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## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

### 7 CFR Part 331

### 9 CFR Part 121

**[Docket No. APHIS–2007–0033]**

**RIN 0579–AC53**

## Agricultural Bioterrorism Protection Act of 2002; Biennial Review and Republication of the Select Agent and Toxin List

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

**ACTION:** Final rule.

**SUMMARY:** In accordance with the Agricultural Bioterrorism Protection Act of 2002, we are amending and republishing the list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products. The Act requires the biennial review and republication of the list of select agents and toxins and the revision of the list as necessary. This action implements the findings of the second biennial review of the list.

**DATES:** *Effective Date:* November 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** For information concerning the regulations in 7 CFR part 331, contact Ms. Cassie Armiger, Program Analyst, Select Agent Program, PPQ, APHIS, 4700 River Road Unit 2, Riverdale, MD 20737–1231, (301) 734–5960.

For information concerning the regulations in 9 CFR part 121, contact Dr. Frederick D. Doddy, Staff Veterinarian, Animals, Organisms and Vectors, and Select Agents, NCIE, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231, (301) 734–5960.

**SUPPLEMENTARY INFORMATION:**

### Background

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 provides for the regulation of certain biological agents and toxins that have the potential to pose a severe threat to both human and animal health, to animal health, to plant health, or to animal and plant products. The Animal and Plant Health Inspection Service (APHIS) has the primary responsibility for implementing the provisions of the Act within the Department of Agriculture (USDA). Plant Protection and Quarantine (PPQ) select agents and toxins are those that have been determined to have the potential to pose a severe threat to plant health or plant products. Veterinary Services (VS) select agents and toxins are those that have been determined to have the potential to pose a severe threat to animal health or animal products. Overlap select agents and toxins—*i.e.*, those determined to have the potential to pose a severe threat to public health and to animal health or animal products—are subject to regulation by both APHIS and the Centers for Disease Control and Prevention (CDC), which has the primary responsibility for implementing the provisions of the Act for the Department of Health and Human Services (HHS).

Subtitle B (which is cited as the ''Agricultural Bioterrorism Protection Act of 2002'' and referred to below as the Act), section 212(a), provides, in part, that the Secretary of Agriculture (the Secretary) must establish by regulation a list of each biological agent and each toxin that the Secretary determines has the potential to pose a severe threat to animal or plant health, or to animal or plant products. Paragraph (a)(2) of section 212 requires the Secretary to review and republish the list every 2 years and to revise the list as necessary.

In determining whether to include an agent or toxin on the list, the Act requires that the following criteria be considered:

- The effect of exposure to the agent or toxin on animal or plant health, and on the production and marketability of animal or plant products;
- The pathogenicity of the agent or the toxin and the methods by which the agent or toxin is transferred to animals or plants;
- The availability and effectiveness of pharmacotherapies and prophylaxes to treat and prevent any illness caused by the agent or toxin; and
- Any other criteria that the Secretary considers appropriate to protect animal or plant health, or animal or plant products.

On August 28, 2007, in accordance with the Act, we published in the **Federal Register** (72 FR 49231–49236, Docket No. APHIS–2007–0033) a proposal [1] to amend and republish the list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products.

We solicited comments concerning our proposal for 60 days ending October 29, 2007. We received 41 comments by that date. On November 16, 2007, we published a notice in the **Federal Register** (72 FR 64540) to reopen the comment period for an additional 15 days to allow interested persons additional time to prepare and submit comments. We received an additional 21 comments by the December 3, 2007, close of the reopened comment period, for a total of 62 comments. The comments we received on the proposed rule were from academic institutions, professional associations, corporations, nonprofit organizations, individuals, and representatives of State and Federal Government agencies. The comments are discussed below.

### PPQ Select Agents and Toxins

The list of PPQ select agents and toxins in 7 CFR 331.3 has included entries for *Candidatus* Liberobacter asiaticus and *Candidatus* Liberobacter africanus. In our proposed rule, we proposed to add *Candidatus* Liberobacter americanus to the list and to remove the entry for *Candidatus* Liberobacter asiaticus.

Many commenters supported the proposed delisting of *Candidatus* Liberobacter asiaticus, but opposed the proposed listing of *Candidatus* Liberobacter americanus, arguing that the presence of citrus greening disease in Florida makes both plant pathogens unlikely agents of bioterrorism. A

[1] To view the proposed rule and the comments we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0033.*

majority of those commenters also recommended that that *Candidatus* Liberobacter africanus should also be removed from the list of PPQ select agents and toxins for that same reason. Those commenters pointed out that in the field there are no apparent differences in the biology of the three plant pathogens and that there are few, if any, established polymerase chain reaction primers available to distinguish among them. Only one commenter supported the proposed listing of *Candidatus* Liberobacter americanus based on the assertion that it is more readily transmittable than *Candidatus* Liberobacter asiaticus; however, we are unaware of any evidence to support that specific assertion.

In response to the points raised by these commenters, we have reevaluated the available science. We agree with the commenters that it is difficult to distinguish between the three plant pathogens. In fact, in the Citrus Health Response Program developed by APHIS and Florida regulatory officials in consultation with the Florida citrus industry and other stakeholders, the management responses for the three bacterial species are identical. Further, we agree that the presence of citrus greening disease in Florida makes them unlikely agents of bioterrorism, as does the long latency period of the disease. Therefore, in this final rule, in addition to delisting *Candidatus* Liberobacter asiaticus as proposed, we are also removing *Candidatus* Liberobacter africanus from the list of PPQ select agent and toxins and have decided not to list *Candidatus* Liberobacter americanus as we had originally proposed.

The list of PPQ select agents and toxins has included an entry for *Xanthomonas oryzae* pv. *oryzicola*. In our proposed rule, we proposed to remove the pathovar designation (pv. *oryzicola*) from the currently listed organism and thus regulate both pathovars of *Xanthomonas oryzae* (*i.e.*, both *oryzicola* and *oryzae*).

Several commenters argued that the proposed removal of the pathovar designation from *Xanthomonas oryzae* pv. *oryzicola* is unnecessary because the exposure of *Xanthomonas oryzae* pv. *oryzae* in the United States carries low risk for significant and ongoing damage, and effective management practices and treatments make establishment unlikely. Most of these commenters also recommended that we remove both pathovars from our list.

We agree that there are effective response and recovery plans in development for treatment and management of these pathovars (*oryzicola* and *oryzae*). However, we do not believe that this alone is a sufficient reason to remove these agents from the list of select agents and toxins at this time. Both pathovars represent a significant risk to U.S. rice production. Until we obtain more scientific information to allow us to better evaluate the potential consequences of removing the pathovars from the list of select agents and toxins, and until we have identified an effective test that can quickly and conclusively distinguish between the pathovars, we intend to regulate all pathovars of *Xanthomonas oryzae* as proposed. As more information becomes available, we will be in a better position to reevaluate the commenters' recommendations.

The list of PPQ select agents and toxins has included an entry for *Peronosclerospora philippinensis*. We proposed to add *Peronosclerospora sacchari* as a synonym of that organism because recent scientific research has shown that these two organisms are the same.

