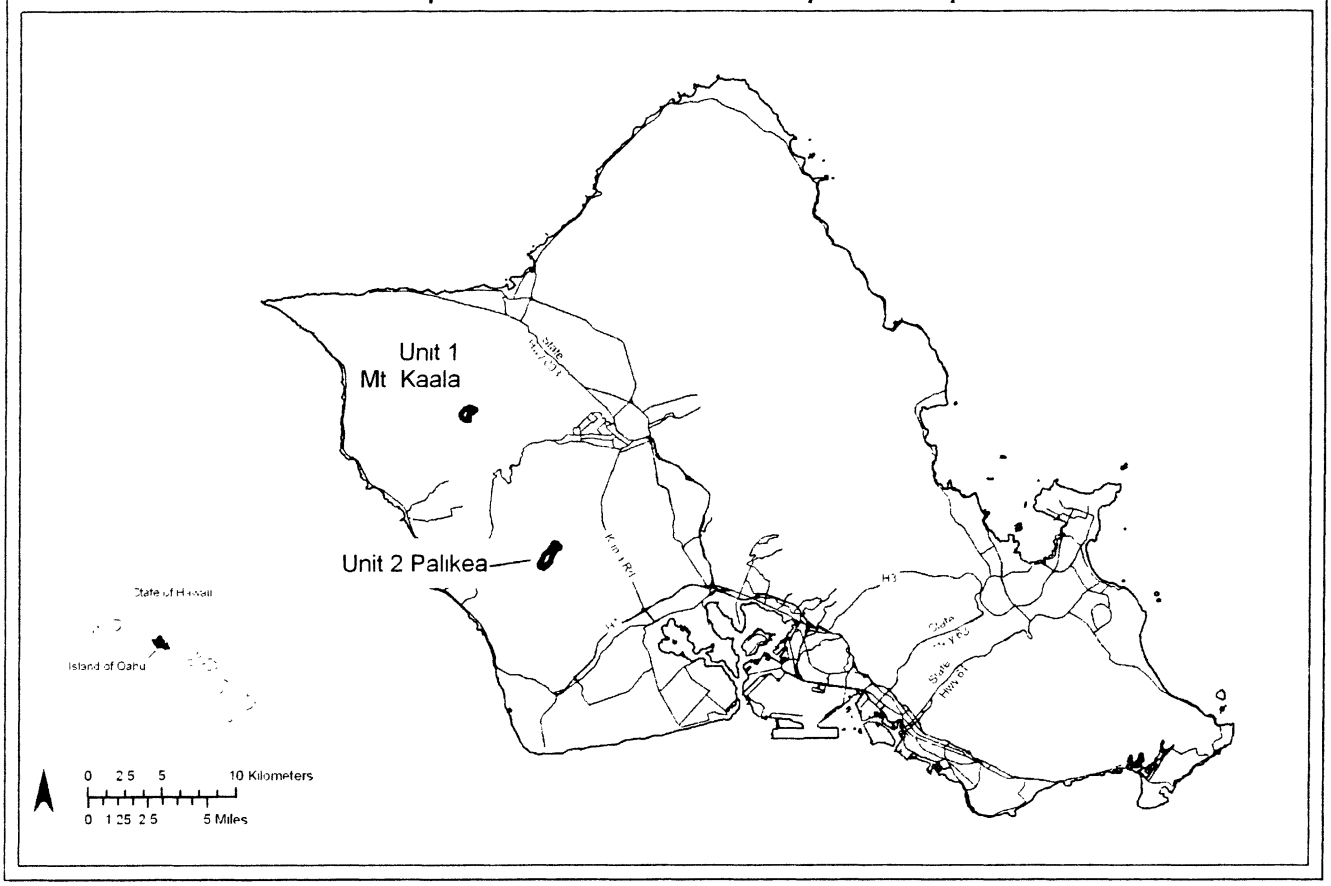
(ii) The larval host plants *Cheirodendron platyphyllum* ssp. *platyphyllum, C. trigynum* ssp. *trigynum, Tetraplasandra kavaiensis*, and *T. oahuensis*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila substenoptera* follows:

Index Map of Critical Habitat Units for - *Drosophila substenoptera*



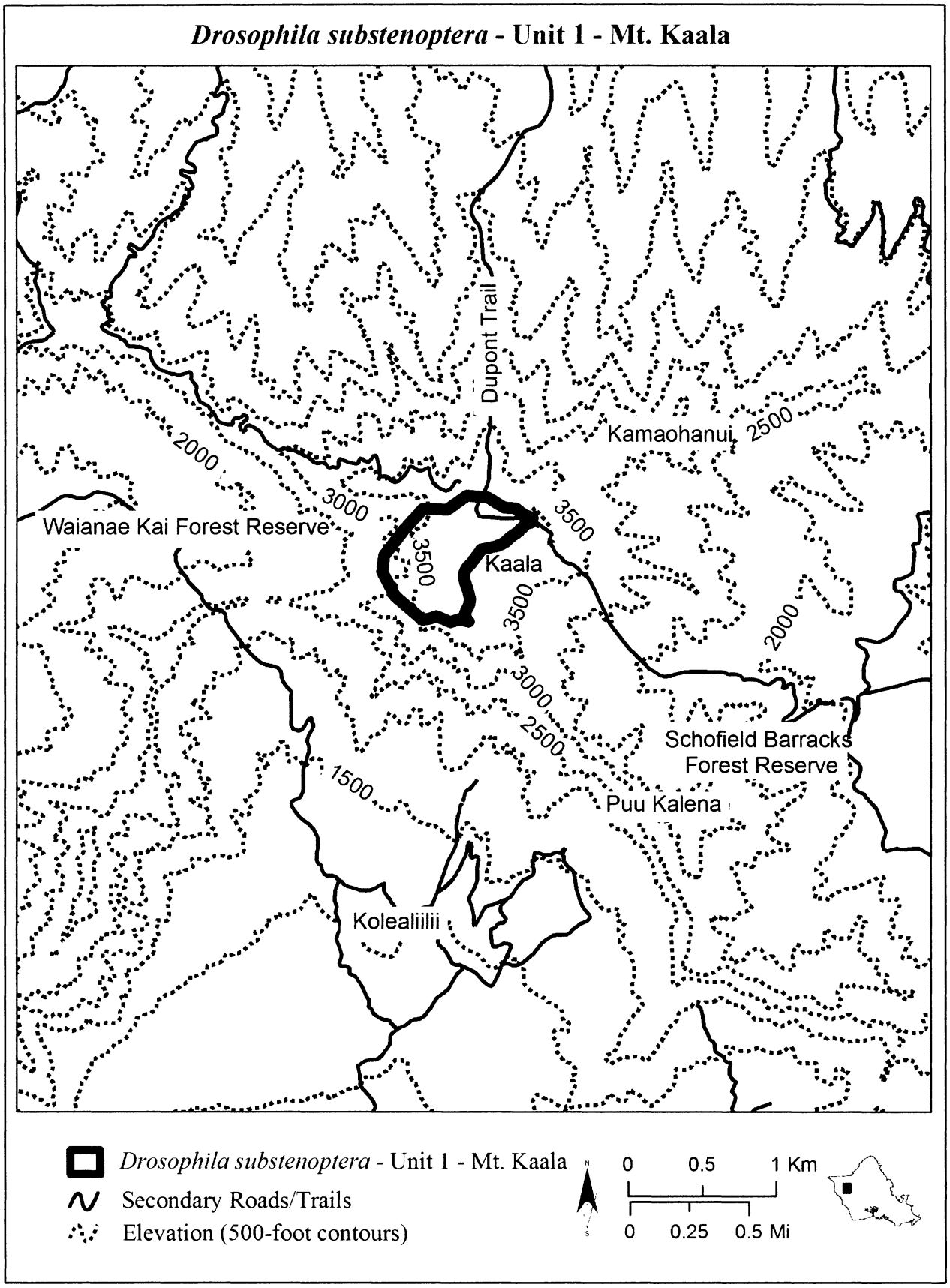
(6) *Drosophila substenoptera*—Unit 1—Mt. Kaala, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 588692, 2378661; 588740, 2378622; 588806, 2378595; 588799, 2378573; 588790, 2378564; 588785, 2378562; 588776, 2378565; 588776, 2378565; 588776, 2378565; 588776, 2378565; 588776, 2378565; 588776, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588766, 2378566; 588765, 2378566; 588765, 2378566; 588765, 2378566; 588753, 2378551; 588731, 2378529; 588722, 2378520; 588722, 2378520; 588722, 2378520; 588714, 2378509; 588660, 2378470; 588660, 2378470; 588660, 2378470; 588660, 2378470; 588617, 2378429; 588584, 2378412; 588563, 2378405; 588530, 2378398; 588530, 2378398; 588484, 2378387; 588466, 2378384; 588466, 2378384; 588466, 2378384; 588466, 2378384; 588466, 2378384; 588466, 2378384; 588466, 2378384; 588459, 2378380; 588459, 2378380; 588459, 2378380; 588459, 2378380; 588459, 2378379; 588459, 2378379; 588459, 2378379; 588459, 2378379; 588395, 2378293; 588361, 2378254; 588361, 2378254; 588361, 2378254; 588361, 2378254; 588361, 2378254; 588349, 2378234; 588349, 2378234; 588349, 2378234; 588349, 2378234; 588349, 2378234; 588349, 2378234; 588349, 2378234; 588344, 2378210; 588344, 2378210; 588344, 2378210; 588344, 2378210; 588344, 2378210; 588344, 2378210; 588344, 2378210; 588344, 2378186; 588344, 2378186; 588344, 2378186; 588344, 2378186; 588349, 2378161; 588349, 2378161; 588349, 2378161; 588349, 2378161; 588373, 2378097; 588385, 2378041; 588384, 2378026; 588380, 2378003; 588364, 2377972; 588364, 2377972; 588364, 2377972; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588351, 2377941; 588354, 2377924; 588354,

2377924; 588354, 2377923; 588354, 2377923; 588354, 2377923; 588362, 2377904; 588362, 2377904; 588362, 2377904; 588362, 2377904; 588362, 2377904; 588369, 2377893; 588369, 2377893; 588369, 2377893; 588369, 2377893; 588369, 2377893; 588376, 2377888; 588308, 2377906; 588255, 2377885; 588156, 2377924; 588103, 2377905; 588064, 2377903; 587879, 2378062; 587792, 2378228; 587806, 2378342; 587939, 2378515; 588067, 2378659; 588232, 2378655; 588363, 2378748; 588503, 2378737; 588614, 2378668.

(ii) Note: Map of *Drosophila substenoptera*—Unit 1—Mt. Kaala follows:

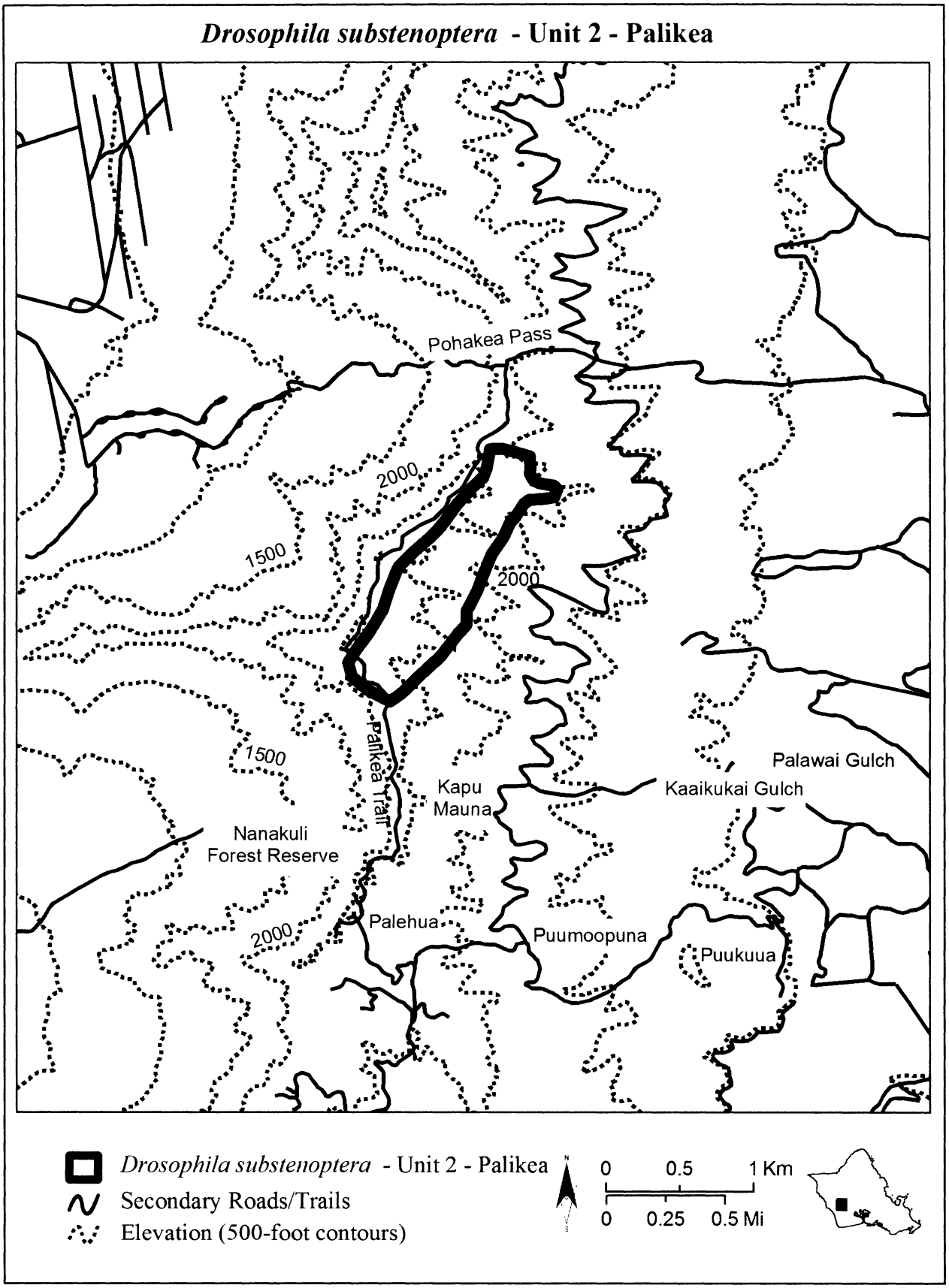
BILLING CODE 4310–55–P


Drosophila substenoptera - Unit 1 - Mt. Kaala
Dupont Trail
Kamaohanui
2500
2000
3000
3500
Waianae Kai Forest Reserve
Kaala
3500
3500
2000
3000
2500
Schofield Barracks
Forest Reserve
1500
Puu Kalena
Kolealiilii
Drosophila substenoptera - Unit 1 - Mt. Kaala
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila substenoptera*—Unit 2—Palikea, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593529, 2367854; 593448, 2367801; 593302, 2367874; 593242, 2367927; 593193, 2367967; 593165, 2368065; 593217, 2368150; 593314, 2368283; 593399, 2368425; 593448, 2368578; 593505, 2368716; 593622, 2368833; 593703, 2368906; 593764, 2368963; 593832, 2369044; 593901, 2369145; 594002, 2369262; 594079, 2369331; 594104, 2369396; 594120, 2369485; 594124, 2369521; 594148, 2369525; 594213, 2369525; 594310, 2369497; 594395, 2369473; 594399, 2369392; 594396, 2369356; 594417, 2369313; 594461, 2369290; 594551, 2369278; 594579, 2369250; 594559, 2369197; 594472, 2369183; 594391, 2369179; 594354, 2369153; 594302, 2369072; 594257, 2369015; 594213, 2368914; 594136, 2368809; 594083, 2368672; 594035, 2368550; 593966, 2368417; 593966, 2368324; 593909, 2368259; 593792, 2368105; 593675, 2368000.

(ii) Note: Map of *Drosophila substenoptera*—Unit 2—Palikea follows:



BILLING CODE 4310–55–C

Hawaiian Picture-Wing Fly (*Drosophila Tarphytrichia*)

(1) Critical habitat units are depicted for County of Honolulu, island of Oahu, Hawaii, on the maps below.

(2) The primary constituent elements of critical habitat for *Drosophila tarphytrichia* are:

(i) Dry to mesic, lowland, ohia and koa forest between the elevations of 1,900 and 2,900 ft (580–885 m); and

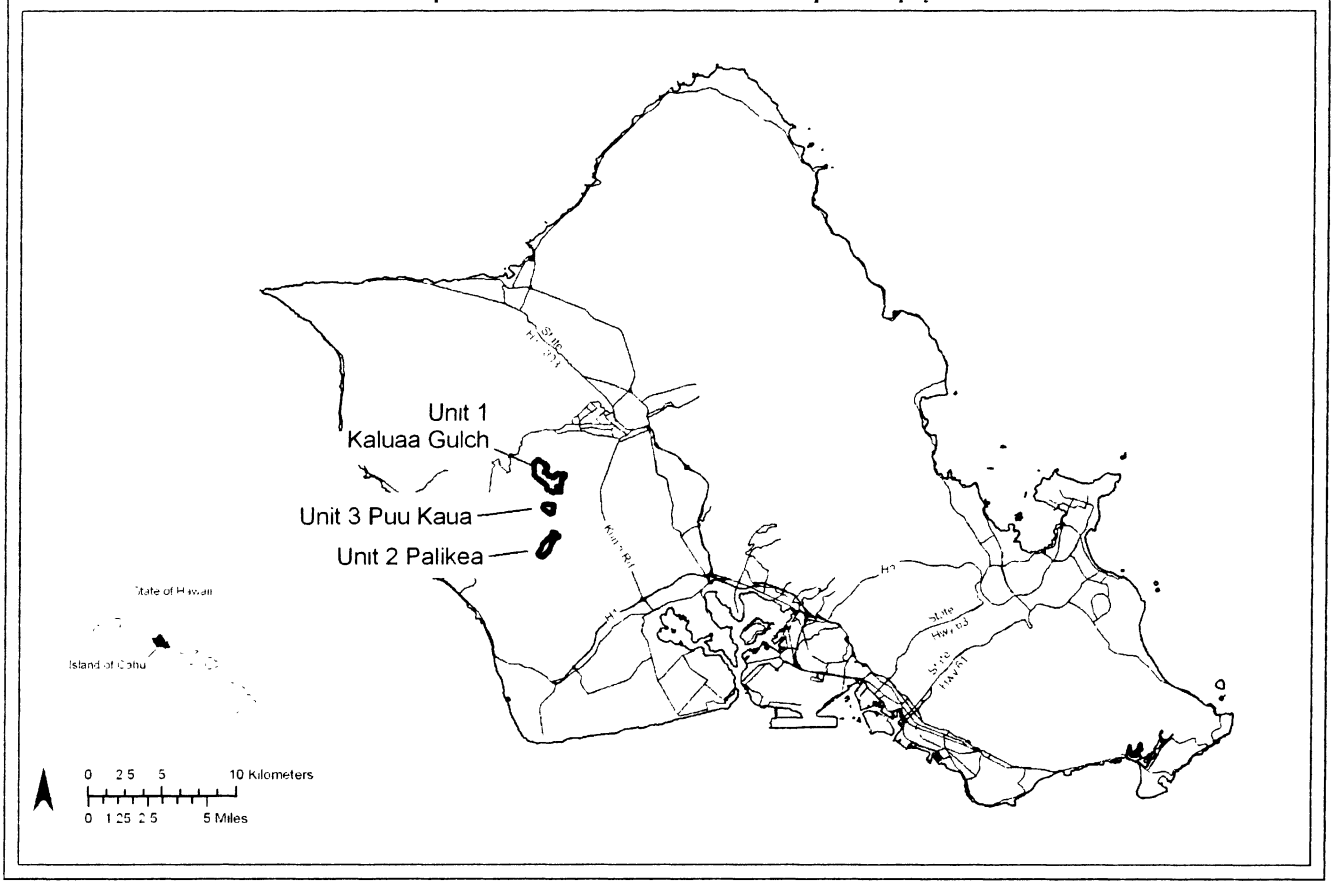
(ii) The larval host plant *Charpentiera obovata*.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, airports, and roads) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) Critical habitat map units. Coordinates are in Universal Transverse Mercator (UTM) Zone 4 with units in meters using North American Datum of 1983 (NAD83).

(5) Note: Index map of critical habitat units for *Drosophila tarphytrichia* follows:

Index Map of Critical Habitat Units for - *Drosophila tarphytrichia*



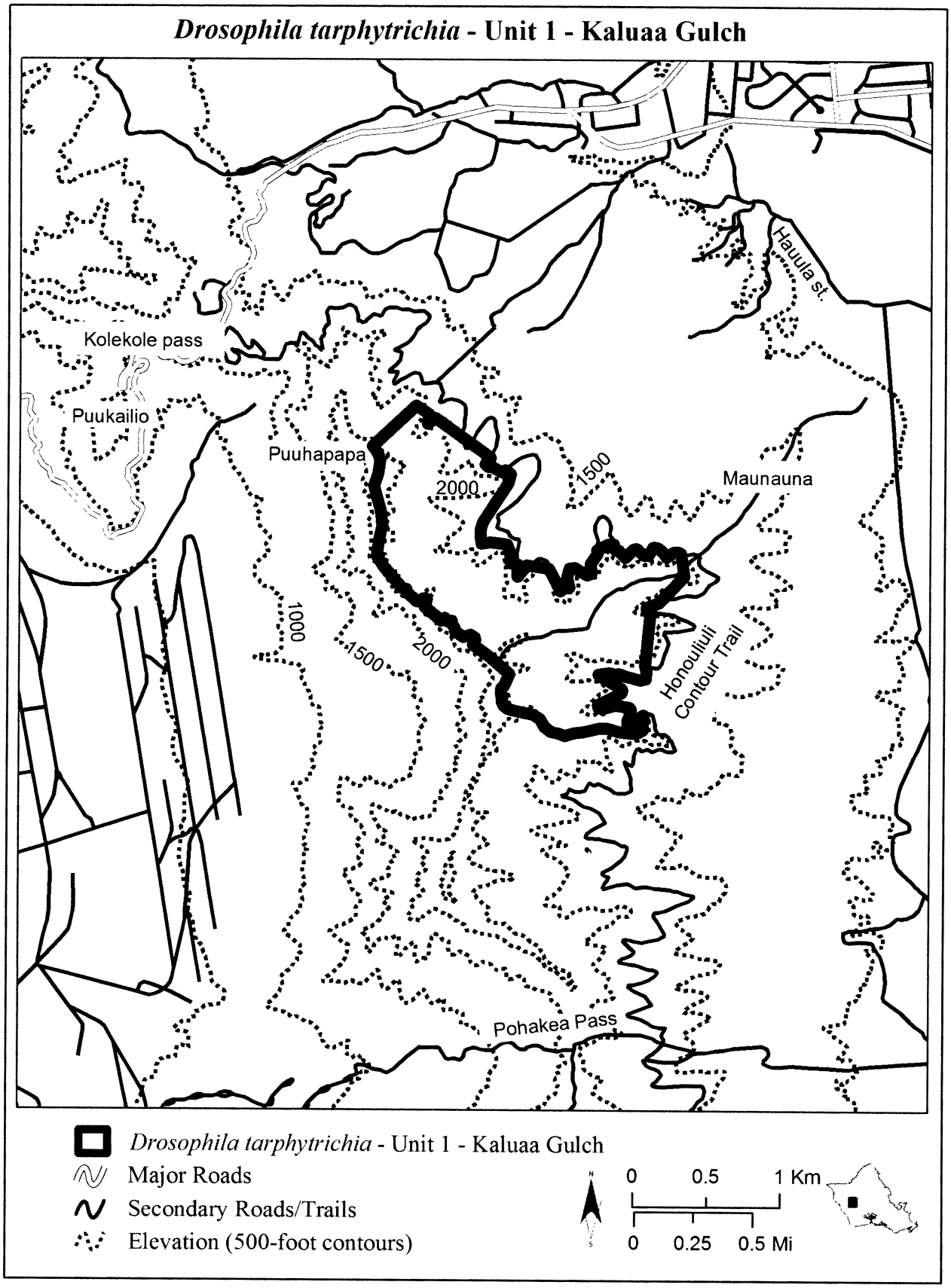
(6) *Drosophila tarphytrichia*—Unit 1—Kaluaa Gulch, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593240, 2374436; 593231, 2374371; 593281, 2374410; 593315, 2374385; 593612, 2374173; 593656, 2374138; 593621, 2374096; 593641, 2374077; 593676, 2374072; 593703, 2374057; 593734, 2374039; 593758, 2374058; 593793, 2374029; 593779, 2373964; 593731, 2373894; 593660, 2373784; 593609, 2373702; 593592, 2373648; 593592, 2373594; 593598, 2373553; 593657, 2373561; 593770, 2373549; 593792, 2373496; 593797, 2373417; 593842, 2373411; 593842, 2373326; 593905, 2373404; 594053, 2373383; 594103, 2373292; 594134, 2373228; 594156, 2373250; 594194, 2373256; 594178, 2373323; 594196, 2373386; 594229, 2373390; 594312, 2373340; 594341, 2373350; 594339, 2373421; 594383, 2373487; 594381, 2373513; 594460, 2373552; 594496, 2373553; 594497, 2373518; 594526, 2373509; 594572, 2373460; 594632, 2373519; 594649, 2373523; 594699, 2373475; 594728, 2373476; 594762, 2373532; 594791, 2373529; 594828, 2373501; 594852, 2373465; 594903, 2373501; 594933, 2373500; 594952, 2373489; 594974, 2373334; 594800, 2373150; 594718, 2373120; 594718, 2373102; 594744, 2373091; 594710, 2372721; 594720, 2372686; 594716, 2372633; 594678, 2372623; 594566, 2372651; 594536, 2372666; 594506, 2372663; 594467, 2372672; 594395, 2372663; 594406, 2372650; 594546, 2372567; 594558, 2372553; 594551, 2372535; 594389, 2372452; 594395, 2372434; 594415, 2372428; 594511, 2372449; 594603, 2372437; 594614, 2372421; 594607, 2372385; 594593, 2372353; 594591, 2372317; 594618, 2372322; 594661, 2372357; 594700, 2372384; 594696, 2372334; 594697, 2372333; 594697, 2372283; 594652, 2372257; 594541, 2372266; 594454, 2372294; 594400, 2372294; 594293, 2372267; 594231, 2372261; 594168, 2372241; 594126, 2372258; 594075, 2372267; 594030, 2372303; 593999, 2372354; 593948, 2372388; 593889, 2372397; 593812, 2372413; 593781, 2372425; 593756, 2372442; 593742, 2372467; 593742, 2372490; 593736,

2372521; 593736, 2372560; 593757, 2372587; 593790, 2372662; 593663, 2372772; 593543, 2372859; 593558, 2372894; 593555, 2372910; 593526, 2372928; 593476, 2372912; 593422, 2372953; 593420, 2372976; 593403, 2372997; 593400, 2373025; 593373, 2373016; 593352, 2373044; 593328, 2373025; 593215, 2373118; 593230, 2373171; 593214, 2373176; 593163, 2373154; 593095, 2373213; 593091, 2373238; 593064, 2373243; 593019, 2373295; 592937, 2373388; 592889, 2373462; 592897, 2373535; 592908, 2373597; 592923, 2373668; 592914, 2373772; 592889, 2373866; 592868, 2373941; 592867, 2373950; 592894, 2374029; 592908, 2374120; 592894, 2374162; 592860, 2374213; 592854, 2374216; 593151, 2374494.

(ii) Note: Map of *Drosophila tarphytrichia*—Unit 1—Kaluaa Gulch follows:

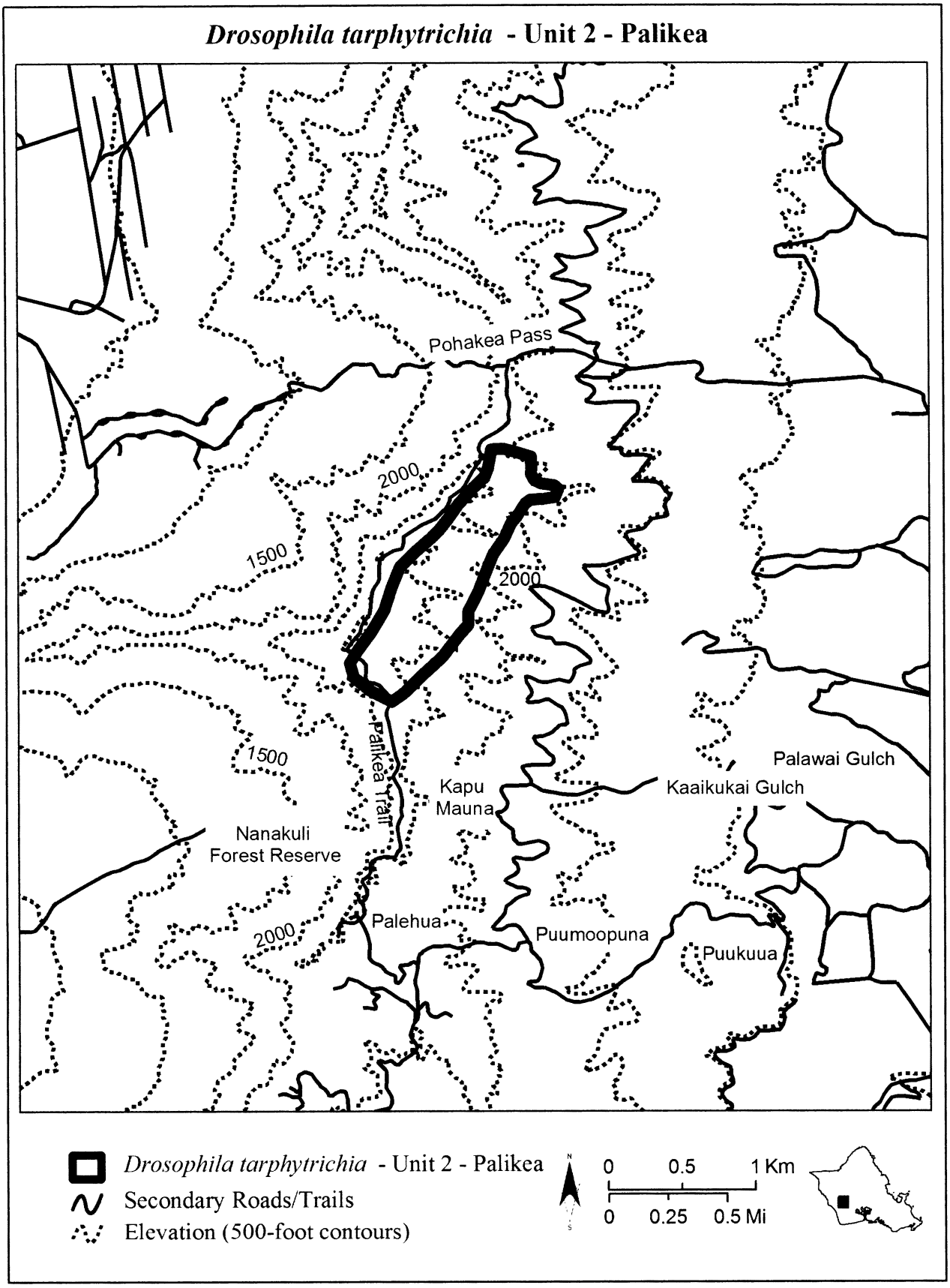
BILLING CODE 4310–55–P


Drosophila tarphytrichia - Unit 1 - Kaluaa Gulch
Kolekole pass
Puukailio
Puuhapapa
2000
1500
Maunauna
Hauula st.
1000
1500
2000
Honouliuli Contour Trail
Pohakea Pass
Drosophila tarphytrichia - Unit 1 - Kaluaa Gulch
Major Roads
Secondary Roads/Trails
Elevation (500-foot contours)
0 0.5 1 Km
0 0.25 0.5 Mi

(7) *Drosophila tarphytrichia*—Unit 2—Palikea, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 593529, 2367854; 593448, 2367801; 593302, 2367874; 593242, 2367927; 593193, 2367967; 593165, 2368065; 593217, 2368150; 593314, 2368283; 593399, 2368425; 593448, 2368578; 593505, 2368716; 593622, 2368833; 593703, 2368906; 593764, 2368963; 593832, 2369044; 593901, 2369145; 594002, 2369262; 594079, 2369331; 594104, 2369396; 594120, 2369485; 594124, 2369521; 594148, 2369525; 594213, 2369525; 594310, 2369497; 594395, 2369473; 594399, 2369392; 594396, 2369356; 594417, 2369313; 594461, 2369290; 594551, 2369278; 594579, 2369250; 594559, 2369197; 594472, 2369183; 594391, 2369179; 594354, 2369153; 594302, 2369072; 594257, 2369015; 594213, 2368914; 594136, 2368809; 594083, 2368672; 594035, 2368550; 593966, 2368417; 593966, 2368324; 593909, 2368259; 593792, 2368105; 593675, 2368000.

(ii) Note: Map of *Drosophila tarphytrichia*—Unit 2—Palikea follows:

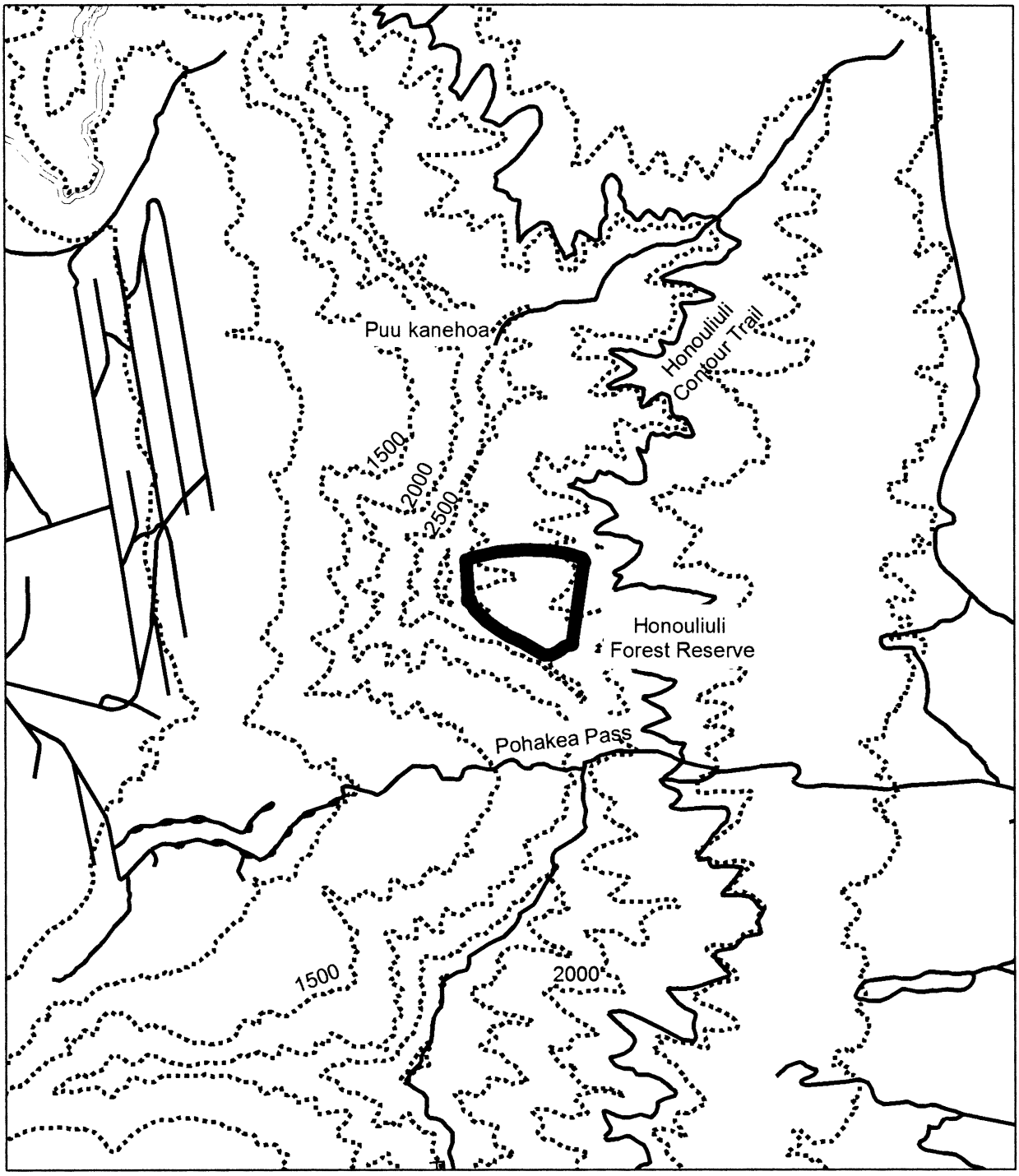

Drosophila tarphytrichia - Unit 2 - Palikea
Pohakea Pass
2000
1500
2000
1500
Palikea Trail
Kapu Mauna
Palawai Gulch
Kaaikukai Gulch
Nanakuli Forest Reserve
Palehua
2000
Puumoopuna
Puukuua
Drosophila tarphytrichia - Unit 2 - Palikea
Secondary Roads/Trails
Elevation (500-foot contours)
N
S
0 0.5 1 Km
0 0.25 0.5 Mi

(8) *Drosophila tarphytrichia*—Unit 3—Puu Kaua, City and County of Honolulu, island of Oahu, Hawaii.

(i) Land bounded by the following coordinates: 594166, 2370854; 594166, 2370853; 594164, 2370854; 594122, 2370843; 594090, 2370815; 594040, 2370789; 593996, 2370789; 593930, 2370827; 593852, 2370875; 593778, 2370907; 593716, 2370947; 593642, 2370999; 593602, 2371041; 593574, 2371067; 593558, 2371095; 593539, 2371118; 593531, 2371121; 593534, 2371173; 593519, 2371375; 593533, 2371375; 593552, 2371390; 593628, 2371404; 593716, 2371426; 593794, 2371431; 593876, 2371437; 593974, 2371435; 594036, 2371431; 594138, 2371415; 594190, 2371399; 594232, 2371385; 594246, 2371359; 594239, 2371354; 594170, 2370879; 594172, 2370877; 594170, 2370855.

(ii) Note: Map of *Drosophila tarphytrichia*—Unit 3—Puu Kaua follows:

***Drosophila tarphytrichia* - Unit 3 - Puu Kaua**



Drosophila tarphytrichia - Unit 3 - Puu Kaua
Secondary Roads/Trails
Elevation (500-foot contours)

0 0.5 1 Km
0 0.25 0.5 Mi

BILLING CODE 4310–55–C

* * * * *

Dated: November 2, 2007.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 07–5706 Filed 11–27–07; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Wednesday,
November 28, 2007

Part IV

Department of Housing and Urban Development

24 CFR Parts 200 and 242
Revisions to the Hospital Mortgage Insurance Program; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 200 and 242

[Docket No. FR–4927–F–02]

RIN 2502–AI22

Revisions to the Hospital Mortgage Insurance Program

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing HUD's mortgage insurance program for hospitals. The rule updates and incorporates some earlier provisions that currently are not published as part of the Federal Housing Administration (FHA) regulations. Further, the rule adds new provisions to make them consistent with current industry practices. The rule also codifies the relevant regulations that address hospital mortgage insurance in one part, thereby making the regulations more user-friendly.

DATES: *Effective Date:* January 28, 2008.

FOR FURTHER INFORMATION CONTACT: Roger E. Miller, Director, Office of Insured Health Care Facilities, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 9224, Washington, DC 20410–8000; telephone (202) 708–0599 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Information Relay Service at (800) 877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. The January 10, 2005, Proposed Rule

On January 10, 2005, HUD published a proposed rule intended to revise HUD's hospital mortgage insurance regulations. The proposed rule (70 FR 1750 *et seq.*) describes in detail the background and purpose of the hospital mortgage insurance regulation.

The January publication proposed eliminating references to hospital mortgage insurance in 24 CFR part 200, and proposed codifying the entire program in 24 CFR part 242. As a result, users of the regulation would be able to find everything they need in one location, and the rule would avoid unnecessary repetition.

The number of applications for hospital mortgage insurance has increased recently, and one purpose of this new rule is to respond to this increase with more detailed and complete regulatory guidance. The new details in the proposed regulation reflect HUD's actual experience with the hospital mortgage insurance industry, as well as statutory developments that have taken place in the last few years. The result is a new proposed comprehensive program of mortgage insurance for hospitals to replace the current, much less detailed regulations.

II. This Final Rule

This final rule follows publication of the January 10, 2005, proposed rule, and takes into consideration the public comments received. The public comment period for this proposed rule closed on March 11, 2005. HUD received comments from four commenters on a wide variety of issues related to the proposed rule. Commenters included a hospital industry trade association, a financing company, and two individuals. The final rule makes a number of changes to the proposed rule based on the comments received. The following pages present a short, section-by-section description of the changes HUD made in the final rule to clarify terminology, conform to a statutory change, and address public comments.

Section 242.1 Definitions

The final rule adds new definitions for the following terms: ''AMPO'' (Allowance for Making Project Operational); ''applicant''; ''construction''; ''days of cash on hand,'' in order to clarify terminology used in the definition of ''surplus cash''; ''most recent audited financial statement''; ''net income''; ''Secretary''; ''service area''; and ''substantial rehabilitation.''

The final rule deletes the definitions of ''Commissioner'' and ''working capital'' because they are no longer needed. ''Commissioner'' is not used in the final rule. ''Working capital'' has been replaced by the more commonly understood phrase, ''initial operating capital.''

The final rule clarifies terminology that was in the proposed rule. Commenters found the term ''credit instrument'' confusing, so this final rule uses the term ''mortgage note'' instead. For ''Debt service coverage ratio,'' the formula has been adjusted to include excess of revenues over expenses as an option for net income, and to take into account amortization expense. The definition of ''identity of interest'' has been revised to include examples in order to provide improved guidance. The term ''mortgagee'' has been clarified. The term ''operating revenue'' has been revised to state that, at HUD's discretion, additional items beyond those specifically mentioned, and that have been historically and reliably received, may be considered operating revenue for underwriting purposes. ''Preapplication meeting'' has been revised to clarify that the meeting includes HUD, the potential mortgagee, and the potential mortgagor. The definition of ''project'' has been clarified by using another defined term, ''substantial rehabilitation,'' and by specifying that construction may include replacement of an existing facility.

The definition of ''surplus cash'' has been clarified by defining the phrase ''days of cash on hand,'' which commenters found unclear, and by defining some terms used in the definition. In addition, instead of using the concept of cash earned, as proposed, the definition now considers surplus cash to be the cash remaining after certain conditions have been met.

Section 242.4 Eligible Hospitals: Transition Provisions

The final rule adds a new paragraph (b) to clarify when the regulations of part 242, as revised by this final rule become applicable, and revises the heading of this section to reflect the addition of transition provisions.

Section 242.13 Parents and Affiliates

The final rule clarifies that the purpose of assurances, guarantees, or collateral is to protect HUD's interests.

Section 242.15 Limitation on Refinancing of Existing Indebtedness

The final rule has substituted the word ''capital'' for ''long-term,'' because there may be instances where it is necessary to finance short-term debt.

Section 242.16 Applications

The final rule clarifies an exception to the 3-year positive operating margin requirement for hospitals in a turnaround situation. Under the exception, only one year is required to submit an application and 2 consecutive years of positive operating margin are required for application approval. The final rule replaces the word ''applicant'' with the words ''mortgagor or mortgagee'' in § 242.16(a)(4)(i) to reflect that both may expend resources in preparing an application.

Section 242.16(b)(6) is revised to take account of the fact that, as a commenter stated, complete architectural plans may not be available at this stage. In the final rule, architectural plans are to be filed with the application ''in sufficient detail to enable a reasonable estimate of cost.''

A reference to a 12-month timeframe for a decision on an application in § 242.16(f) has been removed in

response to a comment that the timeframe could imply that a 12-month wait for a decision is usual, and thereby discourage applicants. While HUD cannot promise a specific timeframe for its review, the agency endeavors to respond more promptly than 12 months.

Section 242.21 Refund of Fees

This section along with § 242.45(e) is revised to make clear that the portion of inspection fees paid for early commencement of work is not refundable.

Section 242.23 Maximum Mortgage Amounts and Cash Equity Requirements

Section 242.23(c) is revised to permit a private nonprofit or public mortgagor, at HUD's discretion and subject to 24 CFR 242.49, to provide equity in the form of a letter of credit. Also, the rule is revised to clarify that cash equity is in addition to property, plant, and equipment.

Section 242.24 Working Capital

The final rule clarifies that HUD did not intend to make an initial cash deposit a mandatory requirement. Whether such a deposit is required will depend in each case on the borrower's financial strength.

Section 242.26 Agreed Interest Rate

The final rule clarifies that different interest rates may be applicable to a project; for example, construction and permanent loan rates can differ.

Section 242.28 Allowable Costs for Consultants

Recognizing that hospital projects can have long planning times, this rule changes, from one year to 2 years, the time limit for allowing consultant's costs prior to the application.

Section 242.31 Accumulation of Accruals

The final rule is slightly revised to provide greater flexibility for mortgagors in purchasing fire and hazard insurance.

Section 242.33 Covenant for Malpractice, Fire, and Other Hazard Insurance

This final rule adopts language requiring the mortgagor to maintain adequate malpractice, fire, and hazard coverage acceptable to the mortgagee and HUD.

Section 242.35 Mortgage Lien Certifications

The final rule is revised so that, in exceptional cases, certain personalty may be excluded from the mortgaged property or the insured lender may take a secondary lien position on it.

Section 242.37 Mortgage Prepayment

The final rule permits the 30-day advance notice of intent to prepay the mortgage to be extended with HUD approval.

Section 242.39 Insurance Endorsement

Section 242.39(c) incorporates subpart B of 24 CFR part 207, covering contract rights and obligations of the mortgagor, mortgagee, and HUD, into this rule. The cross-reference in § 202.94 of the proposed rule is therefore no longer needed and is removed in this final rule.

Section 242.43 Application of Cost Savings

The proposed rule required that any cost savings be used to reduce the mortgage and the mortgagor's equity contribution proportionally. Under this final rule, the mortgagor can elect to have a greater proportion of the savings go to mortgage reduction.

Section 242.45 Early Commencement of Work

The final rule expands this provision to allow for early site preparation. It also provides that the cost of structures may be refinanced with insured mortgage proceeds if the work was completed more than 2 years before application. Where advance approval is sought for early site work and construction activity, HUD will require that key elements of an application be filed first, with the understanding that the remainder of the application will follow.

Section 242.49 Funds and Finances: Deposits and Letters of Credit

Section 242.49(a) is revised to give a fuller explanation of the mortgagor's deposit.

Section 242.50 Funds and Finances: Off-Site Utilities and Streets

For clarity, § 242.50 has been modified to specify that there must be adequate funds available to cover cost of off-site utilities and streets.

Section 242.51 Funds and Finances: Insured Advances and Assurance of Completion

This section is revised so that the amount of surety for completion is related to the construction contract (or Guaranteed Maximum Price, in the case of construction management) rather than the accepted bid price.

Section 242.53 Excluded Contractors

Section 242.53(c) has been revised in this final rule to provide for remedial and enforcement actions other than refusing to insure further advances.

Section 242.54 Nondiscrimination

HUD is revising § 242.54 in this final rule to clarify that the section does not affect the eligibility of women's and children's hospitals for this program.

Section 242.58 Books, Accounts, and Financial Statements

The final rule allows for the use of Governmental Accounting Standards in addition to Generally Accepted Accounting Principles because a number of hospitals use Government Accounting Standards.

Section 242.62 Releases of Lien

The final rule provides that HUD may set thresholds ''or other standards'' for the sale, disposition, transfer, or encumbrance of property securing a lien under this program.

Section 242.74 Smoke Detectors

This section is revised to provide that smoke detectors must comply with local law.

Section 242.76 Title Evidence

The final rule is revised to state that the title policy shall include as insureds not only HUD and the Secretary, but their successors and assigns.

Section 242.89 Supplemental Loans

This section has been revised to permit refinancing of debt incurred in connection with early commencement of work performed in accordance with the requirements of this rule.

III. Discussion of Public Comments on the January 10, 2005, Proposed Rule

The issues that commenters addressed were numerous. Therefore, this discussion organizes the comments into general comments and those addressed to specific sections of the proposed rule. The latter are organized by section order for convenience.

General Comments

Comment: The rule should be re-issued as an interim final rule and additional comments regarding ''any material concerns that remain after publication'' should be solicited. This is particularly important, since HUD policy tends to prohibit discussion about the rule after the close of the comment period.

Response: HUD believes that the public comment process provided sufficient opportunity for comment on the proposed rule.

Comment: The proposed rule was not adaptable and flexible enough for the hospital industry. This commenter stated that ''the Proposed Rule may inadvertently limit the application of a

longstanding and effective underwriting approach to Section 242 financing, which recognizes the organic and evolving nature of hospital delivery services.'' This is because hospital services are typically delivered in an ''evolving regulatory and service environment'' reflecting ''particular needs of a facility's service area as well as technological developments and revenue changes dictated by federal and state reimbursement rules.'' Adaptable underwriting standards will become more necessary as the program involves hospitals in new geographical areas. Absent needed flexibility, the ability of hospitals to participate in this needed program could be severely limited.

Response: HUD viewed the lack of explicit, published underwriting standards to be a weakness. A principal reason for publishing the proposed rule was to correct this weakness, so that potential participants can know in advance what HUD's basic underwriting standards are and to avoid wasting time and money on applications with little or no chance of being approved.

Comment: In order to make the program sufficiently flexible, HUD should move portions of the rule to informal program guidance. This non-regulatory, more flexible approach has worked well in other FHA programs.

Response: HUD views the program as being sufficiently flexible to accommodate a wide range of circumstances.

Comment: What is HUD's policy with regard to interest rate swaps?

Response: The mortgagor may not engage in interest rate swaps or other derivative-type transactions, except in conformance with policies and procedures to be established by HUD. HUD does not believe that the detailed policies and procedures need to be included in the rule. However, after consideration of this comment, HUD is adding clarifying language in the final rule at § 242.63, so that the section reads:

> The mortgagor shall not enter into any long-term debt, short-term debt (including receivables/line of credit financing), equipment leases, or derivative-type transactions, except in conformance with policies and procedures established by HUD.

Comment: ''Since loan to cost is based on the value of the mortgaged property I feel it is not applicable for periods beyond the date of closing. Distributions of equity if a concern should be a separate covenant if deemed a risk factor.''

Response: HUD assumes the commenter is referring to the definition of surplus cash, because of the reference to distributions of equity. Distributions of equity are controlled by §§ 242.65 and 242.66. There is a separate loan covenant in the loan documents based upon these sections.

Comments on Specific Sections

Revisions to Part 200

1. Section 200.24

Comment: One commenter stated that, as a practical matter, this section eliminates § 223(f) and part 242 refinancing for non-FHA insured loans, an unfortunate and unnecessary consequence. The rule should allow otherwise financially sound non-FHA hospitals access to much-needed debt service savings in a rapidly eroding low-interest rate climate when they have no present need for new capital improvements. This change would also allow FHA to realize additional fees and Mortgage Insurance Premium (MIP) revenues without related construction or start-up risk. This commenter stated that the application of Section 223(f) to FHA's multifamily programs has been determined to be sound enough to permit a program MIP reduction. A 223(f)/242 program would be equally successful.

A commenter stated that if the proposed deletion of Section 223(f) authority, which is currently in regulations, is adopted, and if at a subsequent date FHA determines Section 223(f) for hospitals to be in the public interest, FHA will face a difficult and time-consuming regulatory process to implement that result. This commenter states that there is no public policy benefit gained by deleting Section 223(f)/242 financing authority and that existing regulations should remain in effect.

Response: The reference to section 223(f) of the National Housing Act, 12 U.S.C. 1715n(f), in 24 CFR part 200, was never intended to provide program authority. Should the Department decide to implement section 223(f) for hospitals, explicit regulations would be required to provide program structure. HUD is not prepared to issue such regulations at this time, although it could consider doing so at a later date.

Comment: FHA's ''Operating Loss Loans'' authority has been deleted from the draft regulations. The commenter recommends that it be reinstated.

Response: With respect to Section 223(d), HUD's policy has been not to authorize any 223(d) loans for hospitals, and none have ever been authorized. The exclusion of Section 223(d) from the rule is consistent with that policy.

2. Section 200.40 HUD Fees

Comment: Section 223(f)/242 authority should be kept in effect by adding the following text from current regulations to § 200.40(c):

> For a mortgage being insured under Section 242 of the Act (12 U.S.C. 1715z–7), an application fee of $1.50 per thousand dollars of the amount loaned shall be paid to HUD at the time the hospital application is submitted to the Department and the balance thereof no later than initial endorsement.

Response: For the same reasons discussed in connection with comments regarding hospital loans under section 223(f) of the National Housing Act, HUD is not adopting this suggested change.

Subpart A—General Eligibility Requirements

3. Section 242.1 Definitions

Comment: The term ''applicant'' should be defined as to whether the term is meant to apply to the lender or mortgagor throughout the regulations. The ''applicant'' should be the mortgage lender.

Response: HUD agrees that ''applicant'' should be defined because of the possibility of confusion between the roles of lender and mortgagor. *Therefore, a definition of ''applicant'' has been added.*

Comment: The term ''application'' should be defined.

Response: HUD sees no need for a definition of this term; ''application'' is commonly understood in the industry.

Comment: The definition of cash should include operating cash, short-term investments, and funded depreciation accounts. By definition, this would exclude all trusteed accounts. Days of operating expenses should be defined as total operating expenses minus depreciation and interest.

Response: The comment appears to be a reference to the calculation of ''days of cash on hand,'' a term appearing in the definition of ''surplus cash.'' In order to clarify this term, a definition of ''days of cash on hand'' has been added as a separate definition.

Comment: The definition of ''chronic convalescent and rest'' should be revised to delete the terms ''respite care services,'' ''hospice services,'' and ''rehabilitation services.'' Instead, the definition of ''chronic convalescent and rest'' should be tied directly to the types of services provided in the Section 232 program. There is no evidence that the term ''chronic care'' set forth in the National Housing Act (NHA) includes respite care, hospice, or rehabilitation, particularly when delivered on an independent basis and not in

connection with chronic convalescent patients. The proposed definition would appear to exclude revenues received from these services from inclusion in the calculation of acute care patient days for purposes of determining whether a proposed project meets the NHA's 50 percent chronic care bed limitation.

Response: The inclusion of respite, hospice, and rehabilitation patient days in the definition of ''chronic convalescent and rest'' is consistent with the language in the introductory paragraph of the statute. That language would preclude patient days for such services from being counted for the purpose of calculating hospital eligibility based on patient days under the statute's ''50 percent rule.'' The statute, 12 U.S.C. 1715z–7(a), states:

> The purpose of this section is to assist the provision of urgently needed hospitals for the care and treatment of persons who are acutely ill or who otherwise require medical care and related services of the kind customarily furnished only (or most effectively) by hospitals.

Respite, hospice, and chronic rehabilitation services are not acute care services and do not require the services furnished only (or most effectively) by hospitals. Typically, these services are not provided in hospital beds, but rather in sub-acute settings. These services are most accurately included in the broad category, specified in the statute, of ''chronic convalescent and rest'' and, in some cases of rehabilitation, in the excluded categories of ''drug and alcoholic'' and ''mentally deficient.''

Comment: The rule should include a definition of ''commitment.''

Response: HUD sees no need for a definition; the concept of a HUD mortgage insurance commitment is well understood in the industry.

Comment: The rule should include a definition of ''credit instrument.''

Response: Where the term ''credit instrument'' appeared in the proposed rule, HUD has substituted the term ''mortgage note'' in this final rule for clarity.

Comment: A commenter stated that the definition of ''debt service coverage ratio'' should be revised to remove the second and third sentences, which reference a high coverage ratio. These sentences are unnecessary and potentially problematic. The proposed definition suggests that absent a ''high debt service coverage ratio,'' which is undefined, a project is ineligible. The language potentially conflicts with specific coverage standards set forth in § 242.16, and as such there would appear to be no need for a nonspecific policy statement of this type. At a minimum, a cross-reference should be made to § 242.16 to avoid interpretation conflicts.

This commenter also stated that the commenter presumes that the formula in the definition describes the formula currently in use.

Response: HUD agrees that the second and third sentences are potentially problematic and has removed them. The formula in the definition has been clarified, as follows: Debt Service Coverage Ratio (total debt service coverage on all long-term capital debt) equals:

$$\frac{(\text{Excess of revenues over expenses OR net income}) + \text{interest expense} + \text{depreciation expense} + \text{amortization expense}}{\text{Current portion of long-term debt [prior year, including capital leases]} + \text{interest expense}}$$

Comment: A commenter states that the rule should add a phrase to the definition of ''hospital'' to accommodate possible future changes, as follows:

> Hospital means a facility that has been proposed for approval or has been approved by HUD under the provisions of this subpart, as this definition may be modified from time to time pursuant to the Act. * * *

The commenter states that possible future changes may include, for example, an extension of the exclusion of Critical Access Hospitals from the 50 percent acute care requirement beyond its current 2006 sunset, or the elimination of the 50 percent rule in its entirety.

Response: The definition of ''hospital'' is statutory, as is the exclusion of critical access hospitals from the 50 percent rule. (See 12 U.S.C. 1715z–7(b)(1).) At the time of the comment period on the proposed rule, the statutory exemption for Critical Access Hospitals ended in 2006. On July 10, 2006, the exemption for Critical Access Hospitals was extended through July 31, 2011. The relevant portion of this final rule has been conformed to that statutory change. HUD does not believe further definition is necessary.

Comment: The definition of ''identity of interest'' should be modified as follows to permit identity of interest transactions subject to additional underwriting criteria, and to give HUD the ability to set the criteria:

> Identity of interest means a relationship that must be disclosed and may be either prohibited or subject to additional underwriting or criteria pursuant to the requirements of HUD or the Regulatory Agreement.

Response: HUD does not believe that this concept needs to be explicitly stated. HUD has the authority to waive provisions in the Regulatory Agreement for good cause. However, for clarity, HUD includes examples of identity of interest relationships in the definition in this final rule.

Comment: The definition of ''mortgagee or lender'' should be revised to remove material regarding trust indentures, and to expand the definition to include the ''proposed lender with respect to an application for commitment.'' Regarding the indenture, the commenter states that indentures, in the sense the industry uses the term, are not involved, and that the FHA mortgagor would not be a party to the indenture (the commenter states that ''indenture'' means a contract between a government bond issuer and a bond trustee for loans financed through tax-exempt revenue bonds). The suggested revised definition would read as follows:

> Mortgagee or Lender means the proposed lender with respect to an application for a commitment and/or the original lender under a mortgage, and its successors and assigns, which is the holder of the governing mortgage and other related credit instruments (All official contacts and actions by HUD shall be with or through a HUD-approved lender).

Response: The reference to ''trust indenture'' in the proposed rule derived from an obsolete reference. HUD does not insure trust indentures. Therefore, use of the term ''trust indenture'' would be confusing because many mortgages are funded with bond issues, pursuant to trust indentures. Therefore, this final rule changes the definition of ''mortgagee'' to:

> The original lender under a mortgage, and its successors and assigns, including the holders of mortgage notes issued under a trust mortgage or deed of trust, pursuant to which such holders act by and through a trustee therein named.

Comment: The first sentence of the proposed definition of ''mortgage reserve fund'' should be revised to read:

> Mortgage Reserve Fund means a trustee-held account for the benefit of the

Commissioner to which the mortgagor contributes funds required by HUD and from which withdrawals must be approved by HUD.

Response: The mortgage reserve fund is not only for the benefit of HUD, it is also for the benefit of the hospital to preserve the value of the hospital and to help prevent default. In order to clarify this purpose, the first sentence has been modified to state, ''Mortgage reserve fund means a trust account, or an account held by the mortgagee, for and on behalf of the mortgagor, to which the mortgagor contributes funds required by HUD and from which withdrawals must be approved by HUD.''

Comment: The second and third sentences of the definition of ''non-operating revenues and expenses'' should be revised, as follows:

Examples of items classified as non-operating are State and Federal income tax, general contributions, gains and losses from investments, and unrestricted income from non-designated endowment funds, and income from related entities received by a hospital sponsor. Classification of items as operating or non-operating shall be in accordance with generally accepted accounting principles or other applicable accounting standards.

Response: The suggestion is to insert ''non-designated'' before endowment funds to make the wording state that ''unrestricted income from non-designated endowment funds'' is excluded from operating income. HUD does not agree and would consider unrestricted income from all endowment funds to be non-operating revenue.