One commenter did not agree with our proposed addition of *Peronosclerospora sacchari* as a synonym and cited evidence that *Peronosclerospora philippinensis* and *Peronosclerospora sacchari* may have differing host ranges to support his position.

The evidence cited by the commenter is not sufficient to convince us that we should not add *Peronosclerospora sacchari* as a synonym of *Peronosclerospora philippinensis*. While we do not believe there is currently sufficient science to confirm the potential speciation pointed to by the commenter, we are open to reconsidering the issue as new data are published.

We proposed to add *Phoma glycinicola* (formerly *Pyrenochaeta glycines*), which causes red leaf blotch of soybean, to the list of PPQ select agents and toxins.

One commenter was opposed to listing *Phoma glycinicola* as a select agent. The commenter stated that the pathogen is not conducive to widespread movement, effective chemical treatments are available, and the advanced knowledge of plant pathology required to isolate the pathogen makes it unsuitable as a potential weapon of terrorism. However, much of the evidence cited by the commenter was anecdotal and did not provide an adequate basis for not including this aggressive fungus, which is not currently present in the United States, on the list of PPQ select agents and toxins. Therefore, we are adding *Phoma glycinicola* to the list of PPQ select agents and toxins as proposed. We will review this listing in the future and would consider removing this pathogen from the list of PPQ select agents and toxins should new scientific information become available to support such an action.

We proposed to add *Phytophthora kernoviae* to the list of PPQ select agents and toxins based, in part, on our identification of this pathogen as a serious threat to the nursery industry and woodland areas.

One commenter argued that *Phytophthora kernoviae* should not be listed as a select agent based on evidence that it is primarily a forest pathogen and has not been found in the nursery industry as initially believed; accordingly, the effects of exposure on the production and marketability of plant products would be minimal. Further, the commenter stated that evidence suggests that the current regulatory systems and surveys for *Phytophthora ramorum* could be effectively applied toward the control of *Phytophthora kernoviae*.

We agree with this commenter's point that current regulatory systems and surveys for *Phytophthora ramorum* could be effectively applied toward the surveillance for *Phytophthora kernoviae*. Based on this consideration and due to a clearer understanding of the epidemiology of *Phytophthora kernoviae* that suggests a reduction in the initially determined host range of the pathogen, we have decided that *Phytophthora kernoviae* should not be listed as a select agent. We note that a plant pest permit issued under our regulations in 7 CFR part 330 will still be required for the importation or interstate movement of *Phytophthora kernoviae*, however.

We proposed to add *Rathayibacter toxicus*, a bacterium that causes gumming disease in ryegrass, to the list of PPQ select agents and toxins.

One commenter supported the proposed listing, but recommended that APHIS develop a reliable diagnostic tool to differentiate between *Rathayibacter toxicus* and the related, non-toxic species *Rathayibacter rathayi*. This commenter stated it is critically important to be able to distinguish between the two species for the purposes of cooperative pest surveys and for phytosanitary certification purposes. We agree that it is important to develop a diagnostic tool to distinguish between these two species and note that the USDA's Agricultural Research Service is conducting an ongoing research project focused on the identification, molecular characterization, and detection of

foreign and newly emerging domestic bacteria (including *Rathayibacter toxicus*). However, this is not a basis for not including *Rathayibacter toxicus* on the select agent list.

**Overlap and VS Select Agents and Toxins**

We proposed to remove 10 of the 20 overlap select agents and toxins from the list in 9 CFR 121.4(b). Specifically, we proposed to remove three bacteria (Botulinum neurotoxin producing species of *Clostridium, Coxiella burnetii*, and *Francisella tularensis*), a fungus (*Coccidioides immitis*), a virus (Eastern equine encephalitis virus), and five toxins (Botulinum neurotoxins, *Clostridium perfringens* epsilon toxin, shigatoxin, staphylococcal enterotoxin, and T–2 toxin).

One commenter was opposed to the removal of botulinum neurotoxins and botulinum neurotoxin producing species of *Clostridium* from the list of overlap select agents and toxins. The commenter argued that the presence of a select agent in the environment does not minimize the potential for its use as a weapon of bioterrorism, which would result in clear economic and societal consequences.

We do not minimize the fact that botulinum neurotoxins and botulinum neurotoxin producing species of *Clostridium* can present a significant health risk to livestock; indeed, these neurotoxins are some of the most lethal substances known to animals, and could cause the death of many animals in large herds. However, we do not agree that the intentional use of botulinum neurotoxins would have a significant impact on U.S. export trade in animals and animal products, or have a long-term impact on U.S. agriculture. Based on evidence that transmissibility from animal to animal is negligible and that, historically, outbreaks of botulism occur periodically in the United States, we have determined that botulinum neurotoxins are a poor agroterrorism weapon, and we should, therefore, remove botulinum neurotoxins and botulinum neurotoxin producing species of *Clostridium* from the list of overlap select agents in our regulations in § 121.4(b). It should be noted, however, that botulinum neurotoxins and botulinum neurotoxin producing species of *Clostridium* will continue to be regulated by the CDC under its select agent and toxins regulations in 42 CFR part 73 due to their potential threat to human health.

One commenter asked that we clarify which strains of vesicular stomatitis virus (VSV) APHIS considers to be exotic.

Although we did not propose to make any changes in the regulations with respect to VSV, we agree that it would be helpful to clarify which subtypes of VSV we consider to be exotic. Two major serotypes of VSV, New Jersey (VSV–NJ or VSNJV) and Indiana (VSV–IN1 or VSIV), have been reported to cause classical vesicular stomatitis disease in agriculturally significant animals (*i.e.*, cattle, horses, and swine) throughout the Americas. Two subtypes of the Indiana serotype, Cocal (VSIV–IN2 or VSIV–2) and Alagoas (VSV–IN3 or VSIV–3), cause vesicular disease in livestock in Brazil and Argentina. In the United States, VSV has not become established, but domestic outbreaks of VSV caused by VSV–NJ and VSV–IN1 occur sporadically in cycles. Therefore, we have clarified in the regulations that the listed VS select agent ''vesicular stomatitis virus (exotic)'' refers to Indiana subtypes VSV–IN2 and VSV–IN3.

Two commenters involved in the development of veterinary biological products noted that 4 of the 10 overlap select agents and toxins that APHIS had proposed to remove from its list in § 121.4 were agents that the veterinary biologics industry uses to manufacture licensed veterinary biologics or uses in product research and development. Noting that the veterinary biologics industry has a well-established relationship with APHIS' Center for Veterinary Biologics (CVB), the commenters were concerned about what may happen when APHIS no longer has a role in regulating those agents as select agents or toxins. The commenters suggested that:

- The agents should be removed from the CDC select agent list to mirror their delisting by APHIS;
- CDC should exempt the use of the agents in the manufacture of veterinary biologics by CVB-licensed facilities and their investigation use under CVB supervision;
- APHIS should keep the agents on the overlap list; or
- CDC should utilize APHIS/CVB for oversight and inspection of CVB-licensed firms.