The commenter suggests that generally accepted accounting principles determine classification of operating and non-operating revenue and that investment income should be included in operating income. It is true that some endowment funds generate income for the general benefit of the hospital. However, the income these funds generate, depending on the type of investment and market conditions, are subject to variance and may not be available for servicing the mortgage in future periods. There is no direct corresponding expense associated with the investment income that can be eliminated if the investment income decreases. Therefore, this final rule retains the wording without change.

Comment: One commenter suggests a minor editorial revision to the definition of ''operating revenue'' under the heading of ''operating margin,'' to add the phrase ''but not limited to'' after ''including'' in the parenthetical example.

Response: HUD agrees that the items listed were intended to be examples and not an exclusive list.

Comment: The rule should add a definition of ''acute care patient days'' and provide for adjustment of ancillary non-bed hospital services to an acute care patient day.

Response: This term is not used in the rule and no definition is necessary. Also, HUD believes that the calculation of adjusted patient days is at a level of detail that is not necessary to include in the regulation.

Comment: A portion of the definition of ''personalty'' (from the third sentence beginning ''Generally, intangibles * * *'' to the end) should be revised, as follows:

Generally, intangibles shall also include all cash and cash escrow funds which are not otherwise pledged in connection with obligations of the mortgagor outstanding at initial endorsement, such as, but not limited to: depreciation reserve fund or mortgage reserve fund accounts, bank accounts, residual receipt accounts, all unrestricted contributions, donations, gifts, grants, bequests and endowment funds by donors, and all other revenues and accounts receivable from whatever source paid or payable. All personalty shall be securitized with appropriate UCC filings and any excluded personalty shall be indicated in the Regulatory Agreement and the Security Agreement.

The commenter states that the language regarding otherwise-pledged obligations should be added to provide an exception for funds pledged at or prior to initial endorsement in connection with bond-related obligations (such as construction fund negative arbitrage) issued to fund the FHA loan or in connection with other outstanding obligations of the mortgagor described in the FHA application. The qualifier of ''unrestricted'' should be added because under state law, donor restricted funds may be governed by terms and conditions set by the donor.

Response: HUD does not believe it is necessary to narrow the definition of ''personalty,'' because § 242.64 already permits exclusions for specific personalty.

Comment: One commenter suggests a minor clarification to the definition of ''preapplication meeting'' to specify that a potential applicant in this case is a mortgagor or lender, while elsewhere in the rule the term should refer to a mortgagee. The commenter suggests clarification of these usages.

Response: HUD has clarified the definition.

Comment: The definition of ''preliminary review letter'' should be revised, as follows:

Preliminary Review Letter means a letter from HUD to a potential mortgagee communicating the result of the Preliminary Review. The letter may: (1) State that an application for mortgage insurance would result in a rejection and provide the reasons for this determination, (2) state that there are factors that need to be further developed before a determination as to acceptability of a project for Preliminary Review may be made, or (3) state that no factors that would cause an application to be rejected have been identified, and therefore there appears to be no bar to the applicant proceeding to submit an application for insurance.

The commenter states that, even though an early determination of eligibility is desirable, the definition ''may be unnecessarily severe'' as proposed, and that the rule should provide for further discussion or the submission of additional materials at an early stage, which may present HUD with sufficient evidence to reverse an initial rejection. Also, the term ''next step'' is too vague and should be specified.

Response: HUD agrees that ''potential applicant'' in the first sentence should be replaced. HUD has replaced that term with ''proposed mortgagee or mortgagor.'' This language allows HUD to receive and fulfill requests for a preliminary review not only from proposed mortgagees, but also from proposed mortgagors (hospitals) that are seeking to determine if they are viable candidates for an insured loan, before they retain a mortgage lender.

HUD does not believe it necessary to insert the language the commenter proposes as clause (2), because communication often takes place between the mortgagee and HUD to clarify matters during the preliminary review and because there is already flexibility in § 242.16 for HUD to reconsider a negative determination.

HUD agrees that the phrase ''the next step in the application process'' is vague and has replaced it in this final rule with ''a preapplication meeting.''

Comment: The definition of ''project'' should be revised as follows to include the soft costs of construction (interest, taxes, MIP, etc.), as follows:

Project means the construction (which may include a replacement of an existing hospital facility), rehabilitation, modernization, expansion, or renovation of an eligible hospital, including equipment, which has been proposed for approval or has been approved by HUD under the provisions of this subpart, including the financing and refinancing of existing indebtedness and other related costs in connection therewith, if any, plus all related activities involved in completing the improvements to the property.

Response: In reviewing the definition of ''project,'' HUD realized that the word

was used to mean different things in different places. In several instances, the proposed rule used ''project'' when referring to the hospital or mortgagor. This usage derives from HUD's multifamily housing programs, in which ''project'' is used to refer not only to the construction project and the financing thereof, but also to the ongoing operations of the residential rental business during the life of the loan. For clarity, this final rule makes a distinction between ''project'' as defined here and ''hospital'' or ''mortgagor.''

HUD also considered the use of terms such as ''modernization,'' ''renovation,'' and ''expansion.'' The final rule uses the term ''substantial rehabilitation'' to encompass all of these activities, and a definition of this term has been added in § 242.1.

Finally, HUD believes that the definition of ''project'' is not the appropriate place to introduce the concept that a construction project includes soft costs.

Therefore, the definition of ''project'' has been revised to specify the meaning of the word in all contexts in which it is used in the rule, and to conform the definition to the final rule's definition of ''substantial rehabilitation.''

Comment: The definition of ''regulatory agreement'' should be modified to include lessees of the mortgagor, if applicable, as regulated entities under the regulatory agreement. The commenter cites the Shoshone Medical Center as an example.

Response: HUD disagrees. As a general policy, leasing of the entire hospital is not contemplated. However, HUD does have the authority to approve leasing, on a case-by-case basis, for good cause, as was demonstrated in the example offered.

Comment: One commenter suggests revisions as follows to the proposed definition of ''security instrument'' and also questions whether the definition is required, given that there is also a proposed definition of ''mortgage.''

Security instrument means a mortgage, deed of trust or any other document evidencing security for the indebtedness represented by a note endorsed for insurance by HUD and shall be deemed to be the mortgage as defined by the National Housing Act, as amended, implementing regulations, and HUD directives.

Response: HUD believes that the definition of ''security instrument'' is adequate, and that it is inappropriate to include discussion of the note in this definition.

Comment: A commenter asked whether the rule could provide a definition of what constitutes the service area, and stated that some hospitals serve patients from all over the country or all over the state, although most of their patients come from the nearby surrounding community.

Response: In order to avoid ambiguity, a definition of ''service area'' is added to § 242.1 of this final rule.

Comment: The definition of ''state'' should be revised to change ''Virgin Islands'' to ''United States Virgin Islands.''

Response: HUD agrees, and this final rule adopts this change.

Comment: The definition of ''surplus cash'' is a departure from existing practice, particularly when proprietary sponsors are involved, in that it would no longer permit distributions of cash earned in prior periods that a mortgagor elected not to distribute. To eliminate this problem, surplus cash would be better defined in terms of cash remaining as opposed to cash earned in a fiscal period. This change would be in accordance with HUD Circular 4615.2 and HUD's draft applicant's guide. In addition, the commenter suggests changes to give HUD more flexibility to set standards. The commenter also proposes enlarging the ''days in accounts receivable'' portion of the test because, historically, many hospitals are unable to meet the proposed test. Accordingly, this commenter suggests the following revised language:

Surplus Cash means any cash in the applicable fiscal period or prior fiscal periods, including accounts receivable, remaining after the following have been achieved:

(1) Mortgage payments for the preceding 12 months have been made when due, including any grace period;

(2) There is a Debt Service Coverage Ratio greater than or equal to 1.50 or such other ratio as HUD may deem appropriate;

(3) Days in Accounts Receivable are less than or equal to 100 or such other day count as HUD may deem appropriate;

(4) Days in Accounts Payable are less than or equal to 120 or such other day count as HUD may deem appropriate;

(5) The Mortgage Reserve Fund is compliant with the scheduled balance;

(6) All income, property, and statutory employer payroll taxes and employee payroll withholding contributions have been deposited as required;

(7) The Current Ratio is greater than or equal to 1.50 or such other ratio as HUD may deem appropriate;

(8) Days of cash on hand are greater than or equal to 15 days or such other day count as HUD may deem appropriate; and

(9) The payment of:

(i) All sums due or currently required to be paid under the terms of the Mortgage Note and Regulatory Agreement due on the first day of the month following the end of the applicable fiscal period, including, without limitation, in the Mortgage Reserve Fund or any other reserves as may be required by HUD; and

(ii) All other current obligations of the hospital (accounts payable except for a 100 day exception and accrued, unescrowed expenses), unless funds for payment are set aside or HUD has approved deferment of payment.

Response: The addition of the qualifiers, ''or as HUD shall deem appropriate,'' negates the intended purpose of this rule to make clear the minimum financial standards applicable to hospitals with insured loans. With respect to ''surplus cash,'' HUD agrees that cash earned in prior periods that a mortgagor elected not to distribute would be included and that ''surplus cash'' should be defined as earned cash remaining as opposed to cash earned in a fiscal period.

This final rule also adds language to the definition requiring the hospital to meet particular minimum equity requirements and restricting distributions until those requirements are met. The final rule clarifies that the most recent audit required under the regulatory agreement, in conjunction with the effect of the distribution on the interim financial statements, will provide the basis for limitations on distributions. Items 9(i) and 9(ii) of the proposed definition were deleted as being duplicative. Accordingly, the final rule revises the definition of ''surplus cash.''

Comment: One commenter stated: ''We feel that 21 and 15 are very low standards. We would suggest it be raised to 30 days.''

Response: HUD assumes that this comment is meant to refer to the 15 days of cash on hand portion of the definition of ''surplus cash'' in the proposed rule. HUD agrees that 15 days cash on hand is a very low standard and has increased it to 21 days cash on hand. HUD considered the commenter's suggestion to increase the days of cash on hand to 30. However, HUD did not believe it necessary to raise the standard that high. The increase to 21 days strengthens the prior standard, provides sufficient liquidity to make a payroll, and is currently met by 50 percent of the hospitals in the HUD portfolio.

Comment: One commenter stated that ''average payment period'' would be a better measure to use in this definition.

Response: HUD assumes that the commenter was referring to the use of the term ''days in accounts payable'' in the definition of ''surplus cash.'' The measure ''average payment period'' has become the standard in the industry because it is more comprehensive and less subject to manipulation. HUD

agrees to the substitution of this measure for ''days in accounts payable.''

Comment: One commenter suggests that the definition of ''working capital'' be deleted because it is used only once in the rule (§ 242.24).

Response: HUD agrees with the comment. This final rule removes the definition of ''working capital'' in favor of a phrase that is better understood, ''initial operating capital,'' and revises the title of § 242.24 to ''Initial Operating Costs.''

4. Section 242.3 Encouragement of Certain Programs

Comment: One commenter states that everything after the word ''hospitalization'' should be deleted because the language ''is neither an eligibility requirement of the Act.* * *nor, to our knowledge, a statement of current FHA policy.'' The commenter is concerned that this language may be interpreted as a mandatory underwriting requirement, making otherwise eligible projects ineligible.

Response: The language that the commenter requests be deleted is indeed a requirement stated in the statute, 12 U.S.C. 1715z–7(f). This section states that:

> The activities and functions provided for in this section shall be carried out by the agencies involved so as to encourage programs that undertake responsibility to provide comprehensive health care, including outpatient and preventive care, as well as hospitalization, to a defined population, and, in the case of public hospitals, to encourage programs that are undertaken to provide essential health care services to all residents of a community regardless of ability to pay.

HUD's underwriting reflected this requirement in the past and will continue to do so in the future. HUD included the words ''and certain not-for-profit hospitals'' after ''in the case of public'' in recognition of the role that many not-for-profit hospitals fulfill in providing indigent care in areas where there are no public hospitals or in which public hospital capacity is limited. In response to the commenter's concern about mandatory underwriting requirements, HUD notes that encouragement of the provision of comprehensive health care to a population does not mean that a hospital is ineligible because it does not plan to provide comprehensive care or does not plan to provide services to all residents regardless of ability to pay. It does mean, however, that HUD should consider the provision of care and the role that a proposed hospital would play across the service area.

5. Sections 242.4 and 242.5 Eligible Hospitals and Eligible Mortgagees

Comment: Section 242.4 should be revised to conform to the definition of ''project'' by adding the phrase ''modernization, expansion, or renovation'' before the phrase, ''of an existing hospital.''

Response: The definition of ''project'' has been revised in response to other public comments to mean the ''construction or substantial rehabilitation'' of an eligible hospital. This change also addresses the issue cited by this commenter. In addition, HUD has added a paragraph on transition to these regulations.

Comment: The title to § 242.5 should be revised to read ''Eligible mortgagees/lenders.''

Response: HUD agrees, since this title reflects the terminology used in the final rule.

6. Section 242.7 Maximum Mortgage Amounts

Comment: The following phrase should be added after the word ''installed'' and before the period at the end of the sentence:

> * * *and other related project development costs, including but not limited to capitalized interest and Commissioner approved fees.

Response: HUD intended this section to outline broadly the maximum mortgage amount as a percentage of replacement cost. The level of detail sought by the commenter is outside the scope of this section.

7. Section 242.9 Physician Ownership

Comment: The last sentence of this section, as proposed, would require an ''unqualified legal opinion'' regarding compliance with applicable federal law. An unqualified legal opinion is difficult to obtain, and ''an opinion satisfactory to HUD'' would be a more appropriate standard.

Response: HUD has been able to obtain unqualified legal opinions on all professionally owned hospitals since the decision to accept these sponsors into the program was made in January 2003. It would take an inordinate amount of time and expertise for staff to perform the due diligence reflected in an unqualified opinion. The unqualified opinion benefits mortgagors that otherwise would have to obtain an opinion from the Inspector General at the Department of Health and Human Services (HHS). Therefore, in the best interests of the program, HUD shall retain the requirement of an ''unqualified legal opinion.''

8. Section 242.10 Eligible Mortgagors

Comment: Lessees of mortgagors should also be included for the same reason as in the definition of ''regulatory agreement.'' The commenter also states that the section should be revised to read in its entirety:

> The mortgagor shall be a public mortgagor (*e.g.*, an owner of a public facility), a private nonprofit corporation or association, or a profit-motivated mortgagor meeting the definition of ''hospital'' in § 242.1. The mortgagor or a lessee of the mortgagor shall be approved by HUD and shall possess the powers necessary and incidental to operating a hospital. Eligible proprietary or profit-motivated mortgagors may include for-profit corporations, limited partnerships, and limited liability corporations and companies.

The commenter states that ''natural persons, joint ventures and general partnerships'' are eligible mortgagors in other FHA insurance programs and is unaware of any program or legal basis for excluding such ownership forms from Section 242 eligibility if underwriting criteria are otherwise met. The sentence beginning ''for new organizations'' should be deleted and ''treated as a program, not a regulatory requirement.'' Finally, it would also seem inappropriate that stockholders of a privately held corporation should be required to admit other parties to its board of directors (although it may be considered for advisory board purposes), or to otherwise require that private corporations be treated as public entities. The term ''broad community participation'' is undefined, may be difficult to precisely define, and should be treated in a ''more flexible, case by case non-regulatory fashion.''

Response: Generally, this section states the statutory requirements for an eligible hospital mortgagor. Regarding the statement that lessees of mortgagors should also be included, the National Housing Act makes it clear that HUD can insure mortgages where long-term ground leases are involved. However, HUD generally prohibits leases of the entire hospital. In those rare instances where a lease is necessitated by local law, HUD will continue to evaluate each situation on a case-by-case basis.

The comments also suggest striking the latter portion of the section. This wording was carefully developed and HUD believes that there is considerable wisdom in not permitting mortgagor entities with other obligations that could interfere with the operation and stability of the hospital. The same is true of ensuring the continuity of the mortgagor entity so that a legal entity is in place for as long as HUD insures a mortgage loan. Finally, HUD does not agree that the language in this section

requires that private corporations be treated as public entities.

9. Section 242.11 Regulatory Compliance Required

Comment: One commenter suggests minor editorial changes, as follows:

An application for insurance of a mortgage under this part shall be considered only in connection with a hospital that is in substantial compliance with regulations of the Department of Health and Human Services and the applicable State governing the operation and reimbursement of hospitals. A hospital that is under investigation by any State or Federal agency for statutory or regulatory violations is not eligible so long as the investigation is unresolved, unless HUD determines that the investigation is minor in nature, that is, the investigation is unlikely to result in substantial liabilities or of otherwise substantially harming the creditworthiness of the hospital.

Response: HUD adopts these minor clarifying changes to the final rule. Noncompliance with HHS and state regulations can result in significant liabilities and can increase the risk of suspension or cutoff of reimbursements from federal or state payors, significantly increasing the risk that the hospital will default on the FHA-insured mortgage loan.

10. Section 242.13 Parents and Affiliates

Comment: One commenter suggests editorial revisions, as follows:

As a condition of issuing a commitment, HUD may require corporate parents, affiliates, or principals of the proposed mortgagor to provide assurances, guarantees, or collateral with respect to the mortgage loan. HUD may also require financial and operational information on the parent, other businesses owned by the parent, or affiliates of the proposed mortgagor and may also require a parent or affiliate to agree that it will not take any actions which could impact the financial viability of the hospital and its ability to repay the mortgage loan.

Response: HUD agrees that more language is needed to clarify the first sentence ending in ''collateral.'' However, the suggested language is too narrow. In the final rule, the sentence is revised to read, ''As a condition of issuing a commitment, HUD may require corporate parents, affiliates, or principals of the proposed mortgagor to provide assurances, guarantees, or collateral to protect HUD's interests.'' HUD interprets the second suggested revision also as narrowing HUD's ability to protect its interests. Thus, the existing language in the second sentence will be kept.

11. Section 242.14 Mortgage Reserve Fund

Comment: One commenter suggests editorial revisions, as follows:

As a condition of issuing a commitment, HUD may require establishment of a Mortgage Reserve Fund (MRF), a trustee-held account to which the mortgagor will contribute and from which withdrawals must be approved by HUD. The mortgagor shall be required to make contributions to the MRF such that, with fund earnings, the MRF will build to one year of debt service at five years following commencement of amortization, increasing thereafter to two years of debt service on and after ten years following commencement of amortization according to a schedule established by HUD, unless HUD determines that a different schedule of contributions is appropriate based on the mortgagor's risk profile, reimbursement structure, or other characteristics. In particular, hospitals that receive cost-based reimbursement may be required to have MRFs that build to more than two years of debt service. Expenditures from the fund may be made for such purposes, including the payment of debt service as HUD may determine or in accordance with the mortgagor's MRF Schedule. Upon termination of insurance, the balance of the MRF shall be returned to the mortgagor provided that all obligations to HUD have been met.

Response: The benefit of the MRF has been tested over time, and its availability has afforded hospitals in financial distress the time and relief needed to effectuate a turnaround. For that reason, HUD disagrees with the suggested substitution of the word ''shall'' with ''may.'' The availability of an MRF has served HUD, the mortgagee, and the mortgagor well, and this final rule continues to require it.

With respect to expenditures from the fund, HUD believes that the original language is clear on its face and that the additional wording is likely to result in confusion and misinterpretation as to the primary intent of the MRF, which is for the payment of debt service.

HUD concurs that the inclusion of ''following commencement of amortization'' clarifies the MRF funding requirement and has made the appropriate change.

Also, the final rule removes the text in the first sentence following the second comma, because the revised definition of ''mortgage reserve fund'' makes this language redundant.

12. Section 242.15 Limitation on Refinancing of Existing Indebtedness

Comment: One commenter states that the restriction to long-term debt should be removed and that 15 percent rather than 20 percent of the mortgage must be used for hard costs. As to the former suggestion, the change is necessary to permit loans to fund projects completed prior to initial endorsement and financed on the basis of short-term rather than long-term loans. As to the latter, the 20 percent requirement is not a statutory requirement, and the lower standard will allow ''otherwise necessary'' projects to be able to utilize the program. The revised language would read as follows:

Some existing debt may be refinanced with the proceeds of a section 242 insured loan; however, at least 15 percent of the amount of the mortgage must be used to fund the hard costs of construction, equipment and mortgageable costs and expenses related thereto, including but not limited to interest, taxes and other Commissioner approved fees typically included in a commitment.

Response: By deleting but not replacing ''long-term,'' the proposed revision would permit any existing debt to be refinanced, such as operating debt. This would be contrary to the intended purpose of the program to insure the financing of capital projects. However, HUD understands that there may be cases where it would be appropriate to refinance some short-term capital debt. Therefore, HUD has substituted the word ''capital'' for ''long-term.'' Reducing the 20 percent requirement to 15 percent would blur the distinction between Section 242 and Section 223(f), which HUD is not implementing for hospitals through this rule, and HUD does not agree to this revision.

Subpart B—Application Procedures and Commitments

1. Section 242.16 Applications

Comment: One commenter asks whether HUD determines the need or the state CON (Certificate of Need) process does, and states that the rule should clarify this issue.

Response: HUD conducts the same analysis of need whether or not the state has a CON process. There is wide variation in the methods CON states use to decide whether or not to issue a certificate. HUD believes that the Act's required need assessment is best performed using a method that is applied consistently to hospitals in all states. Should the state's CON process and HUD's assessment of need reach differing conclusions on the need for a proposed project, HUD will review the case closely to determine if its conclusion should be changed.

Comment: One commenter suggests a variety of substantive and editorial changes to this section. The commenter would revise § 242.16(a)(1), as follows:

(a) The process for approval of an application shall include consideration of the following financial and programmatic factors.

(1) Market need. The approval process shall include an analysis of the market need of the proposed project, on a market-wide basis, the impact of the proposed facility on, and its relationship to, other health care facilities and services; the number and percentage of any excess beds; and demographic projections.

Generally, except in cases acceptable to HUD, Section 242 insurance may support start-up hospitals or major expansions of existing hospitals only if existing hospital capacity or services are not adequate to meet the needs of the population in the service area.

(i) If the State has an official procedure for analyzing need for hospitals, HUD shall require that such procedure be followed before the application for insurance is submitted, and that the application shall document that need has also been established under that procedure; provided that in circumstances acceptable to HUD, an application may be submitted and review commenced prior to the issuance of such State approval.

Response: The commenter suggests deletion of the requirement that HUD consider the impact of the proposed facility on other health care facilities that ''have a disproportionate share of Medicaid and uninsured patients,'' because it is not a program requirement.

However, the statute, 12 U.S.C. 1715z–7, requires HUD to administer the program ''so as to encourage programs that undertake responsibility to provide comprehensive health care including outpatient and preventive care, as well as hospitalization, to a defined population. * * * Disproportionate share hospitals are a critical element in providing such care, acting as a ''safety net'' for care of the uninsured. These hospitals typically use profitable product lines to subsidize unprofitable activities in a practice known as ''cost shifting.'' A new project that takes profitable business away from a disproportionate share hospital can have the effect of reducing its ability to provide comprehensive health care to the local population. For this reason, HUD believes that it should pay particular attention to the impact of a proposed project on disproportionate share hospitals. Also, see HUD's response to comments on § 242.3.

The commenter also stated that ''in circumstances acceptable to HUD'' the rule should allow for an application to be submitted prior to issuance of official state approval. The commenter stated that as the program gets broader national application, there will be instances where it is ''prudent and equitable'' to begin the review of an application before a certificate of need is issued, ''particularly when it is reasonably inferred that a certificate of need will eventually be issued and the mortgagor is willing to pay the required application fee to reimburse FHA's costs.'' The commenter stated that this concern is ''particularly important in the context of the extensive construction periods associated with hospital projects, as well as the impact of escalating costs on project feasibility.''

However, HUD interprets the statute, 12 U.S.C. 1715z–7, to require that the certificate of need will be submitted as part of the application.

Comment: One commenter stated that § 242.16(a)(2) should be revised, as indicated:

Operating margin and debt service coverage ratio. (i) Hospitals with an aggregate operating margin of less than 0.00 when calculated from the three most recent annual audited financial statements are not eligible for section 242 insurance, unless HUD determines, based on the financial data in those statements or other financial criteria or empirical information acceptable to HUD, that the hospital has achieved a financial turnaround resulting in a positive operating margin in the most recent year, calculated using classifications of items as operating or non-operating in accordance with guidance that shall be provided in accordance with generally accepted accounting principles or HUD is satisfied based on other available financial information or evidence acceptable to HUD that the project constitutes a reasonable underwriting risk.

The commenter stated that this change would permit flexibility, for example, in cases such as Critical Access Hospital applications where prior financial statements were allowed to be retroactively restated to reflect unusual circumstances such as prospective cost plus reimbursement. The commenter stated that negative historical operating margins may not always be relevant to a determination of a facility's prospective viability. For example, a hospital may have had an historical negative operating margin substantially, if not solely, as a result of excessive debt service, which may be fully eliminated through the proposed FHA financing. Similarly, a proposed mortgagor may be trying to reposition a struggling hospital and new or rehabilitated facilities, and equipment may enable that facility to compete more effectively, deliver services more efficiently, provide a higher quality of services, or offer new services without which a needed facility might never be able to improve its financial posture. The commenter states that negative historical margins should not result in automatic disqualification.

Response: HUD believes that in almost all cases, the proven ability to operate in the black is an essential prerequisite for consideration for mortgage insurance. Hospitals transitioning from the prospective payment system to cost-based reimbursement may recast financial results to present them as if they had been receiving cost-based reimbursement in prior years. In unusual circumstances, the applicant can request a waiver of the regulatory requirement for a positive operating margin.

Comment: The commenter states that there is no requirement that a start-up hospital (without an operating history) meet an historical operating margin test. To apply the standard automatically to an existing facility would seem discriminatory when, in fact, the new FHA financing may in and of itself allow the facility in question to meet or exceed required standards. HUD should also consider giving special financial consideration to Critical Access Hospitals, sole community, and disproportionate share providers where other financing options are prohibitively expensive or unavailable.

Response: It is true that start-up hospitals have no operating history to examine, and for that reason other factors become more important in HUD's review of the potential start-up mortgagor. However, when a hospital has an operating history, HUD must examine that history in evaluating the hospital's creditworthiness. HUD believes that demonstrated ability to operate in the black is the single most important indicator of financial strength and ability to repay debt. Note that an exception to the 3-year positive average operating margin may be granted in demonstrated financial turnaround situations.

This exception has been clarified in § 242.16(a)(2)(i). A hospital that has achieved a financial turnaround resulting in a positive operating margin in the most recent year may be considered eligible to *apply* for section 242 insurance. However, HUD does not anticipate *approving* an application unless the hospital has achieved two consecutive years of positive operating margin immediately prior to issuance of an insurance commitment. Accordingly, the following sentence has been added to the end of § 242.16(a)(2)(i):

In any event, HUD shall not issue an insurance commitment for any hospital that has not achieved two consecutive years of positive operating margin immediately prior to issuance of the commitment.

Comment: Section 242.16(a)(2)(ii) should be revised, as follows:

(ii)(A) Hospitals with an average debt service coverage ratio of less than 1.25 in the three most recent audited years are not eligible for section 242 insurance unless HUD

determines, based on the audited financial data, that the hospital has achieved a financial turnaround resulting in a debt service coverage ratio of at least 1.25 in its prior 12 month period, or other period acceptable to HUD, or HUD is satisfied based on other available financial information or evidence acceptable to HUD, that the project constitutes a reasonable underwriting risk.

(B) In cases of refinancing at a lower interest rate, HUD may authorize the use of the projected debt service requirement in lieu of the historical debt in calculating the debt service coverage ratios for each of the prior three years. In cases where HUD authorizes the use of the projected debt service requirement in lieu of the historical debt to determine the debt service coverage ratio, hospitals must have an average debt service coverage ratio of 1.40 or greater, or such lesser ratio as may be acceptable to HUD.

As to the first of these suggested changes, the commenter stated that the 1.40 standard should be revised to reflect the ''underlying 1.25 standard,'' particularly in situations where special financial consideration may be warranted, as described above. As to the allowance of a lesser debt service ratio, such a change would help promote flexibility as described above.

Response: HUD believes that the cash that was available historically to service debt is an important factor in considering a hospital's ability to service debt in the future. A debt service coverage ratio of 1.25 is considered quite low. The prospective debt service coverage ratio of 1.40 is generally the minimum HUD will tolerate in its underwriting of a mortgage insurance application. It is also quite low. The reason HUD will consider applications for hospitals with such low debt service coverage is that the Department recognizes its role in providing affordable financing to needed hospitals that are not financially robust enough to be of interest to private insurers. However, HUD believes that to accept even lower ratios would not be prudent.

Comment: Sections 242.16(a)(3) and (4) should be revised, as indicated:

(3) Financial Feasibility. The process for reviewing an application shall include an analysis of the financial feasibility of the proposal, i.e., an analysis indicating that it is probable that the proposed mortgagor will be able to meet its debt service requirements during the period projected. It includes analysis of the reimbursement structure of the proposed hospital (including patient/payer mix); actions of competitors; and the probable projected impact on the proposed hospital of general health care system trends, such as the development of alternative health care delivery systems and new reimbursement methods. In addition to historical operating margin, analysis of financial feasibility includes, but is not limited to, evaluation of the following factors. The application must address, and HUD will review, each of the following factors:

(i) Current and projected gains from operations and a manageable debt load using reasonable assumptions;

(ii) Current average debt service coverage ratio over a period determined acceptable by HUD of 1.25 or higher and projected debt service coverage ratio of 1.40 or higher, or such lesser ratio as may be acceptable to HUD;

(iii) Cushion in the balance sheet sufficient to demonstrate the ability to withstand short periods of net operating losses without jeopardizing financial viability;

(iv) Patient utilization forecasts (including average length of stay, case intensity, discharges, area-wide use rates) that are consistent with the hospital's historical trends, future service mix, market trends, population forecasts, and business climate;

(v) The hospital's demonstrated ability to position itself to compete in its marketplace;

(vi) Organizational affiliations or relationships that help optimize financial, clinical, and operational performance;

(vii) Management's demonstrated ability to operate effectively and efficiently, and to develop effective strategies for addressing problem areas;

(viii) Systems in place to monitor hospital operations, revenues, and costs accurately and in a timely manner;

(ix) A Board that is appropriately constituted and provides effective oversight;

(x) Required licensures and approvals; and

(xi) Favorable ratings from the Joint Commission on Accreditation of Healthcare Organizations or other organization acceptable to HUD.