We acknowledge that there will be some entities that produce veterinary biologics that will now possess select agents or toxins regulated only by CDC, so the APHIS select agent program will not be part of the inspection process at those facilities unless the facility also possesses VS select agents or toxins. In either case, however, CVB will continue to conduct its own compliance inspections and otherwise exercise oversight of veterinary biologics facilities in keeping with its responsibilities under the Virus-Serum-Toxin Act (VSTA). The compliance inspections conducted by CVB under the VSTA are separate and distinct from the inspections conducted under the select agent program, and there will be no disruption or change in the way CVB conducts those compliance inspections as a result of the removal of select agents and toxins from the overlap list. As for the select agent program, we note that the regulations administered by APHIS and CDC are entirely consistent with each other, so there will be no change in security requirements, registration procedures, restrictions, exemptions, etc. With respect to inspections and other activities conducted under the select agent program, APHIS and CDC have established procedures that ensure close coordination and consistency in the regulation of select agents and toxins. We do not, therefore, believe that it is necessary to make any of the changes suggested by the commenters in order to ensure the continuing efficiency and consistency of the regulation of select agents and toxins by APHIS and CDC.

**Other Comments**

Several commenters argued that the cost to upgrade security at existing facilities was prohibitive. One commenter stated that the cost of compliance with the regulations at his facility came to almost $150,000. Other commenters asserted that research facilities that possess, use, or transfer a select agent or toxin would be forced to close due to dramatic increases in the cost of research, or that research programs will be impeded by the regulatory requirements or even terminated because researchers and their institutions will not want to deal with the new regulatory requirements or be liable for violations of the regulations.

In our economic analysis for the proposed rule, we stated that an entity that possesses a newly added agent will have to comply with the regulations, and may therefore incur cost. We also noted that the costs to comply with the security requirements are site-specific and will vary accordingly. In this final rule, we reiterate that compliance with the regulations can be achieved in a wide variety of ways, and while some of these methods can be expensive, the regulations do not specify how the physical security needs (limiting access to the agents) are to be met, only that they are to be commensurate with the threat that the select agent or toxin poses. Therefore, an entity can choose the most cost-effective alternative to meeting those needs. Often an entity's

standard operating procedures for security are sufficient. Accordingly, research facilities that possess, use, or transfer a select agent or toxin may not be forced to close, as one commenter fears, due to an increased cost of research.

We were required by the Act to establish, by regulation, standards and procedures governing the possession, use, and transfer of listed biological agents and toxins in order to protect animal and plant health, and animal and plant products. Those standards and procedures were established in an interim rule published in the **Federal Register** on December 13, 2002, and effective on February 11, 2003. To date, the commenters' concerns about the costs or difficulties of complying with the regulations have failed to materialize.

Several commenters argued that the process of registering an entity is excessively time-consuming and that the regulations entail additional recordkeeping requirements. One commenter claimed that the process of approval (Federal Bureau of Investigation (FBI) checks, security plans, lab and greenhouse modifications, training, and inspection) took more than 1 year.

Registered entities must develop and implement a written security plan that provides graded protection in accordance with the risk of the select agent or toxin, given its intended use, and must develop and implement a written biosafety/biocontainment plan that is commensurate with the risk of the agent or toxin, given its intended use. Registered entities must also develop and implement a written incident response plan that describes the entity's response procedures for releases, theft, or loss of a select agent or toxin, etc. These reporting and recordkeeping requirements have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act. As for the length of time it took the one commenter's facility to become registered, there are a variety of factors that could have contributed to such a lengthy process, but we are unaware of the particular circumstances of the commenter's experience. We do note that the necessary security risk assessment (SRA) checks are provided free of charge by the FBI and take approximately 45 days to complete, and that APHIS and CDC are committed to ensuring that the registration process is conducted as efficiently as possible.

One commenter stated that we need a mechanism that would allow the timely delisting of a newly detected select agent if it is found to be widely distributed and ineradicable.

Given that the Administrative Procedure Act provides that an agency may, with a showing of good cause, make a rule effective in less than 30 days and without prior opportunity for public comment, we do not believe it is necessary for us to establish any new mechanism for delisting or otherwise amending the regulations.

We received many comments that recommended we remove specific PPQ, VS, and overlap select agents from the lists in 7 CFR part 331 and 9 CFR part 121. The PPQ select agents specifically mentioned were *Ralstonia solanacearum*, race 3, biovar 2; *Sclerophthora rayssiae* var. *zeae*; *Synchytrium endobioticum*; and *Xylella fastidiosa* (citrus variegated chlorosis strain), and the VS select agents mentioned were the bovine spongiform encephalopathy agent and Venezuelan equine encephalitis virus. These commenters supplied detailed information to support their position that these select agents should be delisted; in most cases, the commenters asserted that the continued listing of specific agents they considered low risks for bioterrorism was prohibitive and impeded timely research. Conversely, another commenter submitted information supporting his contention that the agents that cause scrapie and chronic wasting disease should be added to the list of VS select agents and toxins.

We will take the information provided by the commenters into account as we continue to review our regulations and anticipate that we will be providing an opportunity in the future for affected entities and the general public to offer suggestions for adding or eliminating select agents and toxins to or from the lists in our regulations. We will use the information provided by the commenters as we consider the potential regulatory changes that may be part of our next proposed rule.

**Miscellaneous Change**

We are making one other change in this final rule. In the proposed rule, we included an explanatory footnote to the entry for ''virulent Newcastle disease virus'' in the proposed list of VS select agents and toxins. This footnote read: ''A virulent Newcastle disease virus (avian paramyxovirus serotype 1) has an intracerebral pathogenicity index in day-old chicks (*Gallus gallus*) of 0.7 or greater or having an amino acid sequence at the fusion (F) protein cleavage site that is consistent with virulent strains of Newcastle disease virus.'' We are replacing the word ''having'' in the proposed footnote with the word ''has.'' In addition, we are adding a sentence to further clarify the definition: ''A failure to detect a cleavage site that is consistent with virulent strains does not confirm the absence of a virulent virus.'' This sentence will provide additional guidance to entities in determining whether they possess a virulent strain of Newcastle disease virus.

**Compliance Dates**

We recognize that there may be some entities that are not currently registered under the select agents program, but that possess one of the PPQ select agents being added to the regulations by this final rule. The PPQ select agents we are adding to the regulations in 7 CFR part 331 are:

- *Xanthomonas oryzae* pv. *oryzae*,
- *Peronosclerospora sacchari*,
- *Phoma glycinicola* (formerly *Pyrenochaeta glycines*), and
- *Rathayibacter toxicus.*

In addition, although it is not likely, the redefinition of Newcastle disease virus (velogenic) to virulent Newcastle disease virus may lead to new registrants, as it is possible that additional entities may be in possession of a virulent strain of Newcastle disease virus that does not fit the current definition.

Accordingly, entities that currently possess one of those four agents or a strain of Newcastle disease virus that we now define as virulent, if they are not already registered entities, will have to either transfer the organism to a registered entity or become a registered entity themselves as a result of this final rule. Those entities that choose to become registered will need time to come into full compliance with the requirements of the regulations.

This final rule will become effective on November 17, 2008. On and after that date, any individual or entity possessing, using, or transferring any listed agent or toxin must be in compliance with the provisions of each part.

However, to minimize the disruption of research or educational projects (*e.g.*, teaching demonstrations) involving listed select agents or toxins that were underway as of the effective date of these regulations, we provide that any individual or entity possessing such agents or toxins as of the effective date (current possessors) will be afforded additional time to reach full compliance with the regulations in each part. Accordingly, by November 17, 2008, the responsible official at all entities that possess a new agent or toxin must provide notice to APHIS regarding their

possession of the new agent(s) and toxin(s). By April 14, 2008, all previously unregistered entities must be registered.

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 changes discussed in this document.

**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.

In accordance with the Agricultural Bioterrorism Protection Act of 2002, we are amending and republishing the list of select agents and toxins that have the potential to pose a severe threat to animal or plant health, or to animal or plant products. The Act requires the biennial review and republication of the list of select agents and toxins and the revision of the list as necessary. This action implements the findings of the second biennial review of the list.

Certain pathogens or toxins produced by biological organisms that are released intentionally or accidentally can result in disease, wide-ranging and devastating impacts on the economy, disruption to society, diminished confidence in public and private institutions, and large-scale loss of life. People or livestock can be exposed to these agents from inhalation, through the skin, or by the ingestion of contaminated food, feed, or water. Similarly, crops can be exposed to biological pathogens in several ways—at the seed stage, in the field, or after harvest.

Because of its size and complexity, the U.S. food and agriculture system is vulnerable to deliberate attacks, particularly with foreign diseases that do not now occur domestically. The U.S. livestock industry, with revenues of approximately $150 billion annually, is extremely vulnerable to a host of highly infectious and often contagious biological agents that have been eradicated from the United States, or have never existed here. Many of these animal-targeted agents could simply be point-introduced into herds. Given the increasing concentration and specialization in the livestock industries, the introduction of a VS select agent or toxin could cause the immediate halt of movement and export of vast quantities of U.S. livestock and livestock products. Crops, too, are vulnerable. They are grown over very large areas (more than 75 million acres of soybeans were cultivated in the United States in 2006, for example), exacerbating difficulties in surveillance and monitoring.[2]

Preparedness for a biological attack against people, crops or livestock is complicated by the large number of potential agents, the long incubation periods of some agents, and the potential for secondary transmission. All of these factors make vital the prevention of the misuse of biological agents and toxins through registration, biosafety, and security measures and the availability of incident response capabilities.

Section 212(a)(2) of the Act requires a biennial review and republication of the select biological agent and toxin list, with revisions as appropriate in accordance with this law. This rule will implement the recommendations of the second biennial review of the list. Expected benefits and costs are examined in accordance with Executive Order 12866. Expected impacts for small entities are also considered, as required by the Regulatory Flexibility Act.

**Benefits and Costs**

This rule updates the lists of select agents and toxins contained in the regulations in 7 CFR part 331 and 9 CFR part 121. The regulations require registration, biosafety, incident response, and security measures for the possession, use, and transfer of the listed select agents and toxins. The regulations are intended to prevent the misuse of those select agents and toxins, and therefore reduce the potential for those pathogens to harm humans, animals, animal products, plants, or plant products in the United States. Should any select agent or toxin be intentionally introduced into the United States, the consequences would be significant. Direct losses in agriculture could occur as a result of the exposure, such as death or debility of affected production animals, or yield loss for plants. Industry could also be affected through the imposition of domestic and foreign quarantines that result in a loss of markets. The Federal Government and State governments would also incur costs associated with eradication and quarantine enforcement to prevent further spread, and in the case of intentional introduction, law enforcement. In addition, there is the potential for a disruption in the domestic food supply, whether through contamination, consumer perception, or both. Past food safety incidents have shown that consumer perceptions (both domestic and international) about an implicated food product and about the producing country or sector's ability to produce safe food are slow to recover and can have a lasting influence on food demand and global trade.[3] As such, the benefits of the rule are the avoided losses of animals or plants that could be attacked by these organisms or toxic materials (because of the reduced risk of release of the select agents and reduced likelihood of exposure for susceptible animals or plants), the avoided public and private costs of eradication, and the avoided negative effects on products and markets.

The costs associated with the outbreak of a select agent can be very high, as demonstrated, for example, by the losses to agriculture and the food chain from the foot-and-mouth disease (FMD) outbreak in the United Kingdom (UK) in 2001. Those costs amounted to about £3.1 billion ($4.7 billion). In 1999, it was estimated that the potential impacts of an FMD outbreak in California alone would be between $8.5 and $13.5 billion.[4] The bovine spongiform encephalopathy (BSE) crisis in the UK (which has a cattle industry about one-tenth the size of that in the United States) is another example. It has been estimated that the total resource costs to the UK economy as a result of BSE in the first 12 months after the onset of the 1996 crisis were in the range of £740 million to £980 million ($1.2 to $1.5 billion), or just over 0.1 percent of the gross domestic product of the United Kingdom.[5] In addition, the UK lost its entire export market for beef.

These are examples of consequences of natural or accidental disease introduction. Deliberate introduction greatly increases the probability of a select agent or toxin becoming established and causing wide-ranging and devastating impacts on an economy, disruption to society, diminished confidence in public and private institutions, and possible loss of life.

[2] Making the Nation Safer: The Role of Science and Technology in Countering Terrorism. Committee on Science and Technology for Countering Terrorism, Division on Engineering and Physical Sciences, National Research Council. National Academy Press (2002), and USDA National Agricultural Statistics Service, *Prospective Plantings,* March 30, 2007, Cr Pr 2–4, *http://www.usda.gov/nass/PUBS/TODAYRPT/pspl0307.txt.*

[3] Buzby, J.C. *Effects of food-safety perceptions on food demand and global trade.* Changing Structure of Global Food Consumption and Trade/WRS–01–1. Economic Research Service/USDA.

[4] Ekboir, J.M. *Potential impact of foot-and-mouth disease in California: the role and contribution of animal health surveillance and monitoring services.* Davis, CA: Agricultural Issues Center, Division of Agriculture and Natural Resources, University of California, Davis, 1999.

[5] DTZ Pieda Consulting. *Economic Impact of BSE on the UK economy.* A report commissioned by the UK Agricultural Departments and HM Treasury.

The entities most likely to be affected by this rule include research and diagnostic facilities, Federal, State, and university laboratories, and private commercial and non-profit enterprises. An entity that possesses, uses, or transfers listed select agents or toxins is required to comply with the select agent regulations. The regulations require registering the possession, transfer, or destruction of select agents or toxins. In addition, the entity is also required to ensure that the facility where the agent or toxin is housed has adequate biosafety and containment measures, that the physical security of the premises is adequate, that all individuals with access to select agents or toxins have appropriate training to handle such agents or toxins, and that complete records concerning activities related to the select agents or toxins are maintained.