(4) Preliminary Review. A Preliminary Review is a general overview of the acceptability of a potential mortgagor performed at the request of a lender, to identify any factors that would likely cause an application to be rejected, should an application be submitted.

(i) The purpose of the preliminary review is for HUD to identify any obvious factors that would cause an application to be rejected, before the potential mortgagor expends the resources needed to prepare an application and before HUD expends resources to review it. The lender shall submit a preliminary information package to HUD that provides evidence of statutory eligibility, market need, financial strength, and such other documentation as HUD may require.

(ii) If HUD identifies factors that would cause an application to be rejected, HUD shall issue a Preliminary Review Letter notifying the potential applicant that an application for mortgage insurance would result in a rejection and providing the reasons for this decision. Also, no further request from the proposed applicant for a Preliminary Review shall be entertained for a period of one year from the date of HUD's notification. HUD may grant an exception to this one-year limitation if, during the year, there is a major change in the circumstances that caused HUD to determine that the project would be rejected or if additional material information is provided with respect to the reasons on which a rejection is based and which justifies reconsideration of an adverse Preliminary Review Letter. For example, if the sole reason for HUD's determination was the hospital's failure to meet the historical operating margin test, and a new audited annual financial statement contains results that would cause the hospital to meet the test, then the lender may request a new Preliminary Review within one year of HUD's notification.

As to the projected debt service coverage ratio, the commenter stated that application of the proposed 1.40 standard for these purposes without a provision permitting Commissioner discretion to accept a lower projection, particularly where the FHA calculation deletes earnings and contributions, may preclude otherwise viable hospitals from program eligibility. As to the suggested change regarding consideration of additional material information, the commenter cited fairness given the potential one-year bar.

Response: The commenter had a number of suggestions. First, the commenter proposed language that says the application review will include an ''analysis of the financial feasibility of the hospital'' instead of a ''determination of the financial feasibility.'' HUD believes this change is unnecessary, as the meaning of ''determination'' is discussed immediately thereafter.

The commenter suggests using ''during the period projected'' instead of ''during the life of the proposed mortgage'' when highlighting the period in which HUD will determine financial feasibility. This change is accepted.

The commenter suggested lowering the standard of the debt service coverage requirement by adding language stating that HUD may consider a lesser ratio. HUD rejects this response; please see the response to the previous comment on § 242.16(a)(2)(ii) for more information.

The commenter suggests requiring that only lenders (as opposed to a hospital, a financial consultant representing a hospital, or a lender) request a preliminary review. HUD has, in the past, accepted requests for preliminary reviews from hospitals and consultants. In some cases, hospitals wish to assess their eligibility prior to retaining a mortgage banker. HUD will keep the existing language and notes that pre-application meetings for projects with a positive preliminary review require the participation of the proposed mortgagor's mortgage banker.

The commenter suggests replacement of the word ''applicant'' in (4)(i) with the word ''mortgagor.'' HUD has replaced ''applicant'' with the words ''mortgagor or mortgagee'' to reflect that

both may expend resources in preparing an application.

The commenter suggests adding language further describing under what circumstances HUD may reconsider an adverse preliminary review. In its current form, the ''Commissioner may grant an exception * * * if there is a major change in circumstances that caused'' the rejection. Specifically, the commenter suggests adding ''or if additional material information is provided with respect to the reasons on which a rejection is based and which justifies reconsideration of an adverse Preliminary Review.'' HUD considers this added language to be repetitive. Thus, the existing language will remain.

Comment: In accordance with a comment to § 242.1, above, the term ''mortgagor'' should be substituted for the term ''applicant'' in proposed § 242.16(a)(5).

Response: HUD agrees that the term ''mortgagor'' is clearer and the change has been made.

Comment: One commenter stated as to § 242.16(b)(6) that the following should be added to the current ''architectural plans and specifications'': ''* * * to the extent available when the application is filed.'' The commenter stated that usually architectural plans are not available when the application is submitted.

Response: HUD does not intend to require that complete architectural plans and specifications be submitted when a complete application is received. However, the addition of language stating that the drawings and specifications may be submitted ''to the extent available when the application is filed,'' as suggested by the commenter, is insufficient. Accordingly, the language in 242.16(b)(6) will be changed, as follows: ''Architectural plans and specifications in sufficient detail to enable a reasonable estimate of cost.''

Comment: One commenter stated that § 242.16(b)(8) should be revised, as indicated:

> If the State has an official procedure for determining need for hospitals, evidence that such procedure has been followed and that need has been established under that procedure; provided that as set forth in Section 242.16(a)(1)(i) hereof, HUD may allow an application to be filed in certain circumstances acceptable to HUD.

Response: The additional language is not necessary since HUD interprets the statute, 12 U.S.C. 1715z–7, to require that the certificate of need will be submitted as part of the application.

Comment: One commenter stated that § 242.16(b)(9) should be revised, as indicated:

> If HUD has authorized the Department to conduct the environmental study required as a condition of mortgage insurance, evidence of compliance with Federal and State environmental regulations; if HUD has not commissioned such study, the study shall be commissioned and completed prior to the issuance of a commitment.

Response: HUD does not perform the initial environmental site assessment; this is the responsibility of the mortgagor or mortgagee. The application must include a Phase I environmental report and, if Phase I indicates that further study is required, evidence and results of the further study.

Comment: One commenter stated that § 242.16(e) should be revised, as indicated:

> Complete application. Only materially complete applications will be processed. Except as otherwise provided in this subpart, partial applications cannot be processed. Upon determination that an application is complete, HUD shall issue a Completeness Letter to the applicant stating that the application is complete. Such letter shall be issued within two weeks of the receipt of an application which is in compliance with this section.

The commenter states that the term ''technically complete'' is unnecessarily vague and that ''materially complete'' is an appropriate and common industry standard.

Response: Regarding the first comment, HUD does not see an advantage in using the term ''materially'' complete over ''technically'' complete. Maintaining the term ''technically'' is a higher standard that will ensure applications are deemed complete only when all the information has been received in a satisfactory form. In certain cases, HUD will deem an application complete when only very minor items are missing and the applicant has agreed to supply HUD with these items in less than 2 weeks' time.

Concerning the second change, HUD will not commit to a 2-week deadline for the return of a Completeness Letter. It is an internal guideline that staff will make every effort to meet; however, factors beyond HUD's control may at times prevent the Department from meeting that guideline.

Comment: The last sentence of § 242.16(f) should be revised, as indicated:

> (f) * * *. It is the intent to communicate HUD's decision with respect to a project as promptly as possible after receipt of a completed application in the form of a Commitment Letter or a Rejection Letter, but HUD shall be under no obligation to issue such letter within a predetermined timeframe.

The commenter stated that, although the completion of a Section 242 application is not subject to predictable timeframes and that unreasonable borrower expectations have been created when timeframes have been expressed, the inclusion of a 12-month timeframe standard will be extremely detrimental to the program and discouraging to borrowers. As a practical matter, the simple and clear statement suggested above would allow FHA to accomplish its objectives without the negative and dispiriting implication represented by a 12-month timeframe.

Response: HUD agrees that referencing a 12-month timeframe may discourage borrowers by causing them to believe that 12 months are routinely required. That reference has been removed.

2. Section 242.17 Commitments

Comment: Section 242.17(a)(1) should be revised to permit insurance upon completion, as well as insurance upon advances. According to the commenter, this would maintain ''maximum levels of flexibility to deal with the multiple and unique circumstances of healthcare providers.''

Response: Insurance upon completion was considered by HUD, but left out of the rule. HUD has never had a request for insurance upon completion and does not have procedures in place to allow applicants to use this procedure. Therefore, the final rule has not been changed to include insurance upon completion.

Comment: Section 242.17(c)(2) should be revised to permit commitments to be extendable beyond 180 days with the approval of HUD. The commenter states that a commitment period of more than 180 days may occasionally be required to permit a mortgagor to comply with commitment terms and conditions and to complete arrangements in connection with the financing of the insured loan, particularly when the financing source is revenue bond proceeds.

Response: After 6 months, factors such as construction costs, interest rates, the hospital's actual financial performance, and others that were considered by HUD as reasons for issuing a commitment, can change. Substantial resource expenditure can be involved in HUD's re-evaluation of the financial feasibility of the project in light of changing circumstances. Further, an analysis of insured hospital mortgages that were initially endorsed during the prior 3 years indicates that in only one case did the hospital require more than 6 months between commitment and initial endorsement.

Therefore, HUD believes that if the mortgagor cannot be prepared to go to initial endorsement within 6 months after receiving a commitment, and later determines that it is ready to proceed to initial endorsement, the procedures described in § 242.20 should be followed to request a reopening of an expired commitment. For these reasons, HUD does not adopt this comment.

Comment: Section 242.17(d) should be revised, as indicated:

> Commitment fee. A commitment fee which, when added to the application fee, will aggregate $3.00 per thousand dollars of the amount of the loan set forth in the commitment, shall be paid at or prior to initial endorsement.

Response: It is possible that an applicant who receives a commitment may find other means of financing prior to initial endorsement. Under the commenter's proposal, HUD would not collect a commitment fee in this case. HUD sees no need to encourage a situation where HUD does not collect a commitment fee after expending considerable resources in review of an application.

3. Section 242.18 Inspection Fee

Comment: Section 242.18 should be revised, as indicated:

> The commitment may provide for the payment of an inspection fee in an amount not to exceed $5 per thousand dollars of the commitment amount. In determining the amount of such inspection fee, HUD shall consider the amount of the loan that is being applied to the refinancing of the hospital's existing indebtedness. The inspection fee shall be paid at the time of initial endorsement or in the case of a start of construction prior to initial endorsement, such earlier time as HUD may require.

The commenter states that, unlike most multifamily housing projects, Section 242 hospital mortgages often include refinancing components substantially exceeding new construction costs and related expenses. To charge the inspection fee on the full mortgage amount in such cases would seem inappropriate. HUD Handbook 4480.1 specifies that in the case of rehabilitation or reconstruction of an existing structure, the HUD-FHA Inspection Fee is computed on the cost of new improvements and mortgageable equipment. The commenter states that specific language to this effect should be included in the new regulation.

Response: Regardless of the amount of the refinancing, HUD's mortgage on the property demands that it perform a full inspection of the property. Because of the complexity of hospital facilities, the inspection involves a great amount of work regardless of whether there is a refinancing component. The inspection fee reflects this effort. Basing the inspection fee on the full amount of the proposed mortgage is consistent with long-standing practice. The final rule, therefore, retains the proposed language concerning inspection fees.

4. Section 242.19 Fees on Increases

Comment: Section 242.19 should be revised, as indicated:

> (a) Increase in commitment prior to endorsement. An application, filed prior to initial endorsement, for an increase in the amount of an outstanding commitment, shall be accompanied by an additional application fee of $1.50 per thousand dollars computed on the amount of the increase requested. Any increase in the amount of a commitment shall be subject to the payment of an additional commitment fee which, when added to the additional application fee, will aggregate $3.00 per thousand dollars of the amount of the increase. The additional commitment fee shall be paid at initial endorsement of the related mortgage increase. If an inspection fee was required in the original commitment, an additional inspection fee shall be paid in an amount not to exceed $5.00 per thousand dollars of the costs of construction represented in the increase in commitment. The additional inspection fee shall be paid at the time of initial endorsement.
>
> (b) Increase in mortgage between initial and final endorsement. Upon an application, filed between initial and final endorsement, for an increase in the amount of the mortgage, by amendment, supplemental consolidated mortgage or by substitution of a new mortgage, an additional application fee of $1.50 per thousand dollars computed on the amount of the increase requested shall accompany the application. The approval of any increase in the amount of the mortgage shall be subject to the payment of an additional commitment fee which, when added to the additional application fee, will aggregate $3.00 per thousand dollars of the amount of the increase granted. If an inspection fee was required in the original commitment, an additional inspection fee shall be paid in an amount not to exceed $5.00 per thousand dollars of the amount of the increase granted based on the amount of construction set forth in the mortgage increase ratio. The additional commitment and inspection fees shall be paid within 30 days after the date that the increase is granted or at the endorsement of such mortgage increase by HUD.

Response: Delay of payment of the additional commitment and inspection fees is not in the best interest of the program, for the reasons given in the responses to comments on §§ 242.17(d) and 242.18. The proposed change to add ''supplemental consolidated mortgage'' has been implemented by adding ''consolidation agreement'' in § 242.19(b). The remaining changes proposed to this section have not been included in the final rule for reasons described above.

5. Section 242.20 Reopening of Expired Commitments

Comment: One commenter states that this section should be revised to permit waiver of the reopening fee ''solely on grounds acceptable to HUD.''

Response: In the proposed regulation, a commitment expires after 90 days and may be extended to 180 days. If a commitment expires, the proposed rule provides that within 90 days of expiration, the applicant may request a reopening. In this case, 6 to 9 months will have passed since the original commitment. With the passage of so much time, the basis for HUD's issuance of the commitment may no longer be valid. HUD would have to review changes in construction cost, interest rates, actual performance of the hospital, and other factors to determine whether to grant the request for reopening. That review would require an expenditure of HUD resources, for which a fee is appropriate. HUD believes that a waiver process would not be productive. Therefore, HUD does not adopt the comment.

6. Section 242.21 Refund of Fees

Comment: The regulation should address whether the portion of the inspection fee that is related to pre-commitment work or early start is refundable if the conditions described in § 242.21 are met as the government has expended resources prior to the initial closing at the request of the hospital.

Response: The inspection fee in the case of early commencement of work will be non-refundable. For a full discussion of issues concerning early commencement of work, see the response to comments on § 242.45, as well as the final version of that section.

7. Section 242.22 Maximum Fees and Charges by Mortgagee

Commenter: The subject section should be revised, as indicated:

> The mortgagee may collect from the mortgagor a total financing fee for origination and placement of a mortgage loan in an amount not to exceed five and one half percent of the original principal amount of the mortgage, as agreed upon by mortgagee and mortgagor and approved by HUD. Any additional charges or fees, unless paid from non-mortgage sources, collected from the mortgagor shall be subject to prior approval of HUD and shall be disclosed in the Mortgagee's Certificate.

This commenter states that, as a practical matter, the traditional multifamily separate categorization of

FHA financing fees as origination and placement have been effectively eliminated in the Section 242 program, where such fees are often aggregated into a single financing fee. This aggregate approach has been particularly helpful for hospital loans financed with tax-exempt revenue bonds, where placement-related costs are generally higher than those for taxable financings and origination fees are lower. FHA should consider describing the fee structure as a single aggregate line item not to exceed 5.5 percent.

Response: Current policy in the Section 242 program is to limit financing and placement fees to a total of 3.5 percent, with an exception to allow a total of 5.5 percent, on a case-by-case basis, when so requested by the mortgagee. The proposed rule brings the Section 242 program in agreement with all other Multifamily Mortgage Insurance programs. The maximum financing fee the mortgagee may charge is 3.5 percent of the mortgage amount, with a maximum of 2 percent for the initial financing charge and the remainder of the 3.5 percent for the permanent financing fee.

Higher fees up to 5.5 percent are permissible in bond transactions. Where the proposed financing is through the sale of either taxable or tax-exempt bonds, the maximum financing fees allowable in the mortgage computation and recognizable for cost certification purposes is 5.5 percent of the mortgage amount. Any cost beyond the 5.5 percent must be paid from sources outside the mortgage.

The maximum financing fee the mortgagee may retain for its own account is 3.5 percent (for the initial financing fee and permanent financing fee, as indicated above). The remaining 2 percent (or such greater percentage as may result from the lender reducing its maximum retainable 3.5 percent fee) may be used to offset the cost of bond fees.

Comment: In some states, for example New York, state and local governments charge fees in connection with tax-exempt revenue bonds and certificates of need. Therefore, HUD should consider a separate capitalized line item for state and local government fees.

Response: A new capitalized line item to cover such costs would be beyond the scope of the proposed rule.

8. Section 242.23 Adjusted and Reduced Mortgage Amounts

Comment: One commenter states that rehabilitation projects under this section should explicitly include project expansion, and suggests inserting language in § 242.23(a) and § 242.23(a)(2)(i) to this effect. Additionally, in § 242.23(a)(3)(ii), the commenter states that the phrase ''value of'' should be deleted.

Response: The term ''substantial rehabilitation'' is broad and encompasses projects that expand the facility. See comments and responses to § 242.4 and to the definition of ''project'' at § 242.1. The first occurrence of the phrase ''value of'' in proposed § 242.23(a)(3)(ii) was superfluous and is removed in this final rule.

Comment: Section 242.23(c) on cash equity should be revised, as indicated:

> Cash equity. Depending upon the financial circumstances of each hospital facility, HUD shall have the discretion to evaluate, on a case-by-case basis, the amount of cash equity that a mortgagor must supply in addition to the value of plant, property and equipment and other values recognized as loan security in the commitment process. Exercise of this discretion shall never cause a loan to exceed 90 percent of estimated replacement cost, although it may cause it to be less than 90 percent. The equity contribution may not be made from borrowed funds. A private nonprofit or public mortgagor, but not a proprietary mortgagor, in the mortgagee's discretion and subject to 24 CFR 242.49, may provide any such required equity in the form of a letter of credit or surety bond issued by an insurance company acceptable to HUD.

The commenter states that historically, nonprofit hospitals have been permitted to post required non-PPE (property, plant, and equipment) equity at Initial Endorsement in the form of a letter of credit, a privilege stated in Section 242(d) of the NHA. The commenter states that the letter of credit privilege should be augmented to permit equity to be posted in the form of ''surety bonds'' issued by an acceptable insurance company such as AMBAC, FGIC, MBIA, or FSA. The surety bond alternative would represent an opportunity for institutions to fund equity at more competitive costs.

Response: HUD agrees with the suggested changes to the first and second sentences. However, HUD does not agree to delegate to the mortgagee the determination of the form the equity should take. Nor does HUD agree that surety bonds are an acceptable form of equity. Such delegation and use of surety bonds for equity do not offer the level of protection the Department considers necessary.

§ 242.23(c) is revised as indicated:

> Cash equity. Depending upon the financial circumstances of each hospital facility, HUD shall have the discretion to evaluate, on a case-by-case basis, the amount of cash equity that a mortgagor must supply in addition to the value of plant, property, and equipment and other values recognized as loan security in the commitment process. Exercise of this discretion shall never cause a loan to exceed 90 percent of estimated replacement cost, although it may cause it to be less than 90 percent. The equity contribution may not be made from borrowed funds. A private nonprofit or public mortgagor, but not a proprietary mortgagor, in HUD's discretion and subject to 24 CFR 242.49, may provide any such required equity in the form of a letter of credit.

To further clarify § 242.23, HUD has changed its title to ''Maximum Mortgage Amounts and Cash Equity Requirements.''

9. Section 242.24 Working Capital

Comment: The title of this section should be revised to ''Reserve for start-up costs.''

Response: The title is changed to ''Initial Operating Costs,'' as discussed in the response to a comment on the definition of ''Working Capital'' in proposed § 242.1.

Comment: The section should be revised, as indicated:

> In the case of a new hospital or a hospital expansion, HUD shall establish, on a case-by-case basis, the amount of capital, if any, that must be deposited in cash, a letter of credit or surety bond (or any combination thereof) to be available to the new hospital upon commencement of operations. Generally, the working capital other than AMPO shall not be borrowed funds unless HUD determines that there are offsetting financial strengths to compensate for the risk associated with borrowing.

The term ''hospital expansion'' as used in this section is unclear and the mandatory nature of the section is a concern. If the term ''expansion'' includes substantial rehabilitation, cash (or letters of credit) capital escrows are often not required, depending on the borrower's financial wherewithal. Moreover, even if the term does not include substantial rehabilitation, but only new construction or an expansion, the mandatory nature of the requirement would not be necessary if existing operations demonstrated that such capital was available from other sources. The commenter states that AMPO (Allowance to Make Project Operational) in the case of nonprofit sponsors would also be a source of such capital. The commenter suggested that the phrase ''if any'' be added to allow for a case-by-case determination based on the general financial condition of a sponsor.

Response: HUD did not intend to make an initial cash deposit a mandatory requirement. The amount of cash deposit, or whether HUD will require such a deposit at all, depends on the borrower's financial strength and will be a case-by-case determination.

For this reason, HUD agrees with the addition of ''if any.''

HUD disagrees with the notion of allowing the use of surety bonds, as HUD does not believe that they provide sufficient protection. HUD also believes that the commenter's treatment of AMPO is correct, and this final rule adds a definition of AMPO to § 242.1.

Subpart C—Mortgage Requirements

1. Section 242.25 Mortgage Form and Disbursement of Mortgage Proceeds

Comment: Section 242.25(b) should be revised, as indicated:

Disbursement of mortgage proceeds. The mortgagee shall be obligated, as a part of the mortgage transaction, to disburse the principal amount of the mortgage in accordance with the governing building loan agreement acceptable to HUD in the case of a construction or rehabilitation mortgage and in the case of refinancing of mortgages without construction or rehabilitation, in accordance with procedures acceptable to HUD.

Response: The commenter assumes that § 242.25(b) of the regulation intends to implement section 223(f) of the National Housing Act, 12 U.S.C. 1715n(f), which is not the case. The proposed language is clear and is retained in this final rule.

2. Section 242.26 Agreed Interest Rate

Comment: The term ''rate'' in this section should be revised to ''rate or rates'' to reflect the fact that construction and permanent interest rates often differ, as well as to allow for circumstances that arise, when a state agency (for example, the New York Department of Health) requires that refinanced debt be repaid pursuant to a schedule shorter than the FHA amortization period. In either event, it is understood that the project interest rate will not exceed the rate stated in the governing FHA commitment.

Response: HUD agrees that more than one rate may be applicable, and therefore makes the suggested change in this final rule.

3. Section 242.27 Maturity

Comment: The maturity date should be up 35 years, rather than the proposed 25. The commenter states that, as a means of reducing a hospital's monthly debt service burden, Section 242 (and Section 241) amortization periods should approach those used in multifamily housing programs, including nursing homes. Although the amortization of Section 242 loans has historically been 25 years, that standard is not a requirement of the NHA. Moreover, other FHA programs, including FHA's Section 232 program, permit post-construction amortization periods as long as 40 years post-amortization, thereby permitting lower annual debt service as well. The commenter states that longer amortization periods are commonly used in non-FHA commercial hospital finance programs.

Response: Congress has always understood the maximum term to be 25 years and it has been 25 years since the inception of the program, when it was established by regulation. It was deliberately set at 25 when rental project terms were 30 to 40 years, because hospitals become obsolete faster and the equipment (a major component) ages much faster. HUD believes that these reasons support continuation of the current policy, as stated in the proposed rule.

4. Section 242.28 Allowable Costs for Consultants

Comment: Section 242.28 should be revised, as indicated:

Consulting fees for work essential to the development of the project may be included in the insured mortgage. Allowable consulting fees include those for analysis of market demand, expected revenues, and costs; site analysis; architectural and engineering design; fees paid in connection with obtaining a state required certificate of need and other governmental required fees; and such other fees as HUD may determine to be essential to project development. Fees for work performed more than one year prior to preliminary review of a proposed application are not allowable unless such work is directly attributable to and for the benefit of the project as determined by HUD, such as architectural fees. Fees for work performed by any party with an identity of interest with the proposed mortgagor or mortgagee are not allowable unless such fees are determined to be reasonable by HUD.

The commenter disagrees with the one-year limitation and believes that in certain situations the limitation may be unreasonable, particularly in connection with fees for project architects, debt capacity, financial feasibility or planning consultants, and construction managers. These firms are often retained for project development purposes prior to the one-year limitation.

Response: With respect to certificate of need and other government fees, see the response to the second comment on § 242.22, regarding fees. In addition, HUD considered the commenter's suggestion regarding fees paid in connection with obtaining a state-required Certificate of Need. The fees associated with conducting a feasibility study to determine need for construction or substantial rehabilitation of a hospital, as part of the Certificate of Need process, are not includable as costs in the insured mortgage. This step pertains to the submission of an application to the state to determine if the proposed project is required to serve the health needs of the community. However, fees associated with a Study of Market Need and Financial Feasibility can be included in the insured mortgage, because the HUD-required study is used primarily by HUD to determine the need for the hospital and the ability of the hospital to service its mortgage debt.

With respect to the one-year limitation, HUD notes that in some cases several years can pass between preliminary review and application submission, making it difficult to verify the relevance to the application and the cost of consultant services. However, recognizing that hospital projects can require long lead times for planning, HUD has increased the proposed one-year limitation to 2 years in this final rule. With respect to identity of interest, HUD believes that consultants by their very nature should be independent of the mortgagor and the mortgagee. For these reasons, this final rule does not adopt the commenter's suggested changes concerning identity of interest consultants.

5. Section 242.29 Payment Requirements

Comment: Section 242.29 should be revised to include interest in arrears, as follows:

The mortgage shall provide for payments including interest in arrears on the first day of each month in accordance with an amortization plan agreed upon by the mortgagor, the mortgagee and HUD.

Response: HUD does not consider this level of detail to be necessary in the final rule.

6. Section 242.31 Accumulation of Accruals

Comment: One commenter states that § 242.31(b) should be revised to permit greater flexibility in purchasing fire and hazard insurance, as follows:

The mortgage shall provide for such equal monthly payments by the mortgagor to the mortgagee as will amortize the ground rents, if any, and the estimated amount of all taxes, water charges, special assessments, and fire and other hazard insurance premiums, within a period ending one month prior to the dates on which the same become delinquent. The mortgage shall further provide that such payments shall be held by the mortgagee, for the purpose of paying such items before they become delinquent. The mortgage shall also make provision for adjustments in case such estimated amounts shall prove to be more, or less, than the actual amounts so paid therefore by the mortgagor. Notwithstanding the foregoing, in

certain circumstances, a mortgagor may purchase required fire and hazard insurance through a consortium of affiliated institutions or related organizations or in the case of public institutions, through required state purchasing arrangements. In such circumstances, the mortgage accrual requirement may be modified to reflect such circumstances.

The commenter states that in some situations, property insurance may be purchased and paid for through a consortium of affiliated hospitals or a state system under state required arrangements, and the rule should allow for this flexibility.

Response: The commenter's point is well taken and HUD agrees to the language proposed for addition, with a change in the last sentence, as follows:

In such circumstances, the mortgage accrual requirement may be modified to reflect circumstances in which it is inappropriate for the mortgagee to collect monthly payments and to make payments on behalf of the mortgagor.

7. Section 242.33 Covenant for Malpractice, Fire, and Other Hazard Insurance

Comment: FHA's required mortgage form, a real estate-oriented security document, appropriately requires insurance coverage related to real and personal property interests that secure repayment of a loan. Malpractice insurance on the other hand is not real estate-related and would be more appropriately covered in the project Regulatory Agreement. The commenter also notes that malpractice insurance may on occasion be covered in part under self-insurance vehicles. Flexibility should be allowed for those purposes, as well. Finally, the concept of ''adequate * * * coverage'' should be clarified, possibly to reflect the advice of an insurance consultant or other experienced industry expert.

Response: Regardless of local practice, HUD must be able to require an assurance that adequate malpractice coverage be maintained. This final rule adopts language requiring the mortgagor to maintain adequate coverage acceptable to the mortgagee and HUD. This language will maintain flexibility while protecting the mortgagee and the insurance fund.

Comment: Commenter (3) stated that there should be language included to ensure that appropriate amounts of insurance are funded. State pools should be acceptable, and offshore insurance accounts should be acceptable if approved by HUD. Risk retention groups and captive insurance companies should also be acceptable if approved by HUD. The regulation should address whether or not the insurance carriers meet minimum rating standards.

Response: The language of the final rule provides sufficient flexibility to consider alternative sources of insurance, and to provide that insurance is adequate and acceptable.

8. Section 242.35 Mortgage Lien Certifications

Comment: Section 242.35 should be deleted in the final rule, because the certifications required are more in the nature of legal opinions to be rendered by counsel in the jurisdiction where a project is located. If the section is not deleted, it should be revised to provide for such exclusions, liens, and security instruments as are acceptable to HUD. In accordance with existing practice, exceptions should be provided for such items as prior leased equipment, utility easements, and other title exceptions acceptable to HUD.

Response: HUD sees no reason to exclude certain property from the mortgage lien. The language in the final rule is needed to implement the statute and fully protect the interests of HUD. However, the proposed language of this section is changed in this final rule so that in exceptional cases certain personalty may be excluded from the mortgaged property or the insured lender may take a secondary lien position on it. Also, the final rule removes the requirement for formal certification.

9. Section 242.37 Mortgage Prepayment

Comment: Section 242.37(a) should be revised, as follows:

Prepayment privilege. Except as provided in paragraph (c) of this section or otherwise established by HUD, the mortgage note or credit instrument shall contain a provision permitting the mortgagor to prepay the mortgage note or credit instrument in whole or in part upon any interest payment date, after giving the mortgagee a minimum of 30 days notice in writing in advance of its intention to so prepay.

The purpose of these revisions is to provide for alternative notice requirements where required to comply with investor financing arrangements. For example, in order to obtain AA/AAA ratings for bonds that provide the source to finance Section 242 mortgages, prepayments must be bankruptcy-proof (held for periods between 90 and 125 days, depending on state or federal law). In order for mortgage prepayments to be protected, therefore, a longer notice and tendering period should be permitted.

Response: HUD has retained the language in § 242.37(a), but in order to accommodate the scenario that the commenter identifies has added a sentence permitting HUD to extend the notice.

Comment: The term ''mortgage'' in this section should be revised to read ''mortgage note or credit instrument.''

Response: ''Mortgage'' is a defined term in the rule. HUD considers the existing definition of ''mortgage,'' which includes appropriate credit instruments, to be sufficient, and it is not necessary to repeat the definition with each individual usage of the word.

Comment: One commenter stated that § 242.37(b)(1) should be deleted because ''the provision is virtually unknown in the commercial sector and may affect the marketability of the FHA debt in secondary markets, particularly in the case of tax-exempt bonds, resulting in higher than necessary interest rates.'' Additionally, the commenter stated that the rule or an accompanying publication should contain additional guidance regarding acceptable prepayment restrictions and premiums to eliminate ''field office counsel uncertainty.'' The terms and conditions should be similar to those for multifamily projects and should provide for Commissioner exceptions where warranted to deal with investor market conditions and preferences.

Response: This concern is addressed in 242.37(c), which provides that the mortgage may contain prepayment restrictions acceptable to HUD in the case of mortgage-backed securities or bond funding.

Comment: Section 242.37(d) should be revised to read ''mortgage default'' instead of ''default.''

Response: HUD needs to have the ability to take the appropriate action if there are regulatory agreement defaults, not only a mortgage default. Thus, the broad proposed language (''default'' as opposed to ''mortgage default,'' as suggested) is maintained in the final rule.

Subpart D—Endorsement for Insurance

1. Section 242.39 Insurance Endorsement

Comment: The term ''credit instrument'' used in the section is undefined and at a minimum should include a mortgage or deed of trust note or other evidence of indebtedness secured by a mortgage. The commenter also suggested editing § 242.39(c) to read, as follows:

Contract rights and obligations. HUD and the mortgagee or lender shall be bound from the date of initial endorsement by the provisions of the Contract of Mortgage Insurance set forth in subpart B of Section 207 of 24 CFR part 200.

Response: HUD has replaced the term ''credit instrument'' with ''mortgage note,'' to be consistent with the definition of ''mortgage'' in § 242.1. HUD agrees with the suggestion to revise § 242.39(c). That revision, which is adopted in this final rule, makes proposed § 242.94 unnecessary; therefore, that section is omitted from this final rule.

2. Section 242.43 Application of Cost Savings

Comment: One commenter states that this section should be revised, as indicated:

Any cost savings identified through the cost certification process shall be used to:

(a) Reduce the principal amount of the mortgage and the mortgagor's cash equity contribution proportionally or in such other manner as may be approved by HUD subject to the program's 90 percent loan to cost requirement, and/or

(b) Fund in whole or part, any additional construction, modernization, rehabilitation, purchase of equipment or costs related thereto approved by HUD.

The commenter states that in addition to proportional allocation, the rule should allow HUD to allocate higher amounts to project equity based on the financial circumstances of a particular mortgagor, provided that the loan-to-cost ratio is sustained. In some circumstances, particularly where mortgagor liquidity may be an issue post-construction, this result may be of benefit both to FHA and the hospital. In other cases, mortgagors may have voluntarily committed more equity to project construction than FHA would have required.

Response: HUD agrees that a proportional reduction of the mortgage amount and the equity contribution should not necessarily be the mortgagor's only option. The final rule would allow the mortgagor, at HUD's sole discretion, to elect to apply a greater percentage of the cost savings to reduce the principal amount of the mortgage. The mortgagor should not be required to borrow funds that are not needed for the project. HUD does not agree that higher amounts should be allocated to project equity, because to do so would amount to using borrowed funds for working capital, which is not a permitted use of mortgage proceeds. Additionally, HUD has revised § 242.43(b) to make that section consistent with the definition of ''substantial rehabilitation'' in this final rule.

Subpart E—Construction

1. Section 242.45 Early Commencement of Work

Comment: One commenter states that a new § 242.45(a) entitled ''Pre-application work'' should be added and that a number of other revisions to the section should be made. The entire section would read, as follows:

(a) Pre-application work. (1) Project work may be undertaken and completed by the mortgagor prior to filing an application. Such work must meet all applicable local and state requirements for the type of work undertaken and completed and be at the sole risk and responsibility of the mortgagor. At the discretion of HUD, and upon such terms as HUD may prescribe, a loan made to mortgagor in connection with such work may be refinanced from mortgage loan proceeds, or, in the alternative, HUD, in its sole discretion, may recognize all or part of such cost as a mortgagor contribution to any equity requirement set forth in the commitment.

(2) With the prior approval of HUD, pre-application work that will not be completed before the filing of an application may be undertaken by mortgagor at its sole risk and responsibility, provided that all applicable local, state and federal requirements, including the payment of prevailing wages, environmental review under § 242.79, inspections by appropriate federal agencies, payment of FHA inspection fees, and such other requirements as may be imposed by HUD are met as if such work were to be approved for mortgage insurance. If, with HUD's approval, a loan to mortgagor in connection with such pre-application work will be re-financed with mortgage proceeds, that work must be completed to the satisfaction of HUD before initial endorsement of the mortgage loan. If, with HUD's approval, such project work will continue beyond the date of initial endorsement, the expense of such work may, in HUD's sole discretion, be included in the mortgage loan or recognized in whole or in part as a mortgagor contribution to any equity requirement set forth in the commitment, upon such terms and conditions as HUD may prescribe.

(b) Pre-commitment work. After an application has been filed, but prior to the issuance of a commitment by HUD, the mortgagor may request for good cause the commencement of work on the project within legal guidelines and State law. Such work, and the request therefor, shall be subject to the same requirements, conditions and provisions set forth in Section 242.45(a)(2).

(c) Early Start. Subsequent to the issuance of a commitment, if the mortgagor requests the commencement of the project, the work may commence after the review of the request by HUD, including the environmental review under Section 242.79, and the agreement to certain conditions by the mortgagor. Prior to the initial endorsement, the work is accomplished at the sole risk of the mortgagor.

(d) Prepayment of inspection fee. The mortgagor shall pay the inspection fee to HUD before pre-application work pursuant to Section 242.45(a)(2), pre-commitment or early start work commences.

(e) Work started prior to application submission. HUD has the sole discretion to allow such work to be incorporated into the application if, except for work undertaken and completed as set forth in Section 242.45(a)(1), HUD has reviewed and approved the drawings and specifications and has inspected the work.

(f) No expressed or implied intent. Approval to proceed under paragraphs (a), (b), and (c) of this section shall in no way be construed as indicating any intent, expressed or implied, on the part of HUD to approve, disapprove, or make any undertaking or promise whatsoever with respect to the application or with respect to any commitment for mortgage insurance. Any work under paragraphs (a), (b) and (c) of this section shall be accomplished at the sole risk and responsibility of the mortgagor.

These revisions would allow for work on an insured hospital to be done at various times, including prior to an application being filed. The commenter states that at various times over the course of many years of dealing with the Section 242 program, there has been a need for hospitals to begin different types of project-related construction or preparation for such construction for a host of reasons. For example, in some cases construction needed to be commenced early in order to preserve favorable bids from subcontractors or to be ''under roof'' before the onset of winter weather. In other, more complicated phased construction situations, overall completion timing depended on the timely sequential start of each phase, particularly if patient, office, or other service ''decanting'' from one building to another was required. This was particularly true if a building within a fully operational hospital needed to be vacated before it could be rehabilitated, expanded, or demolished to make way for a new structure. In other instances, state or local governmental requirements came into play; for example, the expiration of a building permit or a certificate of need if work were not started by a particular date. The impact of rising interest rates and construction costs has also been a factor in a hospital's decision to undertake and finance pre-application or pre-commitment work (and FHA's decision to approve such work), since such work is at the hospital's risk and expense with no assurance that FHA financing will be available at a later date. Finally, nonprofit hospitals involved in fund-raising campaigns to cover required Section 242 equity and other requirements (or to avoid mortgage loans greater than might otherwise be necessary) have learned that donor interest and levels of

philanthropy will often be higher if potential benefactors can see tangible evidence of new construction or rehabilitation through early construction activity.

All of these considerations have been addressed by HHS and FHA over the years in one form or another as the basis of approving various arrangements for early construction within the confines of governing regulations and statute. Congress also appears to have recognized one of these concerns, the timing of fund-raising activities, by permitting letters of credit in lieu of cash to be utilized to fund project equity by public and nonprofit sponsors under Section 242(d) of the NHA.

Beginning in the early 1980s and continuing to date, a series of HUD opinions and approvals (starting with those for South Nassau Communities Hospital) have been issued to permit variations of pre-application, pre-commitment, and early start work without artificial or unnecessary restrictions beyond meeting governing law, regulations, or other requirements reasonably established to protect the soundness of the mortgage insurance program. The Committee's proposed revisions to Section 242.45 are intended to assure that policies approved to date for these purposes are continued, as well as to provide latitude for reasonable policy adjustments to be made in the future on a case-by-case basis, so long as they comport with federal, state, and local requirements and do not increase FHA's insurance risk.

Response: HUD understands that there are situations such as those described by the commenter in which it is to the advantage of the proposed mortgagor to begin construction prior to receipt of an insurance commitment. At the same time, HUD is concerned that a regulation encouraging such work could result in pre-application and pre-commitment work becoming the rule rather than the exception. Gradually, the focus of the program could become insurance upon completion. HUD's long-standing policy has been not to implement insurance upon completion for Section 242. A second concern is that HUD's authority to expend resources on reviews and inspections of construction is questionable in cases where HUD has received no application.

HUD believes that there is a solution that addresses HUD's concerns while permitting limited project construction to be started in cases such as those described in the comment. That solution would be for the mortgagee and mortgagor together to file an application consisting, at minimum, of: The approved FHA form, the application and inspection fees, a project description, architectural plans and specifications for the initial construction, previous participation review information, a Phase I environmental report, and a certificate of need for the pre-commitment work if required by the state. The remainder of the application could be submitted at a later date. The application would be accompanied by a request for the initial construction to be financed with insured mortgage proceeds and assurance that, should the full application be denied, the mortgagor will not experience significant financial hardship.

With respect to construction completed prior to application, HUD does not intend to implement insurance upon completion, as stated above. However, HUD recognizes that hospitals are dynamic entities that have a need for construction or rehabilitation from time to time, and that a proposed mortgagor may have completed construction or rehabilitation in the recent past. HUD believes that a reasonable balance is achieved by allowing completed construction or rehabilitation to be refinanced with insured mortgage proceeds if the work was completed more than 2 years before application. The cost of work completed less than 2 years before application could be refinanced only with a regulatory waiver on a case-by-case basis.

Therefore, this final rule substantially revises § 242.45 to provide for early commencement upon a minimal application and assurance. The final rule also provides for the refinancing opportunity for work completed more than 2 years prior to the application.

2. Section 242.47 Insured Advances for Building Components Stored Off-Site

Comment: One commenter states that § 242.47(b)(3) should be revised as follows:

> Storage costs, if any, shall be borne by the contractor (which shall include a construction manager).

Response: HUD does not believe that this provision should be limited to the construction manager form of construction, but rather that it should apply generally.

Comment: Section 242.47(d)(1)(ii) should be revised to provide that the mortgagee ''or its counsel'' may make the warranty regarding the security instruments.

Response: This final rule does not adopt this comment. Historically, HUD has required such warranties to be made by the mortgagee itself, since HUD's contractual relationship is directly with the mortgagee. The representation is made by the mortgagee in the mortgagee's certificate.

Comment: In the last sentence of § 242.47(d)(4), the phrase ''insurance of components'' should be revised to ''insurance of advances for components.''

Response: HUD agrees with the change suggested by the comment, because the resulting language is more precise.

3. Section 242.49 Funds and Finances: Deposits and Letters of Credit

Comment: One commenter states that this section should be revised, as indicated:

> (a) Deposits. Where HUD requires the mortgagor to make a deposit of cash or securities, such deposit (other than the Mortgage Reserve Fund or other funds held for the benefit of HUD) shall be with the mortgagee or a depository acceptable to the mortgagee. The deposit shall be held by or for the benefit of the mortgagee in a special account or by the depository under an appropriate agreement approved by HUD.
>
> (b) Letter of credit or surety bond. Where the use of a letter of credit or surety bond is acceptable to HUD in lieu of a deposit of cash or securities, the letter of credit shall be issued to the mortgagee by a banking institution with a National Rating Agency acceptable to HUD in the BBB category or its industry equivalent or equivalent or by another entity acceptable to HUD and shall be unconditional and irrevocable and a surety bond shall be issued to the mortgagee by an insurance company with the rating of a National Rating Agency acceptable to HUD in the BBB category or its industry equivalent. The mortgagee shall be responsible to HUD for collection under the letter of credit or surety bond.
>
> (c) Mortgagee not issuer. The mortgagee of record, unless a trustee in connection with bonds issued to fund the FHA mortgage loan, may not be the issuer of the letter of credit without the prior written consent of HUD.

The commenter's suggestion of a letter of credit option is in accordance with the comment to § 242.23. The commenter stated that the surety bond option would ''represent an opportunity for institutions to fund equity at more competitive costs.''

The commenter suggested revision to the allowed rating agencies because there are other rating agencies. The commenter mentioned two other national rating agencies specifically, and stated that there may be other acceptable ones. Moreover, the commenter stated, requiring an AA rating may limit the availability and increase the cost of credit facilities. The commenter stated that FHA recently amended its Section 232 liability

insurance requirements to permit a rating in the AM Best (a liability insurance company rating agency) B++ category. The commenter suggested that analogous criteria could be applied in this instance.

The commenter stated that the proposed requirement to ''immediately'' meet a demand for payment is troublesome, and that such an immediate timeframe has not been previously established for this purpose. The commenter stated that HUD should consider a reasonable timeframe, for example, that the funds are available when needed for the intended purposes.

Response: HUD agrees with the concept of including more explanatory language about the mortgagor's deposit in 242.49(a), but this final rule adopts slightly different language, which HUD believes is more accurate than the language suggested by the comment.

In response to comments to § 242.23(c), HUD stated that surety bonds are not an acceptable form of equity, and do not offer the level of protection the Department considers necessary. For this reason, the commenter's suggestion to allow the use of surety bonds in 242.49(b) is not accepted in this final rule.

The commenter also suggested changing the allowable credit quality of an acceptable letter of credit provider to B++. Because of the multiplicity of entities that provide ratings and the lack of uniformity among them, HUD has decided to provide in the rule that the lender can choose a financial institution acceptable to it. The lender is responsible for ensuring that any letter of credit is tantamount to cash. HUD has revised § 242.49(b) accordingly.

The commenter also suggested deleting the last sentence of § 242.49(b). HUD views the letter of credit the same as cash, and believes that the lender must have cash available when cash is necessary, so the final rule retains the proposed rule language.

4. Section 242.50 Funds and Finances: Off-Site Utilities and Streets

Comment: This section should be revised to allow the cash escrow to be in the form of a letter of credit or surety bond. The commenter also stated that ''the application of the sentence beginning 'Where such assurance' seems unclear. If mortgage proceeds are to be retained for these purposes without an offsetting cash or cash equivalent deposit with mortgagee at closing, in certain (e.g. where a mortgagor failed to provide needed cash at a later date), there would not be enough funds to complete the FHA project (sic).''

Response: With respect to surety bonds, HUD does not believe that surety bonds provide adequate protection (see also response to comment to § 242.23). For clarity, § 242.50 has been modified to specify that there must be adequate funds available to cover cost of off-site utilities and streets regardless of whether the funds come from escrow or mortgage proceeds for land, or both.

5. Section 242.51 Funds and Finances: Insured Advances and Assurances of Completion

Comment: Section 242.51(a) should be revised, as indicated:

> Where the estimated cost of construction, expansion or rehabilitation is more than $500,000, the mortgagor shall furnish assurance of completion in the form of corporate surety bonds for payment and performance, each in the minimum amount of 100 percent of the construction contract or Guaranteed Maximum Price in the case of construction management satisfactory to HUD and consistent with assurances permitted in connection with multifamily housing projects.

Response: The first sentence is changed to ''* * * cost of construction or substantial rehabilitation * * *'' because expansion is included in the term ''substantial rehabilitation'' as defined in § 242.1 in this final rule. The substance of the additional suggested change has been incorporated into the revised language in this final rule.

6. Section 242.53 Ineligible Contractors

Comment: Section 242.53(b), which prohibits identity of interest contracts, should be deleted, because identity-of-interest construction contracts are generally permitted in FHA multifamily programs so long as the contract is based on cost-plus, cost-certified methodology. Although this is an unlikely scenario in the Section 242 program, the structure should nevertheless be permitted.

Response: HUD believes allowing identity-of-interest projects would introduce unnecessary risks.

Comment: One commenter states that § 242.53(c) should be revised to remove the provision that allows HUD to refuse to insure advances, as well as make a conforming change by deleting the cross-reference to paragraph (b) of that section.

The commenter states that, although it agrees that FHA should have recourse in the event of inappropriate contracting, the list of eligible contractors is maintained and established by the federal government and not by mortgagors or lenders. Moreover, as part of the application process, FHA can screen contractors for these purposes before initial endorsement. As such, a remedy involving a refusal to insure further advances after endorsement not only appears unnecessary, but worse still, may precipitate extremely undesirable results and possibly jeopardize the completion of the project and the availability of secondary financing that provides the source of construction funds.

A still more serious problem would result if under these circumstances the mortgagee's funding obligation under the related Building Loan Agreement were not also terminated with FHA consent; otherwise, the mortgagee would continue to have a funding obligation under the governing Building Loan Agreement, but no ability to fund the loan. In other words, if FHA were to exercise this type of privilege, FHA would most likely have to agree to process an insurance claim if insured advances were withheld by FHA.

The termination of advances would be particularly problematic in cases financed with tax-exempt revenue bonds, the proceeds of which must be invested at initial endorsement so as to keep the bonds fully current until monies are disbursed through the FHA mortgage, and interest accruing on the mortgage is thereupon due for these purposes. Delays in disbursement could result in potential bond defaults and certainly impact the costs of financing. Because agencies of the federal government establish and maintain the list of ineligible contractors and review and approve construction contracts and contractor eligibility as part of the application process, any FHA remedies in this instance should be structured to avoid harm to mortgagors, lenders, or the project involved.

Response: HUD agrees with the commenter's concern. In order to provide for the completion of projects and to protect the insurance fund, proposed § 242.53(c) has been revised in this final rule to provide for remedial and enforcement actions other than refusing to insure further advances.

Subpart F—Nondiscrimination and Wage Rates

1. Section 242.54 Nondiscrimination

Comment: The provisions on sex and age discrimination should be removed because women and children's hospitals are eligible for federal and state reimbursement; however, the reference to ''sex'' and ''age'' in the regulation, absent clarification, may preclude such facilities from being eligible under this program.

Response: The provisions on civil rights are required by federal law and cannot be removed from the rule. HUD is revising § 242.54 in this final rule to clarify that the section does not affect the eligibility of women's and children's hospitals for this program.

Subpart G—Regulatory Agreement, Accounting and Reporting, and Financial Requirements

1. Section 242.56 Form of Regulation

Comment: The term ''mortgagor'' in the third sentence should be revised as ''mortgagor'' (and/or its lessee, if any) where it occurs:

> * * * The mortgagor (and/or its lessee, if any) shall be subject to monitoring by HUD and the U.S. Department of Health and Human Services, and their agents, employees, and contractors, on an ongoing basis for the life of the insured mortgage to ensure against the risk of default, and the mortgagor (and/or its lessee, if any) must make its financial records available to the monitoring agencies upon request.

This suggestion is in accordance with similar comments made with respect to the definition of ''regulatory agreement'' and § 242.10.

Response: As discussed in the response to the comment to § 242.10, HUD will consider a lease in the rare instances when it is made necessary by state or local law. However, HUD does not consider this situation common enough to require specific regulatory language in the final rule. No addition of language to include lessees will be made. This final rule makes a technical correction to the last sentence to clarify that monitoring may be conducted by various agents and contractors on HUD's behalf.

2. Section 242.57 Maintenance of Hospital Facility

Comment: The section should be revised to add lessees, as follows:

> The mortgagor (and/or its lessee, if any) shall maintain the hospital's grounds and buildings and the equipment financed with mortgage proceeds in good repair and shall promptly complete such repairs and maintenance as HUD considers necessary.

Response: The final rule does not add language regarding lessees for the reason stated in the response to comments on § 242.56.

3. Section 242.58 Books, Accounts, and Financial Statements

Comment: The section should be revised throughout to include mortgagors ''and/or their lessees, if any.''

Response: The final rule does not add language regarding lessees for the reason stated in the response to comments on §§ 242.10 and 242.56.

Comment: Proposed § 242.58(b)(ii) should be revised, as follows:

> (ii) Quarterly unaudited financial reports, within 60 days following the end of each quarter of the mortgagor's (and/or its lessee, if any) fiscal year if requested by HUD.

Response: In HUD's experience, 40 days is sufficient time for mortgagors to prepare, review, and submit interim financial statements.

Comment: Proposed § 242.58(b)(iv) should be revised to make the board-certified financial results due within 180 days following the close of the fiscal year, rather than 120 days.

Response: In HUD's experience, 120 days is a sufficient time frame.

Comment: Proposed § 242.58(f) should be revised where it requires books and records to be maintained in accordance with Generally Accepted Accounting Principles (GAAP) to allow flexibility. In the first sentence, the commenter would add the following phrase after ''(GAAP)'': ''* * * or such other accounting principles as may be customary for such persons and acceptable to HUD.'' Some managers and public facilities may use different accounting rules.

Response: Some governmental hospitals use accounting rules under Governmental Accounting Standards. Therefore, the final rule permits the use of Governmental Accounting Standards.

Comment: The regulatory agreement provides: ''If the Mortgagor has any business or activity other than the project and operation of the mortgaged property, it shall maintain all income and other funds of the project segregated from any other funds of the mortgagor and segregated from any funds of any other corporation or persons.'' This requirement does not appear in the proposed regulation. The commenter asked whether this omission is a change in policy.

Response: This requirement is included in the regulatory agreement, and is therefore legally effective and binding on program participants. Participants in HUD's programs are expected to comply with regulatory agreements and contracts pertinent to the programs in which they participate, as well as with program rules. There is no change in policy as to the requirement of segregation of funds.

4. Section 242.61 Management

Comment: Proposed § 242.61(a) should be revised to eliminate the provision for termination without cause and substitute in its place a requirement that termination be for cause and without penalty. The ''without cause'' provision would result in fewer qualified companies being willing to make the investment required to undertake the management of a project. Second, management fees in view of the uncertainties of termination without cause would likely be significantly higher than otherwise. There would seem to be no legitimate policy objective to justify a termination without cause in such instances.

Also, the commenter states that it will be difficult if not impossible for FHA to be given the right to terminate existing agreements (often on a multi-year basis) in place prior to initial endorsement.

Response: In the past, this clause has served the program well and HUD has received no indications that management companies are less willing to manage a hospital, nor that management fees are increased as a result of this clause. HUD needs to be in a position to move quickly and decisively. For agreements existing at the time of commitment, HUD does not require termination but does require an amendment to permit termination by HUD with or without cause.

Comment: The introductory paragraph of § 242.61 and §§ 242.61(a) and 242.61(b) should be revised to include lessees of mortgagors, in accordance with other similar comments.

Response: As discussed in the response to the comment in § 242.10 and other similar comments, HUD will consider leases in the rare instances in which local law makes them necessary; however, this situation is not common enough to merit inclusion in the final rule.

Comment: The section should be clarified to apply to a management agreement executed in connection with an entire facility and not specified services such as pharmacy, cafeteria, or laundry.

Response: HUD believes the language ''for management of the hospital'' is clear and would not preclude contracts for management of ancillary services such as pharmacy, cafeteria, or laundry.

Comment: The term ''principals'' used in § 242.61(b) should be defined. In the case of proprietary mortgagors, the term should not include shareholders.

Response: 24 CFR 24.995 defines ''principal'' and the term is also well understood in the mortgage insurance industry. No additional definition is required.

5. Section 242.62 Releases of Lien

Comment: The first sentence of § 242.62 should be revised as shown below, and the second sentence, dealing

with partial releases of lien, should be deleted:

The mortgagor shall not sell, dispose of, transfer, or permit to be encumbered any security property without the prior approval of the lender and Commissioner, subject to thresholds or such other standards HUD may establish for the approval requirement.

The commenter states that the determination required for partial releases of liens should be made by HUD, which was responsible for the original determination for these purposes in the pre-commitment process, as lenders, particularly bond trustees or lenders by assignment and not involved in loan origination, will more than likely lack the expertise for these purposes.

Response: The words ''or such other standards'' have been added, as suggested. With respect to the second point on partial releases, HUD believes that the lender should have the capability to make this decision, subject to prior approval by HUD.

6. Section 242.63 Additional Indebtedness and Leasing

Comment: This section should be revised to include the mortgagor's lessees, in accordance with other similar comments.

Response: HUD does not believe lease situations warrant inclusion in the final rule. See previous response to comments on §§ 242.10 and 242.56.

7. Section 242.64 Current and Future Property

Comment: The requirement that ''all current or future property or personalty * * * on or off the mortgaged real estate * * * will be considered as part of the HUD-insured hospital and subject to all provisions of the HUD regulatory agreement'' is ''troublesome'' and should be reconsidered. In many instances, this requirement precludes a hospital from making timely business decisions and arranging for financing with respect to acquisitions or off-site properties that might complement the business plan of the FHA facility, particularly given the timeframe sometimes required to obtain required FHA approval. Hospitals, for example, frequently purchase residential space for nurses and doctors and frequently purchase office buildings in peripheral areas to maintain market share and the like. Future purchases for these purposes and the ability to mortgage such ventures should be permitted.

Flexibility should be included in this requirement. While this requirement is appropriate for on-site property, when off the mortgage site and independent of hospital operations, the requirement is more problematic and should be eliminated or, alternatively, made subject to particular pre-determined financial ratios or standards for release that would allow a transaction to move forward without additional FHA consent.

Response: Even though hospitals meeting particular economic thresholds have the power under the regulatory agreement and covenants to acquire and transfer particular property without the prior written approval of HUD, the regulation does clearly and properly indicate that HUD will regulate the operation of the hospital and will not permit hospitals to acquire property that is crucial to the operation of the hospital, but to which the lender and/or HUD would not have access in the event of default and foreclosure. Therefore, there is no change to the final rule as a result of this comment.

Comment: The last sentence of this paragraph should be revised to allow HUD's first lien to be subordinated as acceptable to HUD. Other provisions of these regulations permit exceptions to FHA's first lien requirement based on Commissioner discretion. The requirement in this sentence should parallel those provisions.

Response: It is not legally possible for HUD to subordinate its first lien position on a § 242 mortgage. Section 242(b)(2) of the Act, 12 U.S.C. 1715z–7(b)(2), states that ''mortgage'' shall have the meaning stated in 12 U.S.C. 1713(a). That section defines ''mortgage'' as ''a first mortgage on real estate in fee simple.'' Therefore, HUD must have a first lien position on hospital mortgages under this program. For clarity, the wording of the first sentence of § 242.64 has been slightly revised.

8. Section 242.66 Affiliate Transactions

Comment: The phrase ''with affiliates'' should be added at the beginning of the first sentence after ''Transactions.''

Response: HUD agrees with the suggested change, as it clarifies the meaning. Also, the last phrase, ''in accordance with such policies and procedures as HUD shall prescribe,'' is removed in this final rule as superfluous.

Subpart H—Miscellaneous Requirements

1. Section 242.68 Disclosure and Verification of Social Security and Employer Identification Numbers

Comment: The word ''applicants'' should be deleted and ''mortgagors'' used instead.

Response: While a similar change has been made elsewhere in the rule, in this section it is inappropriate. The language being referenced specifically quotes the requirements of 24 CFR 5.210 *et seq.*, which refers to ''applicants for and participants in'' covered programs, rather than mortgagors. This final rule revises § 242.68 slightly to make this usage clear.

2. Section 242.72 Leasing of Hospital

Comment: One commenter states that this section should be revised to permit leasing of an entire hospital, including lease-back transactions, with HUD's consent. The specific language would be as follows:

Leasing of a hospital in its entirety is prohibited without Commissioner consent. Notwithstanding this prohibition, any proposal in which leasing (and related subleasing back to lessor, or transactions of a similar nature) of the entire facility is a factor due to State, county or other governmental law prohibitions against the mortgaging of health care facilities by such State, county or other governmental entities shall be considered on a case-by-case basis. Also, leasing of a hospital that has an existing Section 242 insured loan is permitted if HUD determines that leasing is necessary to reduce the risk of default by a financially troubled hospital.

The commenter states that the prohibition of operator lessees, with the exception of publicly owned entities, should be eliminated, and the eligibility of projects with operating leases should be permitted for all forms of sponsorship on a case-by-case basis, whether nonprofit, public, or proprietary owners. Language that precludes nonprofit and proprietary sponsors from utilizing an operating lease approach, particularly when that arrangement has legitimate functional advantages and the proposed project otherwise complies with FHA financial standards, discriminates against these other forms of ownership and is inconsistent with statutory policy that permits financing for each of these ownership forms. The commenter states that operator lease arrangements have been routinely permitted in the case of proprietary and nonprofit sponsors in the Section 232 program and that there is no public policy served by a prohibition against these types of sponsors when the public interest can be protected and an operator properly regulated by FHA.

Response: See responses to comments on § 242.10 and § 242.56.

3. Section 242.74 Smoke Detectors

Comment: This section should be removed because not only may the rule conflict with state or local requirements,

but because the specific requirement may be superseded by evolving technology or law.

Response: The section is amended to read:

Each occupied room must include such smoke detectors as are required by law.

4. Section 242.75 Title Requirements

Comment: This section should be revised as follows, in accordance with comment to § 242.72 above to permit hospital leaseholds.

In order for the mortgaged property, including leasehold estates, to be eligible for insurance, HUD shall determine that marketable title thereto is vested in the mortgagor, lessee, or lessor, as appropriate, as of the date the mortgage is filed for record. The title evidence shall be examined by HUD and the endorsement of the credit instrument for insurance shall be evidence of its acceptability.

Response: HUD does not adopt this comment in the final rule for the reasons stated in response to comments on §§ 242.10 and 242.56.

5. Section 242.76 Title Evidence

Comment: The second sentence of § 242.76(a) should be revised to read:

The policy shall name as the insureds the mortgagee and the Secretary of Housing and Urban Development, their successors and assigns, as their respective interests may appear.

Response: The final rule adds ''successors and assigns,'' as suggested.

6. Section 242.77 Liens

Comment: One commenter stated that § 242.77(a) should be revised to allow parity liens, as follows:

An inferior or parity lien made or held by a Federal, State, or local government instrumentality;

The commenter stated that such liens have been approved in at least two cases, one involving another federal agency, the former federal Farmers Home Loan Administration, with the other involving another FHA loan, and that flexibility for such limited purposes should be provided.

Response: HUD has no statutory authority to insure loans that are on a parity basis with other loans.

Comment: Section 242.77(b) should be revised, as follows:

An inferior lien required in connection with a supplemental loan insured pursuant to section 241 or Section 223(a)(7) of the Act;

Response: HUD disagrees with the comment. Including § 223(a)(7) would be confusing because these financings must have first liens, with the exception of those made pursuant to Section 241 loans.