The changes to the PPQ select agent list include the addition of four organisms to the list, the removal of two organisms from the list, and technical changes for organisms currently listed. An entity that possesses a newly added agent or toxin will have to comply with the select agent regulations, and may therefore incur costs. These primarily involve becoming registered, maintaining an inventory of the agents and toxins, and limiting access to the agent or toxin to those individuals who are qualified, have a need to have access to a select agent or toxin, and have an SRA conducted by the FBI. This rule does not change the process for obtaining the agents or toxins (*i.e.*, a permit is required regardless of whether an organism is listed as a select agent) or the bio-containment requirements as set forth in the existing permitting process. Necessary SRA checks are performed free of charge by the FBI and take approximately 45 days to complete. Limiting access to the listed agents or toxins can be achieved in a wide variety of ways. Some of these methods can be very expensive. For example, installing new state-of-the-art electronic surveillance equipment can run into the thousands of dollars even for a relatively small space. However, in most instances the physical security needs can be met with far less rigorous methods. Often an entity's standard operating procedures for security are sufficient. Because many entities deal with select agents or toxins in an area that is fully contained within a larger structure, a lack of entry control equipment may not affect the level of graded protection. It should also be noted that only that portion of a given entity affected by select agent or toxin operations is required to be secured. The select agent regulations do not specify how the physical security needs (limiting access to the agents) are to be met, only that they need to be adequate for the situation. Therefore, an entity can choose the most cost-effective alternative to meet those needs.

The changes should affect only a very small number of entities. The plant pest permit database maintained by APHIS indicates that very few entities currently possess any of the agents that are being added to the PPQ list. It is estimated that less than a total of 10 entities will be affected by changes to the plant list. In addition, most of the entities that do possess the newly added agents are already registered due to their possession of other listed select agents or toxins. After this rule goes into effect, entities will no longer be required to maintain records and security for those agents and toxins that are being removed from the select agent lists by this rule. However, the entities are still required to maintain select agent records for 3 years past the time they were regulated under 7 CFR part 331 or 9 CFR part 121. Additionally, permits are still required under 7 CFR part 330 or 9 CFR part 122 for those agents and toxins that have been removed from the lists. These changes should have little impact.

The changes to the VS select agent list include the removal of agents, the redefinition of an agent, and technical changes to the nomenclature used for some agents in the list to be consistent with current scientific literature. The agents that will be removed are overlap select agents and toxins regulated by both USDA and HHS. Any entity that is in possession of the overlap select agents and toxins that are to be removed, and that does not possess any other overlap agents or toxins or any of the APHIS select agents or toxins, will subsequently possess HHS-only agents and toxins and will thus continue to be subject to select agent regulations as administered by HHS. In addition, the organisms that will be removed from the lists of select agents and toxins (Botulinum neurotoxin producing species of *Clostridium, Coxiella burnetii,* and *Francisella tularensis;* the fungus *Coccidioides immitis;* and Eastern equine encephalitis virus) will continue to be subject to the regulations under 9 CFR part 122. The redefinition of Newcastle disease virus (velogenic) to virulent Newcastle disease virus may lead to new registrants. It is possible that additional entities may be in possession of a virulent strain of Newcastle disease virus that does not fit the current definition. However, these strains have not been circulating in the United States since the 1970s. Those entities most likely to be in possession of virulent Newcastle disease virus are those already in possession of Newcastle disease virus (velogenic) and therefore already registered. Therefore, these changes should have little impact.

**Alternatives Considered**

The alternative to this rule would be to leave the regulations unchanged. In this case, the lists of select agents in 7 CFR part 331 and 9 CFR part 121 would remain unchanged. However, APHIS has conducted reviews of these lists and concluded that changes are necessary to ensure that the lists contain those biological agents and toxins that have the potential to pose a severe threat to both human and animal health, to plant health, or to animal and plant products. These reviews were conducted in accordance with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which requires a biennial review and republication of the select biological agent and toxin list, with revisions as appropriate. Therefore, this alternative was rejected.

**Conclusion**

This rule will update the PPQ, VS, and overlap select agent lists. The regulation of select agents is intended to prevent their misuse and thereby reduce the potential for those agents and toxins to harm animals, animal products, plants, or plant products in the United States. Should any select agent or toxin be intentionally introduced into the United States, the consequences could be significant. Consequences could include disruption of markets, difficulties in sustaining an adequate food and fiber supply, and the potential spread of disease infestations over large areas. In any animal or plant disease outbreak, the Government would incur costs of eradication. Industry would be affected through the imposition of domestic and foreign quarantines that result in a loss of markets and the destruction of animals or plants found to be infected with the disease. Even though entities may be compensated for the destroyed property, repopulating (flocks, herds, fields, etc.) can take time, with additional losses incurred due to idle capital and lost markets. In addition, there is the potential for a disruption in the domestic food supply, whether through contamination, consumer perception, or both. Such a disruption can have a lasting influence on food demand and global trade.

The entities most likely to be affected by this rule are those laboratories and

other institutions conducting research and related activities that involve the use of the newly added select agents and toxins. The impact of these changes is expected to be minimal, however. Indications are that very few entities currently possess any of the agents or toxins that are being added to the list of select agents and toxins. Moreover, after this rule goes into effect, entities will no longer be required to maintain records and security for those agents and toxins that are being removed from the select agent lists by this rule. However, the entities are still required to maintain select agent records for 3 years past the time they were regulated under 7 CFR part 331 or 9 CFR part 121. Additionally, permits are still required under 7 CFR part 330 or 9 CFR part 122 for those agents and toxins that have been removed from the lists. Other changes do not affect what select agents or toxins are listed but rather the nomenclature by which those agents and toxins are identified, and therefore should have no economic impact on holders of those organisms or toxic materials.

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 12372**

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

**Executive Order 12988**

This 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 inconsistent 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.

**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**

*7 CFR Part 331*

Agricultural research, Laboratories, Plant diseases and pests, Reporting and recordkeeping requirements.

*9 CFR Part 121*

Agricultural research, Animal diseases, Laboratories, Medical research, Reporting and recordkeeping requirements.

■ Accordingly, we are amending 7 CFR part 331 and 9 CFR part 121 as follows:

## Title 7—[Amended]

## PART 331—POSSESSION, USE, AND TRANSFER OF SELECT AGENTS AND TOXINS

■ 1. The authority citation for part 331 continues to read as follows:

**Authority:** 7 U.S.C. 8401; 7 CFR 2.22, 2.80, and 371.3.

■ 2. In § 331.3, paragraph (b) is revised to read as follows:

**§ 331.3 PPQ select agents and toxins.**

* * * * *

(b) PPQ select agents and toxins:

*Peronosclerospora philippinensis* (*Peronosclerospora sacchari*);
*Phoma glycinicola* (formerly *Pyrenochaeta glycines*);
*Ralstonia solanacearum,* race 3, biovar 2;
*Rathayibacter toxicus;*
*Sclerophthora rayssiae* var. *zeae;*
*Synchytrium endobioticum;*
*Xanthomonas oryzae;*
*Xylella fastidiosa* (*citrus variegated chlorosis strain*).