Comment: Section 242.77(c) should be revised to incorporate state law considerations, as follows:

An inferior or superior lien on equipment as may be approved in connection with an equipment leasing program approved by HUD, as required by governing state law, in connection with existing financed equipment at the time of initial endorsement or as may or as otherwise may be approved by HUD.

The commenter states that in New York, for example, as a matter of law, equipment purchased pursuant to a lease-purchase or purchase money arrangement will be superior to the insured mortgage, albeit upon the payoff of the underlying financing, the equipment could be covered by the FHA lien instruments.

Response: HUD believes this section is sufficiently flexible, as written.

7. Section 242.89 Supplemental Loans

Comment: This section should be revised to include refinancing of indebtedness resulting from the early start of construction:

A loan, advance of credit, or purchase of an obligation representing a loan or advance of credit made for the purpose of financing improvements or additions (including the refinancing of any indebtedness incurred in connection with the early start of construction of such improvements or additions) to a hospital covered by a mortgage insured under this section of the Act or for a Commissioner-held mortgage, or equipment for a hospital, may be insured pursuant to the provisions of section 241 of the Act and under the provisions of this part as applicable and such additional terms and conditions as established by HUD. See subpart B of 24 CFR part 241 with respect to the contract of mortgage insurance for all loans insured under section 241 of the Act. See 24 CFR part 241, subpart C, for energy improvements.

Response: In order to make this section consistent with the final rule provisions on early commencement of work and refinancing of indebtedness, HUD has added the suggested parenthetical phrase with modification: ''(including the refinancing of any indebtedness incurred in connection with the early commencement of work on such improvements or additions, subject to the requirements of §§ 242.15 and 242.45).''

8. Section 242.91 Eligibility of Refinancing Transactions

Comment: The discussion in § 242.91(c) is confusing regarding the term length of a section 223(a)(7) loan. It appears from the reading that in particular cases, the term could be 35 years if the current mortgage has 23 years remaining, plus the additional 12 years.

Response: HUD has determined that the language should remain unchanged. HUD may approve a term up to 12 years beyond the remaining term of the existing mortgage if it is determined that the longer term is necessary to ensure the economic viability of the hospital and to make an insurance claim less likely.

Findings and Certifications

Information Collection Requirements

The information collection requirements contained in §§ 242.16, 242.35, 242.58, 242.61, and 242.68 have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB Control Number 2502–0518. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid control number.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this final rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact remains applicable, and is available for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–5000.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not impose a federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

There are no anti-competitive discriminatory aspects of the rule with

regard to small entities, and there are not any unusual procedures that would need to be complied with by small entities. The rule revises the regulations under the mortgage insurance program for hospitals to update and improve the efficiency of the program.

Therefore, this final rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Executive Order.

Regulatory Planning and Review

OMB reviewed this rule under Executive Order 12866, Regulatory Planning and Review. OMB determined that this rule is a ''significant regulatory action,'' as defined in section 3(f) of the order (although not an economically significant regulatory action under the order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number is 14.128.

List of Subjects

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social Security, Unemployment compensation, Wages.

24 CFR Part 242

Hospitals, Mortgage insurance, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR parts 200 and 242 to read as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

■ 2. Section 200.24 is revised to read as follows:

§ 200.24 Existing projects.

A mortgage financing the purchase or refinance of an existing rental housing project under section 207 of the Act, or for refinancing the existing debt of an existing nursing home, intermediate care facility, assisted living facility, or board and care home, or any combination thereof, under section 232 of the Act, may be insured pursuant to provisions of section 223(f) of the Act and such terms and conditions established by HUD.

■ 3. Section 200.25 is revised to read as follows:

§ 200.25 Supplemental loans.

A loan, advance of credit or purchase of an obligation representing a loan or advance of credit made for the purpose of financing improvements or additions to a project covered by a mortgage insured under any section of the Act or Commissioner-held mortgage, or equipment for a nursing home, intermediate care facility, board and care home, assisted living facility, or group practices facility, may be insured pursuant to the provisions of section 241 of the Act and such terms and conditions established by HUD.

■ 4. 24 CFR 200.40 is amended by revising paragraphs (c), (d), and (f) as follows:

§ 200.40 HUD fees.

* * * * *

(c) *Application fee—conditional commitment.* For a mortgage being insured under section 223(f) of the Act (12 U.S.C. 1715n), an application-commitment fee of $3 per thousand dollars of the requested mortgage amount shall accompany an application for conditional commitment.

(d) *Application fee—firm commitment: General.* An application for firm commitment shall be accompanied by an application-commitment fee which, when added to any prior fees received in connection with applications for a SAMA letter or a feasibility letter, will aggregate $5 per thousand dollars of the requested mortgage amount to be insured. The payment of an application-commitment fee shall not be required in connection with an insured mortgage involving the sale by the government of housing or property acquired, held, or contracted pursuant to the Atomic Energy Community Act of 1955 (42 U.S.C. 2301 *et seq.*).

* * * * *

(f) *Fees on increases—in general.* This section applies to all applications except applications involving hospitals, which are covered in 24 CFR part 242.

(1) *Increase in firm commitment before endorsement.* An application, filed before initial endorsement (or before endorsement in a case involving insurance upon completion), for an increase in the amount of an outstanding firm commitment, shall be accompanied by a combined additional application and commitment fee. This combined additional fee shall be in an amount that will aggregate $5 per thousand dollars of the amount of the requested increase. If an inspection fee was required in the original commitment, an additional inspection fee shall be paid in an amount computed at the same dollar rate per thousand dollars of the amount of increase in commitment as was used for the inspection fee required in the original commitment. When insurance of advances is involved, the additional inspection fee shall be paid at the time of initial endorsement. When insurance upon completion is involved, the additional inspection fee shall be paid before the date construction is begun; or, if construction has begun, it shall be paid with the application for increase.

(2) *Increase in mortgage between initial and final endorsement.* Upon the filing of an application between initial and final endorsement, for an increase in the amount of the mortgage, either by amendment or by substitution of a new mortgage, a combined additional application and commitment fee shall accompany the application. This combined additional fee shall be in an amount that will aggregate $5 per thousand dollars of the amount of the increase requested. If an inspection fee was required in the original commitment, an additional inspection fee shall accompany the application in an amount not to exceed the $5 per thousand dollars of the amount of the increase requested.

(3) *Loan to cover operating losses.* In connection with a loan to cover operating losses (see Sec. 200.22), a combined application and commitment fee of $5 per thousand dollars of the amount of the loan applied for shall be

submitted with the application for a firm commitment. No inspection fee shall be required.

* * * * *

■ 5. Part 242 is revised to read as follows:

PART 242—MORTGAGE INSURANCE FOR HOSPITALS

Subpart A—General Eligibility Requirements

Sec.
242.1 Definitions.
242.2 Program financial self-sufficiency.
242.3 Encouragement of certain programs.
242.4 Eligible hospitals; transition provisions.
242.5 Eligible mortgagees/lenders.
242.6 Property requirements.
242.7 Maximum mortgage amounts.
242.8 Standards for licensure and methods of operation.
242.9 Physician ownership.
242.10 Eligible mortgagors.
242.11 Regulatory compliance required.
242.13 Parents and affiliates.
242.14 Mortgage reserve fund.
242.15 Limitation on refinancing existing indebtedness.

Subpart B—Application Procedures and Commitments

242.16 Applications.
242.17 Commitments.
242.18 Inspection fee.
242.19 Fees on increases.
242.20 Reopening of expired commitments.
242.21 Refund of fees.
242.22 Maximum fees and charges by mortgagee.
242.23 Maximum mortgage amounts and cash equity requirements.
242.24 Initial operating costs.

Subpart C—Mortgage Requirements

242.25 Mortgage form and disbursement of mortgage proceeds.
242.26 Agreed interest rate.
242.27 Maturity.
242.28 Allowable costs for consultants.
242.29 Payment requirements.
242.30 Application of payments.
242.31 Accumulation of accruals.
242.32 Covenant against liens.
242.33 Covenant for malpractice, fire, and other hazard insurance.
242.35 Mortgage lien certifications.
242.37 Mortgage prepayment.
242.38 Late charge.

Subpart D—Endorsement for Insurance

242.39 Insurance endorsement.
242.40 Mortgagee certificate.
242.41 Certification of cost requirements.
242.42 Certificates of actual cost.
242.43 Application of cost savings.

Subpart E—Construction

242.44 Construction standards.
242.45 Early commencement of work.
242.46 Insured advances—building loan agreement.
242.47 Insured advances for building components stored off-site.
242.48 Insured advances for certain equipment and long lead items.
242.49 Funds and finances: deposits and letters of credit.
242.50 Funds and finances: off-site utilities and streets.
242.51 Funds and finances: insured advances and assurance of completion.
242.52 Construction contracts.
242.53 Excluded contractors.

Subpart F—Nondiscrimination and Wage Rates

242.54 Nondiscrimination.
242.55 Labor standards.

Subpart G—Regulatory Agreement, Accounting and Reporting, and Financial Requirements

242.56 Form of regulation.
242.57 Maintenance of hospital facility.
242.58 Books, accounts, and financial statements.
242.59 Inspection of facilities by Commissioner.
242.61 Management.
242.62 Releases of lien.
242.63 Additional indebtedness and leasing.
242.64 Current and future property.
242.65 Distribution of assets.
242.66 Affiliate transactions.
242.67 New corporations, subsidiaries, affiliations, and mergers.

Subpart H—Miscellaneous Requirements

242.68 Disclosure and verification of Social Security and Employer Identification Numbers.
242.69 Transfer fee.
242.70 Fees not required.
242.72 Leasing of hospital.
242.73 Waiver of eligibility requirements for mortgage insurance.
242.74 Smoke detectors.
242.75 Title requirements.
242.76 Title evidence.
242.77 Liens.
242.78 Zoning, deed, and building restrictions.
242.79 Environmental quality determinations and standards.
242.81 Lead-based paint poisoning prevention.
242.82 Energy conservation.
242.83 Debarment and suspension.
242.84 Previous participation and compliance requirements.
242.86 Property and mortgage assessment.
242.87 Certifications.
242.89 Supplemental loans.
242.90 Eligibility of mortgages covering hospitals in certain neighborhoods.
242.91 Eligibility of refinancing transactions.
242.92 Minimum principal loan amount.
242.93 Amendment of regulations.

Authority: 12 U.S.C. 1709, 1710, 1715b, and 1715u; 42 U.S.C. 3535(d).

Subpart A—General Eligibility Requirements

§ 242.1 Definitions.

As used in this subpart, the following terms shall have the meaning indicated:

Act means the National Housing Act (12 U.S.C. 1701 *et seq.*).

Affiliate means a person or entity which, directly or indirectly, either controls or has the power to control or exert significant influence on the other, or a person and entity both controlled by a third person or entity, which may be a parent entity. Indicia of control include, but are not limited to: Interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person or entity that has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person or entity or as defined in the Medicare reimbursement regulations.

AMPO (Allowance for Making Project Operational) relates to nonprofit projects and means a fund that is primarily for accruals during the course of construction for mortgage insurance premiums (MIPs), taxes, ground rents, property insurance premiums, and assessments, when funds available for these purposes under the Building Loan Agreement have been exhausted; and also for allocation to such accruals after completion of construction, if the income from the hospital at that time is insufficient to meet such accruals. AMPO may also be used for such other purposes as approved by HUD. Any balance remaining unused in the fund at final endorsement will be treated in accordance with § 242.43.

Applicant means a HUD multifamily-approved lender that would be the mortgagee of record.

Chronic convalescent and rest means skilled nursing services, intermediate care services, respite care services, hospice services, rehabilitation services, and other services of a similar nature.

Construction means the creation of a new or replacement hospital facility, which may include the cost of acquisition of new or replacement equipment in the cost of construction.

Days of cash on hand means the number of days of operating cash available to the hospital, calculated pursuant to standards determined by HUD.

Debt service coverage ratio is a measure of a hospital's ability to pay interest and principal with cash generated from current operations. Debt service ratio is calculated as follows: Debt Service Coverage Ratio (total debt service coverage on all long-term capital debt) equals the excess of revenues over expenses (not-for-profit) or net income (for-profit) plus interest expense plus

depreciation expense plus amortization expense, all divided by current portion of long-term debt (including capital leases) from the previous year's audited financial statement plus interest expense. The calculation can be expressed as:

$$\frac{(\text{Excess of revenues over expenses OR net income}) + \text{interest expense} + \text{depreciation expense} + \text{amortization expense}}{\text{Current portion of long-term debt [prior year, including capital leases]} + \text{interest expense}}$$

Hospital means a facility that has been proposed for approval or has been approved by HUD under the provisions of this subpart, and:

(1) That provides community services for inpatient medical care of the sick or injured (including obstetrical care);

(2) Where not more than 50 percent of the total patient days during any year are customarily assignable to the categories of chronic convalescent and rest, drug and alcoholic, epileptic, mentally deficient, mental, nervous and mental, and tuberculosis, except that the 50 percent patient day restriction does not apply to Critical Access Hospitals (hospitals designated as such under the Medicare Rural Hospital Flexibility Program) between January 28, 2008 and July 31, 2011.

(3) That is a facility licensed or regulated by the state (or, if there is no such state law providing for such licensing or regulation by the state, by the municipality or other political subdivision in which the facility is located) and is:

(i) A public facility owned by a state or unit of local government or by an instrumentality thereof, or owned by a public benefit corporation established by a state or unit of local government or by an instrumentality thereof;

(ii) A proprietary facility; or

(iii) A facility of a private nonprofit corporation or association.

Identity of interest means a relationship that must be disclosed and may be prohibited pursuant to the requirements of the Regulatory Agreement. Examples of a prohibited Identity of Interest relationship are, but are not limited to, a financial or family relationship between the mortgagor (which includes but is not limited to an officer, director, or partner of the mortgagor) and general contractor, subcontractor, seller of the land or property, any consultants, or other parties to the transaction.

Mortgage means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate under the laws of the state in which the real estate is located, together with any mortgage note secured thereby. The mortgage may be in the form of one or more trust mortgages or mortgage indentures or deeds of trust securing notes, bonds, or other mortgage notes; and, by the same instrument or by a separate instrument, it may create a security interest in the personalty, including, but not limited to, the equipment, whether or not the equipment is attached to the realty, and in the revenues and receivables of the hospital.

Mortgagee or lender means the original lender under a mortgage, and its successors and assigns, including the holders of mortgage notes issued under a trust mortgage or deed of trust pursuant to which such holders act by and through a trustee therein named. (All official contacts and actions by HUD shall be with or through a HUD-approved lender.)

Mortgagor means the original borrower under a mortgage and its successors and assigns.

Mortgage Reserve Fund means a trust account, or an account held by the mortgagee, for and on behalf of the mortgagor, to which the mortgagor contributes and from which withdrawals must be approved by HUD. The purpose of the fund is to provide HUD a means to assist the hospital to avoid mortgage defaults and to preserve the value of the mortgaged property and the hospital's business.

Most recent audited financial statement means the audited financial statement required under the regulatory agreement for the prior fiscal year.

Net income means the net income of a for-profit entity, or, in the case of a nonprofit entity, the excess of revenues less expenses.

Non-operating revenues and expenses are those revenues and expenses not directly related to patient care, hospital-related patient services, or the sale of hospital-related goods. Examples of items classified as non-operating are state and federal income tax, general contributions, gains and losses from investments, unrestricted income from endowment funds, and income from related entities.

Classification of items as operating or non-operating shall follow written guidance by HUD.

Operating margin is operating income divided by operating revenue, where:

(1) *Operating revenue* is the revenue from the core patient care operations of the hospital. It includes revenues from the provision of such items as patient care (including, but not limited to, hospital-based nursing home and physicians' clinics); transfers from temporarily restricted accounts that are used for current operating expenses; and patient-related activities such as the operation of the cafeteria, parking facilities, television services to patients, sale of medical scrap or waste, etc. (Additional sources of revenue, which are classified as non-operating, are excluded from this measure, provided, however, at HUD's discretion, that revenue that has historically been received reliably and is expected to continue to be received may be considered operating revenue for underwriting purposes); and

(2) *Operating income* is operating revenue minus operating expenses, where operating expenses are the expenses incurred in providing patient care, including such items as salaries, supplies, and the cost of capital.

Parent means an organization or entity that controls or has a controlling interest in another organization or entity.

Personalty means all furniture, furnishings, equipment, machinery, building materials, appliances, goods, supplies, tools, books, records (whether in written or electronic form), computer equipment (hardware and software) and other tangible or electronically stored personal property (other than fixtures) that are owned or leased by the borrower or the lessee now or in the future in connection with the ownership, management, or operation of the land or the improvements or are located on the land or in the improvements, and any operating agreements relating to the land or the improvements, and any surveys, plans, specifications, and contracts for architectural, engineering, and construction services relating to the land or the improvements, chooses in action and all other intangible property and rights relating to the operation of, or used in connection with, the land or the improvements, including all governmental permits relating to any activities on the land. Personalty also includes all tangible and intangible personal property used for health care

(such as major movable equipment and systems), accounts, licenses, bed authorities, certificates of need required to operate the hospital and to receive benefits and reimbursements under provider agreements with Medicaid, Medicare, state and local programs, payments from health care insurers and any other assistance providers (''Receivables''); all permits, instruments, rents, lease and contract rights, and equipment leases relating to the use, operation, maintenance, repair, and improvement of the hospital. Generally, intangibles shall also include all cash and cash escrow funds, such as but not limited to: Depreciation reserve fund or mortgage reserve fund accounts, bank accounts, residual receipt accounts, all contributions, donations, gifts, grants, bequests, and endowment funds by donors, and all other revenues and accounts receivable from whatever source paid or payable. All personalty shall be securitized with appropriate UCC filings and any excluded personalty shall be indicated in the Regulatory Agreement.

Preapplication meeting means a meeting among HUD, a potential mortgagee (applicant), and a potential mortgagor for mortgage insurance where there has been a positive Preliminary Review of the proposed project. The preapplication meeting is an opportunity for the potential mortgagee and mortgagor to summarize the proposed project, for HUD to summarize the application process, and for issues that could affect the eligibility or underwriting of the proposed loan to be identified and discussed.

Preliminary Review Letter means a letter from HUD to a potential applicant communicating the result of the Preliminary Review. The letter may state that an application for mortgage insurance would probably not be successful and provide the reasons for this determination, or state that no factors that would cause an application to be rejected have been identified, and therefore there appears to be no bar to the applicant proceeding to a preapplication meeting.

Project means the construction (which may include replacement of an existing hospital facility) or substantial rehabilitation of an eligible hospital, including equipment, which has been proposed for approval or has been approved by HUD under the provisions of this subpart, including the financing and refinancing, if any, plus all related activities involved in completing the improvements to the property. However, in particular closing documents, ''project'' may be used to mean the mortgagor entity, the operation of the mortgagor, the facility, or all of the mortgaged property, depending on the context in which it is used.

Regulatory Agreement means the agreement under which all mortgagors shall be regulated by HUD, as long as HUD is the insurer or holder of the mortgage, in a published format determined by HUD, and such additional covenants and restrictions as may be determined necessary by HUD on a case-by-case basis.

Secretary means the Secretary of Housing and Urban Development or his or her authorized representatives.

Security instrument means a mortgage, deed of trust, and any other security for the indebtedness, and shall be deemed to be the mortgage as defined by the National Housing Act, as amended, implementing regulations, and HUD directives.

Service area means that geographical area, identified by zip codes, from which a substantial majority of a hospital's patients derive.

State includes the several states, Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, American Samoa, and the United States Virgin Islands.

Substantial rehabilitation means additions, expansion, remodeling, renovation, modernization, repair, and alteration of existing buildings, including acquisition of new or replacement equipment.

Surplus Cash means any cash earned in the applicable fiscal period, including accounts receivable and equity balance, remaining after all of the following conditions have been met:

(1) Final endorsement of the HUD-insured note has occurred;

(2) Mortgage payments for the preceding 12 months have been made when due, including any grace period;

(3) The Debt Service Coverage Ratio is greater than or equal to 1.50 in the most recent audited financial statements and as of the date of distribution;

(4) Days in Accounts Receivable are less than or equal to 80 in the most recent audited financial statements and as of the date of distribution;

(5) The average payment period is less than or equal to 80 in the most recent audited financial statements and as of the date of distribution;

(6) The Mortgage Reserve Fund (MRF) is fully funded as of the date of the distribution in conformity with the MRF schedule;

(7) All income, property, and statutory employer payroll taxes and employee payroll withholding contributions (including penalties and interest, if applicable) have been deposited as of the date of the distribution, as required;

(8) The Current Ratio is greater than or equal to 1.50 in the most recent audited financial statements and immediately after the distribution;

(9) Days of cash on hand are greater than or equal to 21 days in the most recent audited financial statements and immediately after the distribution;

(10) The distribution may not be more than 50 percent of Net Income as reflected in the most recent audited financial statements, unless the Mortgagor has an equity financing ratio equal to or greater than 20 percent in the most recent audited financial statements and immediately after the distribution; and

(11) The Equity less any assets excluded from the mortgaged property is greater than 0.00 in the most recent audited financial statements and immediately after the distribution is made. As used in this definition:

''Most recent audited financial statements'' refers to the audited financial statement required under section 242.58 for the prior fiscal year;

''Net Income'' means Net Income for for-profit entities; Excess of Revenues over Expenses for not-for-profit entities; and Excess of Revenues over Expenses before Capital Grants, Contributions, and Additions to Permanent Endowment for governmental entities; and

''Equity financing ratio'' means (Equity less any assets excluded from the mortgaged property)/(total assets less any assets excluded from the mortgaged property). Equity is defined as Equity for a for-profit entity, Total Net Assets for not-for-profit entities, and Total Net Assets for governmental entities.

§ 242.2 Program financial self-sufficiency.

The Commissioner shall administer the Section 242 program in such a way as to encourage financial self-sufficiency and actuarial soundness; i.e., to avoid mortgage defaults and claims for insurance benefits in order to protect the mortgage insurance fund.

§ 242.3 Encouragement of certain programs.

The activities and functions provided for in this part shall be carried out so as to encourage provision of comprehensive health care, including outpatient and preventive care as well as hospitalization, to a defined population, and in the case of public and certain not-for-profit hospitals, to encourage programs that are undertaken to provide essential health care services to all residents of a community regardless of ability to pay.

§ 242.4 Eligibility for insurance and transition provision.

(a) The hospital to be financed with a mortgage insured under this part shall involve the construction of a new hospital or the substantial rehabilitation (or replacement) of an existing hospital.

(b) This part applies only to applications for FHA mortgage insurance submitted after a pre-application meeting (as defined in § 242.1) with HUD that occurred on and after January 28, 2008. HUD's regulations and practices prior to January 28, 2008 apply to applications for FHA mortgage insurance submitted after a pre-application meeting that occurred before January 28, 2008.

§ 242.5 Eligible mortgagees/lenders.

The lender requirements set forth in 24 CFR part 202 regarding approval, recertification, withdrawal of approval, approval for servicing, report requirements, and conditions for supervised mortgagees, nonsupervised mortgagees, investing mortgagees, and governmental and similar institutions, apply to these programs.

§ 242.6 Property requirements.

The mortgage, to be eligible for insurance, shall be on property located in a state, as defined in § 242.1. The mortgage shall cover real estate in which the mortgagor has one of the following interests:

(a) A fee simple title;

(b) A lease for not less than 99 years that is renewable; or

(c) A lease having a term of not less than 50 years to run from the date the mortgage is executed.

§ 242.7 Maximum mortgage amounts.

The mortgage shall involve a principal obligation not in excess of 90 percent of HUD's estimate of the replacement cost of the hospital, including the equipment to be used in its operation when the proposed improvements are completed and the equipment is installed.

§ 242.8 Standards for licensure and methods of operation.

The Secretary shall require satisfactory evidence that the hospital will be located in a state or political subdivision of a state with reasonable minimum standards of licensure and methods of operation for hospitals, and satisfactory assurance that such standards will be applied and enforced with respect to the hospital.

§ 242.9 Physician ownership.

Ownership of an interest in the mortgagor by physicians or other professionals practicing in the hospital is permitted within limits determined by HUD to avoid insurance risks that may be associated with such ownership. The Commissioner shall determine if the proposed mortgagor will be at low risk for violation of regulations of the U.S. Department of Health and Human Services, other federal regulations, and state regulations governing kickbacks, self-referrals, and other issues that could increase the risk of eventual default. The Commissioner's determination shall be based on an unqualified legal opinion as to compliance with applicable federal law, among other considerations.

§ 242.10 Eligible mortgagors.

The mortgagor shall be a public mortgagor (i.e., an owner of a public facility), a private nonprofit corporation or association, or a profit-motivated mortgagor meeting the definition of ''hospital'' in § 242.1. The mortgagor shall be approved by HUD and shall possess the powers necessary and incidental to operating a hospital. Eligible proprietary or profit-motivated mortgagors may include for-profit corporations, limited partnerships, and limited liability corporations and companies, but may not include natural persons, joint ventures, and general partnerships. Any proposed mortgagor must demonstrate that it has a continuity of organization commensurate with the term of the mortgage loan being insured. For new organizations, or those whose continuity is necessarily dependent upon an individual or individuals, broad community participation is required.

§ 242.11 Regulatory compliance required.

An application for insurance of a mortgage under this part shall be considered only in connection with a hospital that is in substantial compliance with regulations of the Department of Health and Human Services and the regulations of the applicable state governing the operation and reimbursement of hospitals. A hospital that is under investigation by any state or federal agency for statutory or regulatory violations is not eligible so long as the investigation is unresolved, unless HUD determines that the investigation is minor in nature; that is, the investigation is unlikely to result in substantial liabilities or to otherwise substantially harm the creditworthiness of the hospital.

§ 242.13 Parents and affiliates.

As a condition of issuing a commitment, HUD may require corporate parents, affiliates, or principals of the proposed mortgagor to provide assurances, guarantees, or collateral to protect HUD's interests. The Commissioner may also require financial and operational information on the parent, other businesses owned by the parent, or affiliates of the proposed mortgagor and may also require a parent or affiliate to be regulated by HUD as to certain actions that could impact on the insurance of a mortgage loan for the benefit of the hospital.

§ 242.14 Mortgage reserve fund.

As a condition of issuing a commitment, HUD shall require establishment of a Mortgage Reserve Fund (MRF). The mortgagor shall be required to make contributions to the MRF such that, with fund earnings, the MRF will build to one year of debt service at 5 years following commencement of amortization, increasing thereafter to 2 years of debt service on and after 10 years following commencement of amortization according to a schedule established by HUD, unless HUD determines that a different schedule of contributions is appropriate based on the mortgagor's risk profile, reimbursement structure, or other characteristics. In particular, hospitals that receive cost-based reimbursement may be required to have MRFs that build to more than 2 years of debt service. Expenditures from the fund are made at HUD's sole discretion or in accordance with the mortgagor's MRF Schedule. Upon termination of insurance, the balance of the MRF shall be returned to the mortgagor, provided that all obligations to HUD have been met.

§ 242.15 Limitation on refinancing existing indebtedness.

Some existing capital debt may be refinanced with the proceeds of a section 242 insured loan; however, the hard costs of construction and equipment must represent at least 20 percent of the total mortgage amount.

Subpart B—Application Procedures and Commitments

§ 242.16 Applications.

(a) *Application process*—(1) *Market Need.* The approval process entails a determination of the market need of the proposal and stresses, on a market-wide basis, the impact of the proposed facility on, and its relationship to, other health care facilities and services (particularly other hospitals with mortgages insured under this part and hospitals that have a disproportionate share of Medicaid and uninsured patients or provide a substantial amount of charity care); the number and percentage of any excess

beds; and demographic projections. Generally, Section 242 insurance may support start-up hospitals or major expansions of existing hospitals only if existing hospital capacity or services are clearly not adequate to meet the needs of the population in the service area.

(i) If the state has an official procedure for determining need for hospitals, HUD shall require that such procedure be followed before the application for insurance is submitted, and that the application document that need has also been established under that procedure.

(ii) The following factors are relevant in evaluating market need for the project and should be addressed, as applicable, in the study of market need and feasibility submitted with the application. Because each hospital presents a unique situation, there is no formula or cutoff level that applies to all applications:

(A) Service area definition;

(B) Existing or proposed hospital;

(C) Designation as sole community provider, Critical Access Hospital, or rural referral center;

(D) Community-wide use rates (discharges and days/1000);

(E) Statewide use rates (for benchmarking purposes);

(F) Current population and 5-year projection by age cohort;

(G) Staffed versus licensed beds;

(H) Applicant hospital's occupancy rate;

(I) Competitors' occupancy rates;

(J) Outpatient volume;

(K) Availability of emergency services;

(L) Teaching hospital status;

(M) Services offered by hospitals in the service area;

(N) Migration of patients out of the service area;

(O) Planned construction at other facilities in the region;

(P) Historical market share by major service category;

(Q) Disproportionate Share Hospital designation; and

(R) Distance to other hospitals.

(2) *Operating margin and debt service coverage ratio.* (i) Hospitals with an aggregate operating margin of less than 0.00 when calculated from the three most recent annual audited financial statements are not eligible for Section 242 insurance, unless HUD determines, based on the financial data in those statements, that the hospital has achieved a financial turnaround resulting in a positive operating margin in the most recent year, calculated using classifications of items as operating or non-operating in accordance with guidance that shall be provided in written directives by HUD. In any event, HUD shall not issue an insurance commitment for any hospital in a turnaround situation that has not achieved 2 consecutive years of positive operating margin immediately prior to issuance of the commitment.

(ii) Hospitals with an average debt service coverage ratio of less than 1.25 in the 3 most recent audited years are not eligible for Section 242 insurance, unless HUD determines, based on the audited financial data, that the hospital has achieved a financial turnaround resulting in a debt service coverage ratio of at least 1.40 in the most recent year. In cases of refinancing at a lower interest rate, HUD may authorize the use of the projected debt service requirement in lieu of the historical debt in calculating the debt service coverage ratios for each of the prior 3 years. In cases where HUD authorizes the use of the projected debt service requirement in lieu of the historical debt to determine the debt service coverage ratio, hospitals must have an average debt service coverage ratio of 1.40 or greater.