* * * * *

## Title 9—[Amended]

## PART 121—POSSESSION, USE, AND TRANSFER OF SELECT AGENTS AND TOXINS

■ 3. The authority citation for part 121 continues to read as follows:

**Authority:** 7 U.S.C. 8401; 7 CFR 2.22, 2.80, and 371.4.

■ 4. In part 121, footnotes 1 through 14 are redesignated as footnotes 2 through 15, respectively.

■ 5. In § 121.3, paragraph (b) is revised to read as follows:

**§ 121.3 VS select agents and toxins.**

* * * * *

(b) VS select agents and toxins:

African horse sickness virus;
African swine fever virus;
Akabane virus;
Avian influenza virus (highly pathogenic);
Bluetongue virus (exotic);
Bovine spongiform encephalopathy agent;
Camel pox virus;
Classical swine fever virus;
*Ehrlichia ruminantium* (Heartwater);
Foot-and-mouth disease virus;
Goat pox virus;
Japanese encephalitis virus;
Lumpy skin disease virus;
Malignant catarrhal fever virus (Alcelaphine herpesvirus type 1);
Menangle virus;
*Mycoplasma capricolum* subspecies *capripneumoniae* (contagious caprine pleuropneumonia);
*Mycoplasma mycoides* subspecies *mycoides* small colony (*Mmm*SC) (contagious bovine pleuropneumonia);
Peste des petits ruminants virus;
Rinderpest virus;
Sheep pox virus;
Swine vesicular disease virus;
Vesicular stomatitis virus (exotic): Indiana subtypes VSV–IN2, VSV–IN3;
Virulent Newcastle disease virus [1]

* * * * *

■ 6. Section 121.4 is amended as follows:

■ a. By revising paragraph (b) to read as set forth below.

■ b. By removing paragraph (d)(3).

■ c. In paragraph (f)(3)(i), by removing the words ''*Botulinum neurotoxins,*'' and ''*Francisella tularensis*,''.

**§ 121.4 Overlap select agents and toxins.**

* * * * *

(b) Overlap select agents and toxins:

*Bacillus anthracis;*
*Brucella abortus;*
*Brucella melitensis;*
*Brucella suis;*
*Burkholderia mallei;*
*Burkholderia pseudomallei;*
Hendra virus;
Nipah virus;
Rift Valley fever virus;
Venezuelan equine encephalitis virus.

* * * * *

**§ 121.5 [Amended]**

■ 7. In § 121.5, paragraph (a)(3)(i) is amended by removing the words ''Newcastle disease virus (velogenic)'' and adding the words ''virulent Newcastle disease virus'' in their place.

**§ 121.6 [Amended]**

■ 8. In § 121.6, paragraph (a)(3)(i) is amended by removing the words ''*Botulinum neurotoxins,*'' and ''*Francisella tularensis,*''.

[1] A virulent Newcastle disease virus (avian paramyxovirus serotype 1) has an intracerebral pathogenicity index in day-old chicks (*Gallus gallus*) of 0.7 or greater or has an amino acid sequence at the fusion (F) protein cleavage site that is consistent with virulent strains of Newcastle disease virus. A failure to detect a cleavage site that is consistent with virulent strains does not confirm the absence of a virulent virus.

**§ 121.9 [Amended]**

■ 9. In § 121.9, paragraph (c)(1) is amended by removing the words ''*Botulinum neurotoxins,*'' and ''*Francisella tularensis,*'', and by removing the words ''Newcastle disease virus (velogenic)'' and adding the words ''virulent Newcastle disease virus'' in their place.

Done in Washington, DC, this 3rd day of October 2008.

**Kevin Shea,**

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

[FR Doc. E8–23887 Filed 10–15–08; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF HOMELAND SECURITY

## U.S. Citizenship and Immigration Services

## 8 CFR Parts 214 and 248

**[CIS No. 2429–07; DHS Docket No. USCIS–2007–0056]**

**RIN 1615–AB64**

## Period of Admission and Extension of Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities—TN Nonimmigrants

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Department of Homeland Security (DHS) is amending its regulations to allow an increased period of admission and extension of stay for Canadian and Mexican citizens who seek temporary entry to the United States as professionals pursuant to the TN classification, as established by the North American Free Trade Agreement (NAFTA or Agreement). This final rule increases the maximum allowable period of admission for TN nonimmigrants from one year to three years, and allows otherwise eligible TN nonimmigrants to be granted an extension of stay in increments of up to three years instead of the current maximum of one year. In addition, this rule grants the same periods of admission or extension to TD nonimmigrants, the spouses and unmarried minor children of TN nonimmigrants to run concurrent. The rule also removes the mention of specific petition filing locations from the TN regulations and replaces the outdated term ''TC'' (the previous term given to Canadian workers under the 1989 Canada-United States Free Trade Agreement) with ''TN.'' This rule will reduce the administrative burden of the TN classification on USCIS, and will ease the entry of eligible professionals to the United States.

**DATES:** This final rule is effective October 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Paola Rodriguez Hale, Adjudications Officer, Business and Trade Services, Office of Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529, telephone (202) 272–8410.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. NAFTA and the TN Classification*

NAFTA and the NAFTA Implementation Act, Public Law 103–182, redesignated section 214(e) of the Immigration and Nationality Act (INA) to create the ''trade NAFTA'' (TN) nonimmigrant classification and provide for the temporary entry of qualified business persons from each of the countries that signed the Agreement. The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry as business persons to engage in professional business activities at a professional level in the United States. 8 CFR 214.6(a). DHS regulations currently require that TN nonimmigrants may be admitted to the United States for a period not to exceed one year. 8 CFR 214.6(e). The regulations further provide that TN professionals may apply for extensions of stay for a maximum period of one year. 8 CFR 214.6(h)(1).

*B. Proposed Rule*

On May 9, 2008, DHS published a notice of proposed rulemaking in the **Federal Register** at 73 FR 26340 proposing a change in the period of admission and extension of stay granted to TN nonimmigrants from Canada and Mexico engaged in professional business activities. The notice also proposed granting the same period of admission or extension of stay to TN dependents (TD nonimmigrants), removing outdated references to specific filing locations and prior requirements, and replacing the outdated term TC with the current TN term. Written comments to the proposed rule were due on or before June 9, 2008.

In this final rule, DHS is adopting the proposed rule with no changes. The proposed rule was, and this final rule is, intended to improve the administration of the TN program and make it more flexible and attractive to Canadian and Mexican professionals and to employers in the United States. Currently, DHS regulations require TN nonimmigrants, to either seek readmission in TN status or apply for extensions of stay annually if they wish to remain in the United States beyond the period of their initial admission. 8 CFR 214.6(h). This requirement involves the annual submission of documentation and payment of filing fees. By removing these types of administrative requirements on TN employees and their U.S. employers, DHS will further the intent of NAFTA to facilitate the entry of eligible professionals into the United States.

### II. Comments Received in Response to the Proposed Rule

DHS received 80 comments in response to the proposed rule. The majority of commenters (76) supported this rulemaking. Many of these 76 commenters suggested additional changes or enhancements to the TN classification regulations which were not part of the proposed rule. Two commenters opposed the proposed rule. One of these two commenters asked questions about lawful permanent residence and educational opportunities for aliens in the TN classification, but did not express an opinion on the proposed rule. The second of these two commenters simply complained about a perceived slight to U.S. workers contained in another public comment. Many of the received comments raised issues that are beyond the scope of this rulemaking but will be mentioned briefly as part of this disposition of the comments.

*A. Increase to Three Years for Admissions and Extensions of Stay*

*Comments on period of admission:* The overwhelming majority of the commenters supported increasing the period of admission and extensions of stay granted to TN nonimmigrants from one to three years. Only two commenters opposed this proposal because they thought that jobs should be offered to U.S. workers rather than to foreign nationals. One commenter stated that the U.S. economy is suffering and jobs should thus be reserved for U.S. workers. The other commenter stated that the United States is presently flooded with immigrants and the TN program should be shut down while the country sorts out the problems with illegal immigrants present in the United States, and also made additional comments about aliens, politicians and the U.S. government in general.

*Response to comments on period of admission:* DHS has not adopted these comments in opposition. This rule does not make it easier to hire TN nonimmigrants by altering eligibility requirements, changing existing filing fee requirements, or expanding the principle of ''dual intent.'' Rather, this rule simply increases the amount of time granted to a TN nonimmigrant once all eligibility requirements have been established. This rule has nothing to do with permanent immigration or illegal immigrants presently within the United States.

*B. Other Comments*

*Comments on dual intent:* Thirteen commenters requested that TN nonimmigrants be granted ''dual intent'' and thereby be allowed to pursue permanent resident status while present in the United States in nonimmigrant status similar to the H–1B and L–1 nonimmigrant programs.

*Response to comments on dual intent:* The dual intent doctrine holds that even though a nonimmigrant visa applicant has previously expressed a desire to enter the United States as an immigrant, and may still have such a desire, that does not of itself preclude USCIS from issuing a nonimmigrant visa to him or her nor preclude his or her being a bona fide nonimmigrant. *Matter of H-R-,* 7 I&N Dec. 651, 654 (INS Reg. Comm'r 1958). *See also* INA section 214(h) (limiting dual intent to certain H, L, and V nonimmigrants); 8 U.S.C. 1184(h). Dual intent cannot be provided solely through regulation; it must be authorized by statute and it is not authorized in the TN nonimmigrant context. Furthermore, temporary entry, as defined in Chapter 16 of the NAFTA, Article 1608, is ''entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence.'' Congressional approval of this Article in the NAFTA treaty indicates that Congress did not intend TNs to have dual intent. Therefore, the commenters' suggestion will not be adopted because it is clearly inconsistent with Article 1608 and Congressional intent.

*Comment on inability of Mexican TN nonimmigrants to apply for admission at the border:* One commenter requested that Mexican TN nonimmigrants be able to apply for admission at designated ports-of-entry similar to Canadian TN nonimmigrants. Currently, Mexican workers are required to obtain visas from the Department of State (DOS) before entering the United States.

*Response to comment on inability of Mexican TN nonimmigrants to apply for admission at the border:* DHS appreciates the suggestion made by this commenter but the suggestion is outside the scope of this regulation. This rule deals with increasing the period of time granted to a TN nonimmigrant upon admission or pursuant to a timely filed request for extension of stay from a maximum of one year to a maximum of three years. Any additional regulatory changes, including a change to the place of admission, exceed the scope of this rule The commenter's suggestion, therefore, is not adopted.

*Comment on advance approval of Canadian admission requests:* One commenter requested that Canadian TN nonimmigrants be permitted to file petitions with USCIS Service Centers for admission as an alternative to requesting admission at U.S. ports-of-entry, so that applications for TN status can be approved in advance of entry dates rather than requiring intended employees to actually apply for status before knowing whether their applications will be approved.

*Response to comment on advance approval of Canadian admission requests:* DHS appreciates the suggestion made by this commenter. However, such reform exceeds the scope of the changes in the proposed rule and is not adopted in this final rule. The suggestion may be considered for future rulemaking involving TN nonimmigrants.

*Comments on erroneous periods of admission:* Several commenters suggested that some TN nonimmigrants have erroneously been admitted for three years instead of a validity period of one year. Thus, one commenter requested that this rule should have a retroactive effective date to correct this problem.

*Response to comments on erroneous periods of admission:* DHS understands these commenters' concerns. However, TN nonimmigrants who were admitted for a period of more than the one-year were granted that period of admission in violation of 8 CFR 214.6(e) as it existed prior to this rulemaking. Petitions must be processed in accordance with the regulations in effect when submitted, and this rule cannot deem those who were erroneously granted more than one year in the past to meet the requirements in this rule by making its provisions retroactive. Therefore, the commenter's suggestion was not adopted. Each TN nonimmigrant erroneously admitted for periods of three years prior to the effective date of this rulemaking is encouraged to correct his or her Form I–94 at a port-of-entry or deferred inspection station to ensure compliance with existing regulations and to ensure that he or she does not remain in the U.S. for a period longer than is authorized by law.

*Miscellaneous comments:* Several commenters requested a more comprehensive reform of the TN regulations to include the following: more extensive definitions for the positions of Management Consultant and Scientific Technician/Technologist; increased vigilance against TN fraud; the establishment of clear guidelines in determining a ''closely related'' degree; an increase in the fee for port-of-entry processing of each TN application; a 30-day period during which the TN worker could enter the U.S. before the employment start date and/or remain outside the country without having the TN status invalidated; and work authorization for the spouses of TN nonimmigrants.

*Response to miscellaneous comments:* DHS appreciates the suggestions made by the commenters. However, such comprehensive reform of the TN program exceeds the scope of the proposed rule, which was simply focused on allowing TN nonimmigrants and their employers a more stable and predictable period of employment. Therefore, the commenters' suggestions are not adopted in this rule.

## III. Regulatory Requirements

*A. Regulatory Flexibility Act*

1. Initial Regulatory Flexibility Analysis

DHS reviewed this rule in accordance with the Regulatory Flexibility Act and determined that this rule will reduce compliance costs on the regulated industries. This rule will reduce information collection costs for the public, and will reduce USCIS legal costs and the amount of fees collected, because TN and TD status holders will not have to renew their statuses each year. There are no provisions in this rule that add compliance costs. Therefore, DHS certifies that this rule would not have a significant economic impact on a substantial number of small entities.

2. Final Regulatory Flexibility Analysis (FRFA)

In accordance with 5 U.S.C. 604, DHS performed a final regulatory flexibility analysis regarding the economic effects of this rule on small entities. DHS has not identified any duplication, overlap, or conflict of this rule with other Federal rules. Since DHS does not foresee the rule having an economic impact on small entities, this rule does not put forth significant alternatives to minimize impacts. The rule benefits the United States by reducing burden in the TN nonimmigrant status program. No

cost increases due to the revised requirements are expected. USCIS invited the public to comment on the extent of any potential economic impact of this rule on small entities, the scope of these costs, a more accurate means for defining these costs, and the estimated cost to petitioning firms to comply with the new requirements. In response to those requests, USCIS received no comments. Therefore, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, no further regulatory flexibility analysis is required.