(3) *Financial Feasibility.* The approval process entails a determination of the financial feasibility of the proposal, i.e., a determination that it is probable that the proposed mortgagor will be able to meet its debt service requirements during the period projected. It includes analysis of the reimbursement structure of the proposed hospital (including patient/payer mix); actions of competitors; and the probable projected impact on the proposed hospital of general health care system trends, such as the development of alternative health care delivery systems and new reimbursement methods. In addition to historical operating margin, determination of financial feasibility includes, but is not limited to, evaluation of the following factors, which the application must address and which HUD will review:

(i) Current and projected gains from operations and a manageable debt load using reasonable assumptions;

(ii) Current debt service coverage ratio of 1.25 or higher and projected debt service coverage ratio of 1.40 or higher;

(iii) Cushion in the balance sheet sufficient to demonstrate the ability to withstand short periods of net operating losses without jeopardizing financial viability;

(iv) Patient utilization forecasts (including average length of stay, case intensity, discharges, area-wide use rates) that are consistent with the hospital's historical trends, future service mix, market trends, population forecasts, and business climate;

(v) The hospital's demonstrated ability to position itself to compete in its marketplace;

(vi) Organizational affiliations or relationships that help optimize financial, clinical, and operational performance;

(vii) Management's demonstrated ability to operate effectively and efficiently, and to develop effective strategies for addressing problem areas;

(viii) Systems in place to monitor hospital operations, revenues, and costs accurately and in a timely manner;

(ix) A Board that is appropriately constituted and provides effective oversight;

(x) Required licensures and approvals; and

(xi) Favorable ratings from the Joint Commission on Accreditation of Healthcare Organizations or other organizations acceptable to HUD.

(4) *Preliminary Review.* A Preliminary Review is a general overview of the acceptability of a potential mortgagor performed at the request of a hospital, a financial consultant representing a hospital, or a lender, to identify any factors that would likely cause an application to be rejected, should an application be submitted.

(i) The purpose of the preliminary review is for HUD to identify any obvious factors that would cause an application to be rejected, before the potential mortgagor or mortgagee expends resources to prepare one. The hospital, financial consultant, or lender shall submit a preliminary information package to HUD that provides evidence of statutory eligibility, market need, financial strength, and such other documentation as HUD may require. The scope of the preliminary review does not include approval of any specific site in the community.

(ii) If HUD identifies factors that would cause an application to be rejected, HUD shall issue a Preliminary Review Letter notifying the potential applicant that an application for mortgage insurance would probably not be successful and providing the reasons for this decision. Also, no further request from the proposed applicant for a Preliminary Review shall be entertained for a period of one year from the date of HUD's notification. HUD may grant an exception to this one-year limitation if, during the year, there is a major change in the circumstances that caused HUD to determine that the project would be rejected. For example, if the sole reason for HUD's determination was the hospital's failure to meet the historical operating margin test, and a new audited annual financial statement contains results that would

cause the hospital to meet the test, then the lender may request a new Preliminary Review within one year of HUD's notification.

(iii) If HUD does not identify any factors that would cause an application to be rejected, HUD shall issue a Preliminary Review Letter advising the potential applicant that there appears to be no bar to the applicant's proceeding to the next step in the application process, provided that if a complete application is not received by HUD within one year following the date of HUD's letter, another Preliminary Review may be required, at HUD's discretion, before the application process may proceed.

(iv) The Commissioner's determination in the preliminary review phase that no factors have been identified that would cause an application to be rejected shall in no way be construed as an indication that a subsequent application will be approved.

(5) *Preapplication meeting.* The next step in the application process is the preapplication meeting. At HUD's discretion, this meeting may be held at HUD Headquarters in Washington, DC, or at another site agreeable to HUD and the potential applicant. The preapplication meeting is an opportunity for the potential mortgagor to summarize the proposed project, for HUD to summarize the application process, and for issues that could affect the eligibility or underwriting of the project to be identified and discussed to the extent possible. Following the meeting, HUD may:

(i) Advise the potential applicant that there appears to be no bar to submitting an application for mortgage insurance; or

(ii) Identify issues that must be resolved before a full application should be submitted for processing.

(b) *Application contents.* The application for mortgage insurance shall include exhibits that follow such guidance as to content and format that HUD shall provide from time to time. The application shall include:

(1) A description of the proposed sources and uses of funds;

(2) A description of the mortgagor entity, its ownership structure, and its directors and managers;

(3) A description of the project, the business plan of the hospital, and how the project will further that plan;

(4) Historical audited financial statements and interim year-to-date financial results (for existing hospitals);

(5) A study of market need and financial feasibility, addressing the factors listed in paragraphs (a)(1)(ii), (a)(2), and (a)(3) of this section, with assumptions and financial forecast clearly presented, and prepared by a certified accounting firm acceptable to HUD;

(6) Architectural plans and specifications in sufficient detail to enable a reasonable estimate of cost;

(7) Evidence that the hospital will be located in a state or political subdivision of a state with reasonable minimum standards of licensure and methods of operation for hospitals and satisfactory assurance that such standards will be applied and enforced with respect to the hospital;

(8) If the state has an official procedure for determining need for hospitals, evidence that such procedure has been followed and that need has been established under that procedure;

(9) A Phase I environmental report; and

(10) Such other exhibits as HUD shall require based upon the facts pertaining to the particular case.

(c) *Fee.* An application fee of $1.50 per thousand dollars of the amount of the loan to be insured shall be paid to HUD at the time the application is submitted to HUD for approval.

(d) *Filing of application.* An application for insurance of a mortgage on a project shall be submitted on an approved FHA form by an approved mortgagee and by the sponsors of such project to the FHA Office of Insured Health Care Facilities.

(e) *Complete application.* Only technically complete applications will be processed. Partial applications cannot be processed. Upon determination that an application is complete, HUD shall issue a Completeness Letter to the applicant stating that the application is complete.

(f) *Application Review.* Upon receipt of a complete application, HUD shall evaluate the application to determine if eligibility, market need, financial feasibility, and compliance with applicable regulations (including but not limited to federal environmental regulations, wage rate regulations, and health care regulations) have been demonstrated, and to evaluate any other factors, including but not limited to risk to the Insurance Fund, that should be considered in determining if the application for mortgage insurance should be approved. As a part of this review, HUD may solicit the advice of private consultants and expert staff in the Department of Health and Human Services and other federal agencies. Based on review of the complete application, HUD may request additional information from the applicant. The timeliness of the applicant's submission of the additional information may affect the approval or disapproval of the application. The Commissioner's decision shall be communicated in the form of a Commitment Letter or a Rejection Letter. HUD will not issue a Commitment Letter until HUD completes the environmental review under 24 CFR 242.79.

§ 242.17 Commitments.

(a) *Issuance of commitment.* Upon approval of an application for insurance, a commitment shall be issued by HUD setting forth the terms and conditions under which an insurance endorsement shall be issued for the hospital. The commitment shall include the following:

(1) A commitment for insurance of advances reflecting the mortgage amount, interest rate, mortgage term, date of commencement of amortization, and other requirements pertaining to the mortgage and construction project;

(2) HUD's computation of the replacement cost and maximum insurable mortgage amount;

(3) Financial requirements for closing;

(4) Approval covenants, including any special conditions that must be satisfied prior to initial endorsement;

(5) Mortgage Reserve Fund Agreement.

(b) *Type of commitment.* The commitment will provide for the insurance of advances of mortgage funds during construction.

(c) *Term of commitment.* (1) The initial commitment shall be issued for a period of 90 days.

(2) The term of a commitment may be extended in such manner as HUD may prescribe, provided, however, that the combined term of the original commitment and any extensions do not exceed 180 days.

(d) *Commitment fee.* A commitment fee that, when added to the application fee, will aggregate $3 per thousand dollars of the amount of the loan set forth in the commitment, shall be paid within 30 days of the date of issuance of the commitment. If such fee is not paid within this 30-day period, the commitment shall automatically terminate.

§ 242.18 Inspection fee.

The commitment may provide for the payment of an inspection fee in an amount not to exceed $5 per thousand dollars of the commitment. The inspection fee shall be paid at the time of initial endorsement.

§ 242.19 Fees on increases.

(a) *Increase in commitment prior to endorsement.* An application, filed prior

to initial endorsement, for an increase in the amount of an outstanding commitment, shall be accompanied by an additional application fee of $1.50 per thousand dollars computed on the amount of the increase requested. Any increase in the amount of a commitment shall be subject to the payment of an additional commitment fee which, when added to the additional application fee, will aggregate $3 per thousand dollars of the amount of the increase. The additional commitment fee shall be paid within 30 days after the date of the amended commitment. If the additional commitment fee is not paid within 30 days, the commitment novation providing for the increased amount will automatically terminate and the previous commitment will be reinstated. If an inspection fee was required in the original commitment, an additional inspection fee shall be paid in an amount not to exceed $5 per thousand dollars of the amount of increase in commitment. The additional inspection fee shall be paid at the time of initial endorsement.

(b) *Increase in mortgage between initial and final endorsement.* Upon an application, filed between initial and final endorsement, for an increase in the amount of the mortgage, either by amendment, consolidation agreement, or by substitution of a new mortgage, an additional application fee of $1.50 per thousand dollars computed on the amount of the increase requested shall accompany the application. The approval of any increase in the amount of the mortgage shall be subject to the payment of an additional commitment fee which, when added to the additional application fee, will aggregate $3 per thousand dollars of the amount of the increase granted. If an inspection fee was required in the original commitment, an additional inspection fee shall be paid in an amount not to exceed $5 per thousand dollars of the amount of the increase granted. The additional commitment and inspection fees shall be paid within 30 days after the date that the increase is granted.

§ 242.20 Reopening of expired commitments.

An expired commitment may be reopened if a request for reopening is received by HUD no later than 90 days after the date of expiration of the commitment. The reopening request shall be accompanied by a fee of 50 cents per thousand dollars of the amount of the expired commitment. A commitment that has expired because of failure to pay the commitment fee may be reopened only upon payment of the commitment fee and the reopening fee. If the reopening request is not received by HUD within the required 90-day period, a new application accompanied by an application fee must be submitted. If a commitment for an increased amount has expired because of failure to pay an additional commitment fee based on the amount of the increase, the reopening fee shall be computed on the basis of the amount of the commitment increase rather than on the amount of the original commitment.

§ 242.21 Refund of fees.

Commitment, inspection, and reopening fees (but not application fees) may be refunded, in whole or in part, if HUD determines that the construction or financing of the project has been prevented because of condemnation proceedings or other legal action taken by a government body or public agency, or in such other instances as HUD may determine as being beyond the control of the applicant and resulting from no fault of the applicant. A transfer fee may be refunded only in such instances as HUD may determine. However, the portion of the inspection fee paid in connection with early commencement of work is not refundable.

§ 242.22 Maximum fees and charges by mortgagee.

The mortgagee may collect from the mortgagor the amount of the fees provided for in this subpart. The mortgagee may also collect from the mortgagor an initial service charge not to exceed 2 percent of the original principal amount of the mortgage to reimburse the mortgagee for the cost of closing the transaction. A permanent financing fee not to exceed 3.5 percent may be collected from the mortgagor; however, the combined initial service charge and permanent financing fee may not exceed 5.5 percent in bond transactions and 3.5 percent in all other transactions. Any additional charges or fees collected from the mortgagor shall be subject to prior approval of HUD and shall be clearly disclosed in the Mortgagee's Certificate.

§ 242.23 Maximum mortgage amounts and cash equity requirements.

(a) *Adjusted mortgage amount—rehabilitation projects.* A mortgage financing the rehabilitation of an existing hospital shall be subject to the following limitations, in addition to those set forth in § 242.7:

(1) Property held unencumbered. If the mortgagor is the fee simple owner of the property and the ownership is not encumbered by an outstanding indebtedness, the mortgage shall not exceed 100 percent of HUD's estimate of the cost of the proposed rehabilitation.

(2) Property subject to existing mortgage. If the mortgagor owns the property subject to an outstanding indebtedness, which is to be refinanced with part of the insured mortgage, the mortgage shall not exceed the total of the following:

(i) The Commissioner's estimate of the cost of rehabilitation, plus

(ii) Such portion of the outstanding indebtedness as does not exceed 90 percent of HUD's estimate of the fair market value of such land and improvements prior to rehabilitation.

(3) Property to be acquired. If the property is to be acquired by the mortgagor and the purchase price is to be financed with a part of the insured mortgage, the mortgage shall not exceed 90 percent of the total of the following:

(i) The Commissioner's estimate of the cost of rehabilitation, plus

(ii) The actual purchase price of the land and improvements or HUD's estimate (prior to rehabilitation) of the fair market value of such land and improvements, whichever is the lesser.

(b) *Reduced mortgage amount—leaseholds.* In the event the mortgage is secured by a leasehold estate rather than a fee simple estate, the value or replacement cost of the property described in the mortgage shall be the value or replacement cost of the leasehold estate (as determined by HUD), which shall in all cases be less than the value or replacement cost of the property in fee simple.

(c) *Cash equity.* Depending on the financial circumstances of each hospital facility, HUD shall have the discretion to evaluate, on a case-by-case basis, the amount of equity that a mortgagor must supply in addition to the value of plant, property, and equipment and other values recognized as loan security in the commitment process. Exercise of this discretion shall never cause a loan to exceed 90 percent of estimated replacement cost, although it may cause it to be less than 90 percent. The equity contribution may not be made from borrowed funds. A private nonprofit or public mortgagor, but not a proprietary mortgagor, in HUD's discretion and subject to 24 CFR 242.49, may provide any such required equity in the form of a letter of credit.

§ 242.24 Initial operating costs.

In the case of a new hospital or a hospital expansion, HUD shall establish, on a case-by-case basis, the amount of initial operating capital, if any, that must be deposited in cash or a letter of credit (or combination) to be available to the new hospital upon commencement

of operations. Generally, the initial operating capital other than AMPO shall not be borrowed funds unless HUD determines that there are offsetting financial strengths to compensate for the risk associated with borrowing.

Subpart C—Mortgage Requirements

§ 242.25 Mortgage form and disbursement of mortgage proceeds.

(a) *Mortgage form.* The mortgage shall be:

(1) Executed on a form approved by HUD for use in the jurisdiction in which the property covered by the mortgage is situated; the form shall not be changed without the prior written approval of HUD.

(2) Executed by an eligible mortgagor.

(b) *Disbursement of mortgage proceeds.* The mortgagee shall be obligated, as a part of the mortgage transaction, to disburse the principal amount of the mortgage to (or for the account of) the mortgagor or to his or her creditors for his or her account and with his or her consent.

§ 242.26 Agreed interest rate.

(a) The mortgage shall bear interest at the rate or rates agreed upon by the mortgagee and the mortgagor.

(b) The amount of any increase approved by HUD in the mortgage amount between initial and final endorsement in excess of the amount that HUD had committed to insure at initial endorsement shall bear interest at the rate agreed upon by the mortgagee and the mortgagor.

§ 242.27 Maturity.

The mortgage shall have a maturity not to exceed 25 years from the date amortization begins.

§ 242.28 Allowable costs for consultants.

Consulting fees for work essential to the development of the project may be included in the insured mortgage. Allowable consulting fees include those for analysis of market demand, expected revenues, and costs; site analysis; architectural and engineering design; and such other fees as HUD may determine to be essential to project development. Fees for work performed more than 2 years prior to application are not allowable. Fees for work performed by any party with an identity of interest with the proposed mortgagor or mortgagee are not allowable.

§ 242.29 Payment requirements.

The mortgage shall provide for payments on the first day of each month in accordance with an amortization plan agreed upon by the mortgagor, the mortgagee, and HUD.

§ 242.30 Application of payments.

All payments to be made by the mortgagor to the mortgagee shall be added together and the aggregate amount thereof shall be paid by the mortgagor each month in a single payment. The mortgagee shall apply each payment received to the following items in the following order:

(a) Premium charges under the contract of mortgage insurance;

(b) Ground rents, taxes, special assessments, and fire and other hazard insurance premiums;

(c) Interest on the mortgage; and

(d) Amortization of the principal of the mortgage.

§ 242.31 Accumulation of accruals.

(a) The mortgage shall provide for payments by the mortgagor to the mortgagee on each interest payment date of an amount sufficient to accumulate, in the hands of the mortgagee one payment period prior to its due date, the next annual MIP payable by the mortgagee to HUD. Such payments shall continue only so long as the contract of insurance shall remain in effect.

(b) The mortgage shall provide for such equal monthly payments by the mortgagor to the mortgagee as will amortize the ground rents, if any, and the estimated amount of all taxes, water charges, special assessments, and fire and other hazard insurance premiums, within a period ending one month prior to the dates on which the same become delinquent. The mortgage shall further provide that such payments shall be held by the mortgagee, for the purpose of paying such items before they become delinquent. The mortgage shall also make provision for adjustments in case such estimated amounts shall prove to be more, or less, than the actual amounts so paid therefore by the mortgagor. Notwithstanding the foregoing, in particular circumstances, a mortgagor may purchase required fire and hazard insurance through a consortium of affiliated institutions or related organizations or, in the case of public institutions, through required state purchasing arrangements. In such circumstances, the mortgage accrual requirement may be modified to reflect circumstances in which it is inappropriate for the mortgagee to collect monthly payments and to make payments on behalf of the mortgagor.

§ 242.32 Covenant against liens.

The mortgage shall contain a covenant against the creation by the mortgagor of any liens against the property, except for such liens as may be approved by HUD.

§ 242.33 Covenant for malpractice, fire, and other hazard insurance.

The mortgage shall contain a covenant binding the mortgagor to maintain adequate liability, fire, and extended coverage insurance on the property. The mortgage shall also contain a covenant binding the mortgagor to maintain adequate malpractice coverage. All coverage shall be acceptable to the mortgagee and HUD.

§ 242.35 Mortgage lien certifications.

At initial and/or final endorsement of the mortgage note, each of the following requirements must be met:

(a) The mortgage is the first lien upon and covers all of the property used in the operation of the entire hospital;

(b) The property upon which the improvements have been made or constructed and the equipment financed with mortgage proceeds are free and clear of all liens other than the insured mortgage and such other secondary liens as may be approved by HUD;

(c) The Security Agreement and Uniform Commercial Code filings establish a first lien on the personalty of the mortgagor, including but not limited to equipment acquired with mortgage proceeds or otherwise not subject to a prior lien;

(d) The mortgagor has notified HUD in writing of all unpaid obligations in connection with the mortgage transaction, the purchase of the mortgaged property, the construction or rehabilitation of the project, or the purchase of the equipment financed with mortgage proceeds.

§ 242.37 Mortgage prepayment.

(a) *Prepayment privilege.* Except as provided in paragraph (c) of this section or otherwise established by HUD, the mortgage shall contain a provision permitting the mortgagor to prepay the mortgage in whole or in part upon any interest payment date, after giving the mortgagee a 30-day notice in writing in advance of its intention to so prepay. The 30-day notice may be extended with the prior written approval of HUD.

(b) *Prepayment charge.* The mortgage may contain a provision for such charge, in the event of prepayment of principal, as may be agreed upon between the mortgagor and the mortgagee, subject to the following:

(1) The mortgagor shall be permitted to prepay up to 15 percent of the original principal amount of the mortgage in any one calendar year without any such charge.

(2) Any reduction in the original principal amount of the mortgage resulting from the certification of cost, which HUD may require, shall not be

construed as a prepayment of the mortgage.

(c) *Prepayment of bond-financed or GNMA-securitized mortgages.* Where the mortgage is given to secure GNMA mortgage-backed securities or a loan made by a lender that has obtained the funds for the loan by the issuance and sale of bonds or bond anticipation notes, or both, the mortgage may contain a prepayment restriction and prepayment penalty charge acceptable to HUD as to term, amount, and conditions.

(d) *HUD override of prepayment restrictions.* In the event of a default, HUD may override any lockout, prepayment penalty, or combination of penalties in order to facilitate a partial or full refinancing of the mortgaged property and avoid a claim.

§ 242.38 Late charge.

The mortgage may provide for the collection by the mortgagee of a late charge in accordance with terms, conditions, and standards of HUD for each dollar of each payment to interest or principal more than 15 days in arrears, to cover the expense involved in handling delinquent payments. Late charges shall be separately charged to and collected from the mortgagor and shall not be deducted from any aggregate monthly payment.

Subpart D—Endorsement for Insurance

§ 242.39 Insurance endorsement.

Initial endorsement of the mortgage note shall occur before any mortgage proceeds are insured, and the time of final endorsement shall be as set forth in paragraph (b) of this section.

(a) *Initial endorsement.* The Commissioner shall indicate the insurance of the mortgage by endorsing the original mortgage note and identifying the section of the Act and the regulations under which the mortgage is insured and the date of insurance.

(b) *Final endorsement.* When all advances of mortgage proceeds have been made and all the terms and conditions of the commitment have been met to HUD's satisfaction, HUD shall indicate on the original mortgage note the total of all advances approved for insurance and again endorse such instrument.

(c) *Contract rights and obligations.* The Commissioner and the mortgagee or lender shall be bound from the date of initial endorsement by the provisions of the Contract of Mortgage Insurance stated in subpart B of part 207, which is hereby incorporated by reference into this part.

§ 242.40 Mortgagee certificate.

At initial endorsement, the mortgagee shall execute a Mortgagee Certificate in a form prescribed by HUD.

§ 242.41 Certification of cost requirements.

Before initial endorsement of the mortgage for insurance, the mortgagor, the mortgagee, and HUD shall enter into an agreement in form and content satisfactory to HUD for the purpose of precluding any excess of mortgage proceeds over statutory limitations. Under this agreement, the mortgagor shall disclose its relationship with the builder, including any collateral agreement, and shall agree:

(a) To execute a Certificate of Actual Costs, upon completion of all physical improvements on the mortgaged property.

(b) To apply any cost savings in accordance with the provisions below.

§ 242.42 Certificates of actual cost.

(a) The mortgagor's certificate of actual cost, in a form prescribed by HUD, shall be submitted upon completion of the physical improvements to the satisfaction of HUD and before final endorsement, except that in the case of an existing hospital that does not require substantial rehabilitation and where the commitment provides for completion of specified repairs after endorsement, a supplemental certificate of actual cost will be submitted covering the completed costs of any such repairs. The certificate shall show the actual cost to the mortgagor, after deduction of any kickbacks, rebates, trade discounts, or other similar payments to the mortgagor, any of its officers, directors, stockholders, partners, or other entity member ownership, of construction and other costs, as prescribed by HUD.

(b) The Certificate of Actual Cost shall be verified by an independent certified public accountant or independent public accountant in a manner acceptable to HUD.

(c) Upon HUD's approval of the mortgagor's certification of actual cost, such certification shall be final and incontestable except for fraud or material misrepresentation on the part of the mortgagor.

§ 242.43 Application of cost savings.

At the sole discretion of HUD, any cost savings shall be used to:

(a) Reduce the principal amount of the mortgage and the mortgagor's cash equity contribution proportionally, unless the mortgagor elects to have a greater portion of the savings used to reduce the mortgage; and/or

(b) Fund any additional construction or substantial rehabilitation approved by HUD.

Subpart E—Construction

§ 242.44 Construction standards.

Work designed and performed under this section shall conform to the standards adopted by HUD, which, at a minimum, shall include the ''Guidelines for Construction and Equipment of Hospital and Medical Facilities,'' which is regularly updated and published by the American Institute of Architects.

§ 242.45 Early commencement of work.

(a) *Site preparation.* Prior to or following the submission of an application, the mortgagor may request for good cause the commencement of certain limited site preparation for the project within legal guidelines and state law. Such work can commence only after the review of the work and concurrence by HUD, including the environmental review under 24 CFR 242.79, previous participation review, and the agreement to certain conditions by the applicant. HUD will not approve such request until it has completed the environmental review under 24 CFR 242.79. The work must meet all requirements and guidelines as if it were approved for mortgage insurance and is to be accomplished at the sole risk of the mortgagor.

(b) *Construction completed prior to application.* Structures completed more than 2 years prior to application are eligible to be refinanced with insured mortgage proceeds.

(c) *Pre-commitment work.* Subsequent to submission of an application but prior to the issuance of a commitment or denial by HUD, the hospital and lender may request for good cause the commencement of certain necessary early site work and limited construction activity in connection with the improvements, within legal guidelines and state law. This work must be requested by both the hospital and the lender to be approved. Such work may be eligible to be financed with insured mortgage proceeds if the application is approved and the work complies with all specified conditions of HUD as set forth in a written agreement between the hospital and HUD. It is understood that in some cases the application submitted in order for pre-commitment work to begin may not be complete in all respects. However, at a minimum, the application shall include the approved FHA application form, the application fee (based on the amount of the total proposed insured loan), the inspection fee (based on the cost of the pre-

commitment work), a project description of the pre-commitment work and its relation to the total project, and plans and specifications for the proposed pre-commitment work in sufficient detail to allow HUD to conduct its architectural and engineering review and obtain the necessary previous participation information and evidence of compliance with federal and state environmental regulations. Such work can commence only after the review of the work and concurrence by the lender and HUD, including previous participation review. HUD will not approve such request until it has completed the environmental review under 24 CFR 242.79. The work must meet all requirements and guidelines as if it were approved for mortgage insurance and is to be accomplished at the sole risk of the hospital. A request shall be accompanied by documentation required by HUD. That documentation shall include:

(1) A justification explaining the urgent and compelling circumstances that make it necessary to begin construction without waiting for the application process to run its course. The justification must specify the harm the hospital would suffer from waiting.

(2) A plan detailing how the hospital will finance the limited construction if the application for mortgage insurance is denied.

(3) A statement that financing the limited construction by means other than a HUD-insured mortgage in the event the application is denied will impose no significant financial hardship on the hospital. The statement shall be accompanied by supporting historical and projected financial data.

(4) A statement that the hospital recognizes that HUD's agreement to include the cost of the limited construction in a subsequently approved application does not in any way indicate that the application will be approved.

(5) A resolution of the governing body (or, at HUD's discretion, the executive committee of the governing body) of the mortgagor attesting to paragraphs (c)(1) through (4).

(d) *Early Start.* Subsequent to the issuance of a commitment, if the hospital and lender request the commencement of the project, the work may commence after the review and approval of the request by HUD, including the agreement by the hospital and the lender to any conditions that HUD may require. Any work undertaken prior to the initial endorsement shall be at the sole risk of the hospital.

(e) *Prepayment of inspection fee.* The hospital shall pay a non-refundable inspection fee to HUD before the work described in paragraph (c) or (d) of this section commences. The fee shall be based on the amount of the pre-commitment and/or early start work requested to be included in the insured mortgage loan.

(f) *No expressed or implied intent.* Approval to proceed under paragraphs (c) or (d) of this section shall in no way be construed as indicating any intent, expressed or implied, on the part of HUD to approve, disapprove, or make any undertaking or promise whatsoever with respect to the application or with respect to any commitment for mortgage insurance. Any work under paragraphs (c) or (d) of this section shall be undertaken at the sole risk and responsibility of the hospital.

§ 242.46 Insured advances—building loan agreement.

Prior to the initial endorsement of the mortgage for insurance, the mortgagor and mortgagee shall execute a building loan agreement, approved by HUD, setting forth the terms and conditions under which progress payments may be advanced during construction. To be covered by mortgage insurance, or to be included as an eligible cost, each progress payment involving mortgage proceeds and the owner's equity requirement shall be approved by HUD.

§ 242.47 Insured advances for building components stored off-site.

(a) Building components. In insured advances for building components stored off-site, the term building component shall mean any manufactured or pre-assembled part of a structure that HUD has specifically identified for incorporation into the property and has designated for off-site storage because it is of such size or weight that:

(1) Storage of the number of components required for timely construction progress at the construction site is impractical, or

(2) Weather damage or other adverse conditions prevailing at the construction site would make storage at the site impractical or unduly costly.

(b) *Storage.* (1) An insured advance may be made for up to 90 percent of the invoice value (to exclude costs of transportation and storage) of the building components stored off-site, if the components are stored at a location approved by the mortgagee and HUD.

(2) Each building component shall be adequately marked so as to be readily identifiable in the inventory of the off-site location. Each component shall be kept together with all other building components of the same manufacturer intended for use in the same project for which insured advances have been made and separate and apart from similar units not for use in the project.

(3) Storage costs, if any, shall be borne by the contractor.

(c) *Responsibility for transportation, storage, and insurance of off-site building components.* The general contractor of the insured mortgaged property shall have the responsibility for:

(1) Insuring the components in the name of the mortgagor while in transit and storage; and

(2) Delivering or contracting for the delivery of the components to the storage area and to the construction site, including payment of freight.

(d) *Advances.* (1) Before an advance for a building component stored off-site is insured: (i) The mortgagor shall:

(A) Obtain a bill of sale for the component;

(B) Give the mortgagee a security agreement; and

(C) File a financing statement in accordance with the Uniform Commercial Code; and

(ii) The mortgagee shall warrant to HUD that the security instruments are a first lien on the building components covered by the instruments except for such other liens or encumbrances as may be approved by HUD.

(2) Before each advance for building components stored off-site is insured, the mortgagor's architect shall certify to HUD that the components, in their intended use, comply with HUD-approved contract plans and specifications. Under those circumstances permitted by HUD in which there is no architect, compliance with the HUD-approved contract plans and specifications shall be determined by HUD.

(3) Advances may be made only for components stored off-site in a quantity required to permit uninterrupted installation at the site.

(4) At no time shall the invoice value of building components being stored off-site, for which advances have been HUD insured, represent more than 50 percent of the total estimated construction costs for the insured mortgaged project as specified in the construction contract. Notwithstanding the preceding sentence and other regulatory requirements that set bonding requirements, the percentage of total estimated construction costs insured by advances under this section may exceed 25 percent but not 50 percent if the mortgagor furnishes assurance of completion in the form of a corporate

surety bond for the payment and performance each in the amount of 100 percent of the amount of the construction contract. In no event will insurance of advances for components stored off-site be made in the absence of a payment and a performance bond.

(5) No single advance that is to be insured shall be in an amount less than $10,000.

§ 242.48 Insured advances for certain equipment and long lead items.

The Commissioner may allow advances for certain pieces of equipment or other construction materials for which a manufacturer, fabricator, or other source requires an interim payment(s) in order to assure the timely manufacture or fabrication and delivery to the project site. Such advances can be made only if a bill of sale or an invoice describes the material or equipment and its completion and delivery dates in no uncertain terms, and that such displayed timetable is necessary to meet the requirements of the overall construction schedule cited in the construction contract.

§ 242.49 Funds and finances: deposits and letters of credit.

(a) *Deposits.* Where HUD requires the mortgagor to make a deposit of cash or securities, such deposit shall be with the mortgagee or a depository acceptable to the mortgagee. Any such deposit shall be held in a separate account for and on behalf of the mortgagor, and shall be the responsibility of the mortgagee.

(b) *Letter of credit.* Where the use of a letter of credit is acceptable to HUD in lieu of a deposit of cash or securities, the letter of credit shall be issued to the mortgagee by a banking institution acceptable to the lender. The mortgagee shall be responsible to HUD for collection under the letter of credit. In the event a demand for payment thereunder is not immediately met, the mortgagee shall forthwith provide a cash deposit equivalent to the undrawn balance of the letter of credit.

(c) *Mortgagee not issuer.* The mortgagee of record may not be the issuer of the letter of credit without the prior written consent of HUD.

§ 242.50 Funds and finances: off-site utilities and streets.

The Commissioner shall require assurance of completion of off-site public utilities and streets in all cases, except where a municipality or other public body has by agreement acceptable to HUD agreed to install such utilities and streets without cost to the mortgagor. Where such assurance is required, it shall be either in the form of a cash escrow deposit or the retention of a specified amount of mortgage proceeds by the mortgagee, or both. In any case, the amount of deposit or retained cash (or both) must be sufficient to cover the cost of off-site utilities and streets. If a cash escrow is used, it shall be deposited with the mortgagee or with an acceptable trustee or escrow agent designated by the mortgagee. If mortgage proceeds are used, the mortgagee shall retain under terms approved by HUD, rather than disburse at the initial closing of the mortgage, a sufficient portion of the mortgage proceeds allocated to land in the project analysis. As additional assurance, HUD may also require a surety company bond or bonds.

§ 242.51 Funds and finances: Insured advances and assurance of completion.

(a) Where the estimated cost of construction or substantial rehabilitation is more than $500,000, the mortgagor shall furnish assurance of completion in the form of corporate surety bonds for payment and performance, each in the minimum amount of 100 percent of the construction contract (or Guaranteed Maximum Price, in the case of construction management) and each satisfactory to HUD.

(b) All types of assurance of completion shall be on forms approved by HUD. All surety companies executing a bond and all parties executing a personal indemnity agreement must be satisfactory to HUD.

(c) A mortgagee may prescribe more stringent requirements for assurance of completion than the minimum requirements provided for in this section.

§ 242.52 Construction contracts.

(a) *Awarding of contract.* A contract for the construction or rehabilitation of a hospital shall be entered into by a mortgagor, with a builder selected by a competitive bidding procedure acceptable to HUD.

(b) *Form of contract.* The construction contract shall be: A lump sum form providing for payment of a specified amount; a construction management contract with a guaranteed maximum price, the final costs of which are subject to a certification acceptable to HUD; a design-build contract with terms and certification requirements acceptable to HUD; or such other form of contract as may be acceptable to HUD.

(c) *Competitive bidding.* A competitive bidding procedure acceptable to HUD must be used in the selection of bidders to perform work or otherwise provide service to the project, the costs of which are included in any form of construction contract cited in paragraph (b) of this section. Fixed equipment not included in the construction contract, and movable equipment, may be purchased by securing quotations or by using competitive bidding procedures.

§ 242.53 Excluded contractors.

(a) Contracts relating to the construction of the project shall not be made with any person or entity that has been excluded from participation in federal programs, including but not limited to: A general contractor, a subcontractor, or construction manager (or any firm, corporation, partnership, or association in which such contractor, subcontractor, or construction manager has a substantial interest). Before entering into contracts with any such person or entity, owners must consult the government-wide list of excluded parties, and any list of excluded parties maintained by HUD.

(b) Contracts relating to the construction of the project shall not be made with a general contractor that has an identity of interest, as defined by HUD, with the mortgagor or mortgagee.

(c) If HUD determines that a contract has been made contrary to the requirements of paragraphs (a) or (b) of this section and so notifies the mortgagee, HUD will require the contractor or construction manager to cost-certify and may require other remedial action in addition to taking enforcement action, as HUD deems appropriate.

Subpart F—Nondiscrimination and Wage Rates

§ 242.54 Nondiscrimination.

Hospital facilities financed with mortgages insured under this part must be made available without discrimination as to race, color, religion, sex, age, disability, or national origin. Hospitals must be operated in compliance with all applicable civil rights laws and regulations, including 24 CFR part 200, subpart J (Equal Employment Opportunity), and the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*). Racially restrictive covenants are per se illegal and their use is prohibited. The aforesaid provisions regarding age and sex discrimination do not affect the eligibility of hospitals for women and children.

§ 242.55 Labor standards.

(a) Projects financed under this part (except under 24 CFR 242.91) must comply with the prevailing wage rates determined under the Davis-Bacon Act

(40 U.S.C. 3141 *et seq.*), and U.S. Department of Labor regulations in 29 CFR parts 1, 3, and 5 for compliance with labor standards laws, in accordance with section 212 of the Act, provided that supplemental loans under section 241 of the Act made in connection with loans insured under this part are subject to labor standards requirements in the same manner and to the same extent as mortgages insured under section 242 of the National Housing Act.

(b) The requirements stated in 24 CFR part 70 governing HUD waiver of Davis-Bacon prevailing wage rates for volunteers apply to hospitals with mortgages insured under this part.

(c) Each laborer or mechanic employed on any facility covered by a mortgage insured under this part (except under 24 CFR 242.91, but including a supplemental loan under section 241 of the National Housing Act made in connection with a loan insured under this part) shall receive compensation at a rate not less than 1.5 times the basic rate of pay for all hours worked in any workweek in excess of 8 hours in any workday or 40 hours in the workweek.

(d) Project commitments, contracts, and agreements, as determined by HUD, and construction contracts and subcontracts, shall include terms, conditions, and standards for compliance with applicable requirements set forth in 29 CFR parts 1, 3, and 5 and section 212 of the Act.

(e) No advance under a loan or mortgage that is subject to the requirements of section 212 shall be eligible for insurance unless there is filed with the application for the advance a certificate as required by HUD certifying that the laborers and mechanics employed in construction of the project have been paid not less than the wage rates required under section 212.

Subpart G—Regulatory Agreement, Accounting and Reporting, and Financial Requirements

§ 242.56 Form of regulation.

As long as HUD is the insurer or holder of the mortgage, all mortgagors shall be regulated by HUD through the use of a regulatory agreement in a published format determined by HUD and such additional covenants and restrictions as may be determined necessary by HUD on a case-by-case basis. In addition, all mortgagors shall be subject to the provisions of 24 CFR part 24 and such other enforcement provisions as may be applicable. The mortgagor shall be subject to monitoring by HUD and its agents and contractors, on an ongoing basis for the life of the insured mortgage to ensure against the risk of default, and the mortgagor must make its financial records available to HUD and its agents and contractors upon request.

§ 242.57 Maintenance of hospital facility.

The mortgagor shall maintain the hospital's grounds, buildings, and the equipment financed with mortgage proceeds in good repair, and shall promptly complete such repairs and maintenance as HUD considers necessary.

§ 242.58 Books, accounts, and financial statements.

(a) *Books and accounts.* The mortgagor's books and accounts relating to the operation of the physical facilities of the hospital shall be established in a manner satisfactory to HUD, and shall be kept in accordance with the requirements of HUD as long as the mortgage is insured or held by HUD.

(b) *Financial reports.* The mortgagor shall file with HUD:

(i) Annual audited financial statements in accordance with the guidance below;

(ii) Quarterly unaudited financial reports, within 40 days following the end of each quarter of the mortgagor's fiscal year;

(iii) If requested by HUD, monthly financial reports within 40 days following the end of each month;

(iv) Board-certified annual financial results within 120 days following the close of the fiscal year (if the annual audited financial statement has not yet been filed with HUD) and at such other times as HUD may designate on a case-by-case basis; and

(v) Such other financial and utilization reports as HUD may require.

(c) *Audits.* (1) Not-for-profit organizations shall conduct audits in accordance with the Consolidated Audit Guide for Audits of HUD Programs (Handbook 2000.04) and OMB Circular A–133 (Audits of states, local governments, and nonprofit organizations).

(2) For-profit organizations shall conduct audits in accordance with the Consolidated Audit Guide for Audits of HUD Programs (Handbook 2000.04).

(d) *Changes in accounting policies.* The annual audited financial statements shall identify any changes in accounting policies and their financial effect on the balance sheet and on the income statement.

(e) *Compliance reporting.* The mortgagor shall instruct the auditor of the annual financial statement to include in its report an evaluation of the mortgagor's compliance with the Regulatory Agreement.

(f) *Books of management agents.* The books and records of management agents, lessees, operators, managers, and affiliates, as they pertain to the operations of the hospital, shall be maintained in accordance with Generally Accepted Accounting Principles (GAAP) or Governmental Accounting Standards and shall be open and available to inspection by HUD, after reasonable prior notice, during normal office hours, at the hospital or other mutually agreeable location. Every contract executed on behalf of the hospital with any of the aforesaid parties shall include the provision that the books and records of such entities shall be properly maintained and open to inspection during normal business hours by HUD at the hospital or other mutually agreeable location.

(g) *Medicare cost reports.* Upon request, the mortgagor shall provide to HUD a copy of the Medicare Cost Report most recently submitted to the Centers for Medicare and Medicaid Services (an agency of the Department of Health and Human Services), along with related financial documents.

§ 242.59 Inspection of facilities by Commissioner.

The mortgaged property (including buildings and equipment) and the books, records, and documents relating to the operation of the physical facilities of the hospital shall be subject to inspection and examination by HUD or its authorized representative at all reasonable times.

§ 242.61 Management.

The mortgagor shall provide for management of the hospital in a manner satisfactory to HUD.

(a) *Contract Management.* The mortgagor shall not execute a management agreement or any other contract for management of the hospital without HUD's prior written approval. Any management agreement or contract shall contain a provision that it shall be subject to termination without penalty and with or without cause, upon written request by HUD addressed to the mortgagor and management agent.

(b) *Principals.* HUD shall have the authority to require that any principals of the mortgagor, including but not limited to board members of a corporate entity, be removed, substituted, or terminated for cause upon written request by HUD addressed to the mortgagor.

(c) *Employees.* HUD shall have the authority to require that any key management employees of the

mortgagor (as defined and determined solely by HUD) be terminated for cause upon written request by HUD addressed to the mortgagor.

(d) *Procedures upon receipt of request under paragraphs (a) through (c) of this section.* Upon receipt of such requests under paragraphs (a) through (c) of this section, the mortgagor shall immediately terminate said management agreement, principals, or employees within the shortest applicable period HUD determines appropriate and shall make arrangements satisfactory to HUD for ongoing proper management of the hospital.

§ 242.62 Releases of lien.

The mortgagor shall not sell, dispose of, transfer, or permit to be encumbered any security property without the prior approval of the lender and Commissioner, subject to thresholds or such other standards as HUD may establish for the approval requirement. Where there is a partial release of lien, the lender must make a determination, subject to prior review and approval by HUD, that the remaining or replacement property subject to the first lien provides adequate security for the remaining principal indebtedness.

§ 242.63 Additional indebtedness and leasing.

The mortgagor shall not enter into any long-term debt, short-term debt (including receivables or line of credit financing), equipment leases, or derivative-type transactions, except in conformance with policies and procedures established by HUD.

§ 242.64 Current and future property.

All current or future property (including personalty) of the mortgagor on or off mortgaged real estate (except that specifically restricted by donors or specifically excluded by HUD) will be considered as part of the HUD-insured hospital and subject to all provisions of the HUD regulatory agreement. All equipment acquired by the hospital following initial endorsement and at any time during the term of the loan shall become subject to the lien of the security agreement and any Uniform Commercial Code Financing Statements filed pursuant to the security agreement, unless the mortgagor specifically requests and HUD, for good cause, approves subordination of the lien of the insured mortgagee on specific personalty for specific periods of time. The first lien on the realty (as defined in the regulatory agreement and as identified in the security instrument) cannot be subordinated in whole or in part.

§ 242.65 Distribution of assets.

The Commissioner shall establish financial thresholds and procedures for the distribution of surplus cash and other assets. Surplus cash that meets the definition in 24 CFR 242.1, or cash that has been expressly approved for distribution by HUD, may be distributed to other organizations formally affiliated with the mortgagor, a parent organization with which the mortgagor is also affiliated, partners, or stockholders, in accordance with those financial thresholds and procedures set forth in the regulatory agreement. Other assets may be distributed to other organizations formally affiliated with the mortgagor, a parent organization with which the mortgagor is also affiliated, partners, or stockholders, in accordance with those financial thresholds and procedures set forth in the regulatory agreement, and in accordance with the release of lien conditions in 24 CFR 242.62, if applicable.

§ 242.66 Affiliate transactions.

Transactions with affiliates that are arms-length are permitted as specified in the Regulatory Agreement. Transactions with affiliates that are not arms-length are not permitted except with the prior written approval of HUD.

§ 242.67 New corporations, subsidiaries, affiliations, and mergers.

The mortgagor shall not establish, develop, organize, acquire, become the sole member of, or acquire an interest sufficient to require disclosure on the audited financial statements of the mortgagor, in any corporation, subsidiary, or affiliate organization other than those with which the mortgagor was affiliated as of date of application, without the prior approval of HUD. The mortgagor shall obtain HUD's written approval for all future mergers.

Subpart H—Miscellaneous Requirements

§ 242.68 Disclosure and verification of Social Security and Employer Identification Numbers.

The requirements set forth in 24 CFR part 5, regarding the disclosure and verification of Social Security Numbers and Employer Identification Numbers, and Employer Identification Numbers by ''applicants for and participants in'' assisted mortgage and loan insurance and related programs, apply to this program.

§ 242.69 Transfer fee.

Upon application for review of a transfer of physical assets or the substitution of mortgagors, a transfer fee of 50 cents per thousand dollars of the outstanding principal balance of the mortgage shall be paid to HUD. A transfer fee is not required if both parties to the transfer transaction are not-for-profit or public organizations.

§ 242.70 Fees not required.

The payment of an application, commitment, inspection, or reopening fee shall not be required in connection with the insurance of a mortgage involving the sale by the Secretary of any property acquired under any section or title of the Act.

§ 242.72 Leasing of hospital.

Leasing of a hospital in its entirety is prohibited. Notwithstanding this prohibition, any proposal in which leasing of the entire facility is a factor due to state law prohibitions against the mortgaging of health care facilities by state entities shall be considered on a case-by-case basis. Also, leasing of a hospital that has an existing Section 242-insured loan is permitted if HUD determines that leasing is necessary to reduce the risk of default by a financially troubled hospital.

§ 242.73 Waiver of eligibility requirements for mortgage insurance.

The Secretary may insure under this part, without regard to any limitation upon eligibility contained in this subpart, any mortgage assigned to him or her in connection with payment under a contract of mortgage insurance, or executed in connection with a sale by him or her of any property previously insured under this part and acquired subsequent to a claim.

§ 242.74 Smoke detectors.

Each occupied room must include such smoke detectors as are required by law.

§ 242.75 Title requirements.

In order for the mortgaged property to be eligible for insurance, HUD shall determine that marketable title thereto is vested in the mortgagor as of the date the mortgage is filed for record. The title evidence shall be examined by HUD and the endorsement of the mortgage note for insurance shall be evidence of its acceptability.

§ 242.76 Title evidence.

Upon insurance of the mortgage, the mortgagee shall furnish to HUD a survey of the mortgage property, satisfactory to HUD, and a policy of title insurance covering the property, as provided in

paragraph (a) of this section. If, for reasons HUD considers to be satisfactory, title insurance cannot be furnished, the mortgagee shall furnish such evidence of title in accordance with paragraph (b) or (c) of this section as HUD may require. Any survey, policy of title insurance, or evidence of title required under this section shall be furnished without expense to HUD. The types of title evidence are:

(a) A policy of title insurance issued by a company and in a form satisfactory to HUD. The policy shall name as the insureds the mortgagee and the Secretary of Housing and Urban Development, and their successors and assigns, as their respective interests may appear. The policy shall provide that upon acquisition of title by the mortgagee or the Secretary, it will continue to provide the same coverage as the original policy, and will run to the mortgagee or the Secretary, as the case may be.

(b) An abstract of title satisfactory to HUD, prepared by an abstract company or individual engaged in the business of preparing abstracts of title, accompanied by a legal opinion satisfactory to HUD as to the quality of such title, signed by an attorney-at-law experienced in the examination of titles.

(c) A Torrens or similar title certificate.

§ 242.77 Liens.

The hospital must be free and clear of all liens other than the insured mortgage, except that the property may be subject to a lien as provided by terms and conditions established by HUD, as follows:

(a) An inferior lien made or held by a federal, state, or local government instrumentality;

(b) An inferior lien required in connection with a supplemental loan insured pursuant to section 241 of the Act;

(c) An inferior or superior lien on equipment as may be approved in connection with an equipment leasing program approved by HUD;

(d) An inferior or superior lien on accounts receivable as approved by HUD as collateral for a line of credit or other borrowing by a hospital insured under this part that has extraordinary needs such as cash flow difficulties; or

(e) Similar liens otherwise approved by HUD.

§ 242.78 Zoning, deed, and building restrictions.

The project when completed shall not violate any material zoning or deed restrictions applicable to the project site, and shall comply with all applicable building and other governmental codes, ordinances, regulations, and requirements.

§ 242.79 Environmental quality determinations and standards.

Requirements set forth in 24 CFR part 50, ''Protection and Enhancement of Environmental Quality,'' 24 CFR part 51, ''Environmental Criteria and Standards,'' and 24 CFR part 55, ''Floodplain Management,'' governing environmental review responsibilities (as applicable) and any additional environmental standards, reviews, or determinations required by HUD apply to this program.

§ 242.81 Lead-based paint poisoning prevention.

Requirements set forth in 24 CFR part 35 apply to this program.

§ 242.82 Energy conservation.

Construction, mechanical equipment, and energy and metering selections shall provide cost-effective energy conservation in accordance with standards established by HUD.

§ 242.83 Debarment and suspension.

The requirements set forth in 24 CFR part 24 apply to this program.

§ 242.84 Previous participation and compliance requirements.

The requirements set forth in 24 CFR part 200, subpart H, apply to this program.

§ 242.86 Property and mortgage assessment.

The requirements set forth in 24 CFR part 200, subpart E, regarding the mortgagor's responsibility for making those investigations, analysis, and inspections it deems necessary for protecting its interests in the property apply to these programs.

§ 242.87 Certifications.

Any agreement, undertaking, statement, or certification required by HUD shall specifically state that it has been made, presented, and delivered for the purpose of influencing an official action of the FHA, and of HUD, and may be relied upon by HUD as a true statement of the facts contained therein.

§ 242.89 Supplemental loans.

A loan, advance of credit, or purchase of an obligation representing a loan or advance of credit made for the purpose of financing improvements or additions (including the refinancing of any indebtedness incurred in connection with the early commencement of work on such improvements or additions, subject to the requirements of §§ 242.15 and 242.45) to a hospital covered by a mortgage insured under this section of the Act or for a Commissioner-held mortgage, or equipment for a hospital, may be insured pursuant to the provisions of section 241 of the Act and under the provisions of this part as applicable and such additional terms and conditions as established by HUD. See subpart B of 24 CFR part 241 with respect to the contract of mortgage insurance for all loans insured under section 241 of the Act. See 24 CFR part 241, subpart C, for energy improvements.

§ 242.90 Eligibility of mortgages covering hospitals in certain neighborhoods.

(a) A mortgage financing the repair, rehabilitation, or construction of a hospital located in an older declining urban area shall be eligible for insurance under this subpart, subject to compliance with the additional requirements of this section.

(b) The mortgage shall meet all of the requirements of this subpart, except such requirements (other than those relating to labor standards and prevailing wages or environmental review) as are judged to be not applicable on the basis of the following determinations to be made by HUD.

(1) That the conditions of the area in which the property is located prevent the application of certain eligibility requirements of this subpart.

(2) That the area is reasonably viable, and there is a need in the area for an adequate hospital to serve low and moderate income families.

(3) That the mortgage to be insured is an acceptable risk.

(c) Mortgages complying with the requirements of this section shall be insured under this subpart pursuant to section 223(e) of the National Housing Act. Such mortgages shall be insured under and be the obligation of the Special Risk Insurance Fund.

§ 242.91 Eligibility of refinancing transactions.

A mortgage given to refinance an existing insured mortgage under section 241 or Section 242 of the Act covering a hospital may be insured under this subpart pursuant to section 223(a)(7) of the Act. Insurance of the new, refinancing mortgage shall be subject to the following limitations:

(a) *Principal amount.* The principal amount of the refinancing mortgage shall not exceed the lesser of:

(1) The original principal amount of the existing insured mortgage, or

(2) The unpaid principal amount of the existing insured mortgage, to which may be added loan closing charges associated with the refinancing

mortgage, and costs, as determined by HUD, of improvements, upgrading, or additions required to be made to the property.

(b) *Debt service rate*. The monthly debt service payment for the refinancing mortgage may not exceed the debt service payment charged for the existing mortgage.

(c) *Mortgage term*. The term of the new mortgage shall not exceed the unexpired term of the existing mortgage, except that the new mortgage may have a term of not more than 12 years in excess of the unexpired term of the existing mortgage in any case in which HUD determines that the insurance of the mortgage for an additional term will inure to the benefit of the FHA Insurance Fund, taking into consideration the outstanding insurance liability under the existing insured mortgage, and the remaining economic life of the property.

(d) *Minimum loan amount*. The mortgagee may not require a minimum principal amount to be outstanding on the loan secured by the existing mortgage.

§ 242.92 Minimum principal loan amount.

A mortgagee may not require, as a condition of providing a loan secured by a mortgage insured under this part, that the principal amount of the mortgage exceed a minimum amount established by the mortgagee.

§ 242.93 Amendment of regulations.

The regulations in this subpart may be amended by HUD at any time and from time to time, in whole or in part, but such amendment shall not adversely affect the interests of a mortgagee or lender under the insurance on any mortgage or loan already insured, and shall not adversely affect the interests of a mortgagee or lender on any mortgage or loan to be insured on which HUD has issued a commitment to insure.

Dated: October 24, 2007.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E7–22406 Filed 11–27–07; 8:45 am]

BILLING CODE 4210–67–P

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648 ....64023, 64187
679 ....63871, 64034, 65539

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT NOVEMBER 28, 2007

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Alaska; fisheries of Exclusive Economic Zone—

Salmon bycatch measures; published 10-29-07

ENVIRONMENTAL PROTECTION AGENCY

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Acetamiprid; published 11-28-07

FEDERAL DEPOSIT INSURANCE CORPORATION

Practice and procedure:

Technical amendments; published 11-28-07

HOMELAND SECURITY DEPARTMENT

Coast Guard

Ports and waterways safety; regulated navigation areas, safety zones, security zones, etc.:

Buzzards Bay, MA; published 8-30-07

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Acquisition regulations:

Debarment and suspension procedures; published 10-29-07

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airworthiness directives:

Airbus; published 10-24-07

Boeing; published 10-24-07

British Aerospace Regional Aircraft; published 10-24-07

EADS SOCATA; published 11-8-07

Fokker; published 10-24-07

General Electric Co.; published 10-24-07

McDonnell Douglas; published 10-24-07

Standard instrument approach procedures; published 11-28-07

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Dairy Product Mandatory Reporting Program; establishment; comments due by 12-3-07; published 11-2-07 [FR E7-21559]

Egg, poultry, and rabbit products; inspection and grading:

Fees and charges increase; comments due by 12-6-07; published 11-6-07 [FR 07-05571]

Leafy greens; handling regulations; comments due by 12-3-07; published 10-4-07 [FR E7-19629]

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Agricultural Bioterrorism Protection Act of 2002; implementation:

Select agent and toxin list; biennial review and republication; comments due by 12-3-07; published 11-16-07 [FR E7-22431]

AGRICULTURE DEPARTMENT

Agricultural Research Service

Patent licenses; non-exclusive, exclusive, or partially exclusive:

ISTO Technologies, Inc.; comments due by 12-6-07; published 11-6-07 [FR 07-05505]

Peterson Seed Associates; comments due by 12-6-07; published 11-6-07 [FR 07-05504]

AGRICULTURE DEPARTMENT

Grain Inspection, Packers and Stockyards Administration

Ethanol production, differentiating grain inputs and standardized testing of ethanol production co-products; USDA role; comments due by 12-4-07; published 10-5-07 [FR E7-19733]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Caribbean, Gulf, and South Atlantic fisheries—

Gulf of Mexico reef fish and shrimp; comments due by 12-7-07; published 10-23-07 [FR 07-05245]

Northeastern United States fisheries—

Summer flounder, scup, and black sea bass; comments due by 12-3-07; published 11-14-07 [FR 07-05647]

DEFENSE DEPARTMENT

Non-Federal entities authorized to operate installations; procedures and support; comments due by 12-3-07; published 10-2-07 [FR E7-19446]

DEFENSE DEPARTMENT

Navy Department

Admiralty claims; comments due by 12-3-07; published 10-3-07 [FR E7-19407]

ENVIRONMENTAL PROTECTION AGENCY

Acquisition regulations:

Award term incentives use, guidance; administrative amendments; comments due by 12-3-07; published 10-4-07 [FR E7-19632]

Air quality implementation plans; approval and promulgation; various States:

Colorado; comments due by 12-6-07; published 11-6-07 [FR E7-21611]

Connecticut; comments due by 12-5-07; published 11-5-07 [FR E7-21690]

Delaware; comments due by 12-7-07; published 11-7-07 [FR E7-21853]

Louisiana; comments due by 12-6-07; published 11-6-07 [FR E7-21687]

Massachusetts; comments due by 12-5-07; published 11-5-07 [FR E7-21691]

West Virginia; comments due by 12-7-07; published 11-7-07 [FR E7-21866]

Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:

Thiabendazole; comments due by 12-3-07; published 10-3-07 [FR E7-19542]

FEDERAL COMMUNICATIONS COMMISSION

Emergency Alert System; regulatory review; comments due by 12-3-07; published 11-2-07 [FR 07-05331]

Radio services, special:

Private land mobile services—

800 MHz band; improving public safety communications; comments due by 12-3-07; published 11-13-07 [FR E7-22128]

FEDERAL MEDIATION AND CONCILIATION SERVICE

Freedom of Information Act; implementation; comments due by 12-5-07; published 11-5-07 [FR E7-21629]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Food for human consumption:

Food labeling—

Dietary noncariogenic carbohydrate sweeteners and dental caries; health claims; comments due by 12-3-07; published 9-17-07 [FR E7-18196]

HOMELAND SECURITY DEPARTMENT

U.S. Customs and Border Protection

Air commerce:

Private aircraft arriving and departing U.S.; advance information requirement; comments due by 12-4-07; published 11-14-07 [FR E7-22309]

Immigration regulations:

Nonimmigrant aliens infected with HIV; visa and authorization for temporary admission into U.S.; comments due by 12-6-07; published 11-6-07 [FR E7-21841]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Drawbridge operations:

Louisiana; comments due by 12-3-07; published 10-2-07 [FR E7-19422]

Ports and waterways safety; regulated navigation areas, safety zones, security zones, etc.:

Manbirtee Key, Manatee, FL; comments due by 12-6-07; published 11-6-07 [FR E7-21761]

St. Petersburg Captain of Port Zone, FL; comments due by 12-6-07; published 11-6-07 [FR E7-21760]

HOMELAND SECURITY DEPARTMENT

U.S. Citizenship and Immigration Services

Immigration:

Intercountry adoptions by U.S. citizens; citizenship

classification of alien children under Hague Convention; comments due by 12-3-07; published 10-4-07 [FR E7-18992]

INTERIOR DEPARTMENT

National Indian Gaming Commission

Indian Gaming Regulatory Act:

Facility license standards; comments due by 12-3-07; published 10-18-07 [FR E7-20541]

PERSONNEL MANAGEMENT OFFICE

Reemployment rights:

Federal employees detailed and transferred to international organizations; comments due by 12-3-07; published 10-2-07 [FR E7-19447]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airport noise compatibility program:

Noise exposure maps—

Cincinnati/Northern Kentucky International Airport, KY; comments due by 12-8-07; published 10-17-07 [FR 07-05102]

Airworthiness directives:

Airbus; comments due by 12-3-07; published 11-1-07 [FR E7-21394]

Boeing; comments due by 12-3-07; published 10-17-07 [FR E7-20466]

Cessna; comments due by 12-3-07; published 11-2-07 [FR E7-21571]

Empresa Brasileira de Aeronautica S.A. (EMBRAER); comments due by 12-3-07; published 11-1-07 [FR E7-21490]

Honeywell; comments due by 12-4-07; published 10-5-07 [FR E7-19684]

McDonnell Douglas; comments due by 12-3-07; published 11-14-07 [FR 07-05654]

Airworthiness standards:

Aircraft engine standards for pressurized engine static parts; comments due by 12-5-07; published 9-6-07 [FR E7-17626]

Special conditions—

Cessna Model 208B airplane; comments due by 12-3-07; published 11-2-07 [FR E7-21599]

Class E airspace; comments due by 12-5-07; published 11-2-07 [FR 07-05421]

Restricted areas; comments due by 12-7-07; published 10-23-07 [FR E7-20795]

TRANSPORTATION DEPARTMENT

National Highway Traffic Safety Administration

Motor vehicle safety standards:

Controls, telltales, and indicators; comments due by 12-3-07; published 10-4-07 [FR E7-19365]

TREASURY DEPARTMENT

International Investment Office

Foreign Investment and National Security Act (2007); implementation:

Mergers, acquisitions and takeovers; comments due by 12-7-07; published 10-11-07 [FR E7-20042]

VETERANS AFFAIRS DEPARTMENT

Compensation, pension, burial, and related benefits:

Payments to beneficiaries who are eligible for more than one benefit; comments due by 12-3-07; published 10-2-07 [FR E7-19280]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "P L U S" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 2602/P.L. 110–118

To name the Department of Veterans Affairs medical facility in Iron Mountain, Michigan, as the "Oscar G. Johnson Department of Veterans Affairs Medical Facility". (Nov. 16, 2007; 121 Stat. 1346)

S.J. Res. 7/P.L. 110–119

Providing for the reappointment of Roger W. Sant as a citizen regent of the Board of Regents of the Smithsonian Institution. (Nov. 16, 2007; 121 Stat. 1347)

S. 2206/P.L. 110–120

To provide technical corrections to Public Law 109-116 (2 U.S.C. 2131a note) to extend the time period for the Joint Committee on the Library to enter into an agreement to obtain a statue of Rosa Parks, and for other purposes. (Nov. 19, 2007; 121 Stat. 1348)

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