*B. Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*C. Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

*D. Executive Order 12866 (Regulatory Planning and Review)*

This rule has been designated as a ''significant regulatory action'' by the Office of Management and Budget (OMB) under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, an analysis of the economic impact of this rule has been prepared and submitted to the Office of Management and Budget (OMB) for review.

DHS has determined that this rule decreases the costs imposed by the TN nonimmigrant program on the government as well as the public. The changes made by this rule will result in more satisfaction with the TN program among TN nonimmigrants and their U.S. employers by increasing program flexibility and reducing time and travel restrictions. The expected effect is an increase in the number of TN nonimmigrants in the United States. A small economic benefit may result from the increased availability of scarce workers for U.S. employers in particular fields and industries. This rule will result in cumulative TN application fees decreasing by approximately $2.4 million per year. In addition, the total paperwork burden costs on the public will decrease by about 12,225 hours and $340,000 as a result of fewer required filings. Eventually, DOS and U.S. Customs and Border Protection annual fee collections from TN nonimmigrants will also decrease as a result of this rule. A copy of DHS' complete analysis is available in the rulemaking docket for this rule at *www.regulations.gov,* under Docket No. USCIS–2007–0056, or by calling the information contact listed above.

*E. Executive Order 13132 (Federalism)*

This rule will have no substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*F. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a rule. This rulemaking does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. However, by requiring TN and TD status renewals every three years instead of every year, this rule will reduce the volume of Form I–129, Petition for Nonimmigrant Worker, filings, Form I–907, Request for Premium Processing Service, filings, and Form I–539, Application To Extend/Change Nonimmigrant Status, filings per year, and so will reduce the aggregate paperwork burden on the public accordingly. Accordingly, USCIS has submitted the OMB Correction Worksheets (OMB–83C) to the Office of Management and Budget, reducing the burden hours and costs associated with these forms.

**List of Subjects**

*8 CFR Part 214*

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

*8 CFR Part 248*

Aliens, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

## PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1258, 1281, 1282, 1301–1305 and 1372; sec. 643, Public Law 104–208, 110 Stat. 3009–708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

### § 214.1 [Amended]

■ 2. Section 214.1 is amended by:
■ a. Removing the designation ''Cdn FTA, Professional'' and ''TC'' from the list in paragraph (a)(2);
■ b. Removing the term ''TC'' and adding ''TN'' in its place in the first sentence in paragraph (c)(1).

■ 3. Section 214.6 is amended by:
■ a. Revising the section heading and revising paragraphs (e), (g), and (h);
■ b. Redesignating paragraphs (j)(1), (j)(2) and (j)(3) as paragraphs (j)(2), (j)(3), and (j)(4), respectively;
■ c. Adding a new paragraph (j)(1);
■ d. Revising newly redesignated paragraphs (j)(2), (j)(3), and (j)(4); and by
■ e. Revising paragraph (k);

The addition and revisions read as follows:

### § 214.6 Citizens of Canada or Mexico seeking temporary entry under NAFTA to engage in business activities at a professional level.

* * * * *

(e) *Procedures for admission.* A citizen of Canada or Mexico who qualifies for admission under this section shall be provided confirming documentation and shall be admitted under the classification symbol TN for a period not to exceed three years. The conforming document provided shall bear the legend ''multiple entry.'' The fee prescribed under 8 CFR 103.7(b)(1) shall be remitted by Canadian Citizens upon admission to the United States pursuant to the terms and conditions of the NAFTA. Upon remittance of the prescribed fee, the TN applicant for admission shall be provided a DHS-issued receipt on the appropriate form.

* * * * *

(g) *Readmission.* (1) *With a Form I–94.* An alien may be readmitted to the

United States in TN classification for the remainder of the authorized period of TN admission on Form I–94, without presentation of the letter or supporting documentation described in paragraph (d)(3) of this section, and without the prescribed fee set forth in 8 CFR 103.7(b)(1), provided that the original intended professional activities and employer(s) have not changed, and the Form I–94 has not expired.

(2) *Without a valid I–94.* If the alien seeking readmission to the United States in TN classification is no longer in possession of a valid, unexpired Form I–94, and the period of initial admission in TN classification has not lapsed, then a new Form I–94 may be issued for the period of validity that remains on the TN nonimmigrant's original Form I–94 with the legend ''multiple entry'' and the alien can then be readmitted in TN status if the alien presents alternate evidence as follows:

(i) For Canadian citizens, alternate evidence may include, but is not limited to, a fee receipt for admission as a TN or a previously issued admission stamp as TN in a passport, and a confirming letter from the United States employer(s).

(ii) For Mexican citizens seeking readmission as TN nonimmigrants, alternate evidence shall consist of presentation of a valid unexpired TN visa and evidence of a previous admission.

(h) *Extension of stay.* (1) *Filing.* A United States employer of a citizen of Canada or Mexico who is currently maintaining valid TN nonimmigrant status, or a United States entity (in the case of a citizen of Canada or Mexico who is currently maintaining valid TN nonimmigrant status and is employed by a foreign employer), may request an extension of stay, subject to the following conditions:

(i) An extension of stay must be requested by filing the appropriate form with the fee provided at 8 CFR 103.7(b)(1), in accordance with the form instructions with USCIS.

(ii) The beneficiary must be physically present in the United States at the time of the filing of the appropriate form requesting an extension of stay as a TN nonimmigrant. If the alien is required to leave the United States for any reason while the petition is pending, the petitioner may request that USCIS notify the consular office where the beneficiary is required to apply for a visa or, if visa exempt, a DHS-designated port-of-entry where the beneficiary will apply for admission to the United States, of the approval.

(iii) An extension of stay in TN status may be approved by USCIS for a maximum period of three years.

(iv) There is no specific limit on the total period of time an alien may be in TN status provided the alien continues to be engaged in TN business activities for a U.S. employer or entity at a professional level, and otherwise continues to properly maintain TN nonimmigrant status.

(2) *Readmission at the border.* Nothing in paragraph (h)(1) of this section shall preclude a citizen of Canada or Mexico who has previously been admitted to the United States in TN status, and who has not violated such status while in the United States, from applying at a DHS-designated port-of-entry, prior to the expiration date of the previous period of admission, for a new three-year period of admission. The application for a new period of admission must be supported by a new letter from the United States employer or the foreign employer, in the case of a citizen of Canada who is providing prearranged services to a United States entity, which meets the requirements of paragraph (d) of this section, together with the appropriate filing fee as noted in 8 CFR 103.7(b)(1). Citizens of Mexico must present a valid passport and a valid, unexpired TN nonimmigrant visa when applying for readmission, as outlined in paragraph (d)(1) of this section.

* * * * *

(j) * * * (1) The spouse or unmarried minor children of a citizen of Canada or Mexico admitted in TN nonimmigrant status, if otherwise admissible, may be admitted initially, readmitted, or granted a change of nonimmigrant status or an extension of his or her period of stay for the same period of time granted to the TN nonimmigrant. Such spouse or unmarried minor children shall, upon approval of an application for admission, readmission, change of status or extension of stay be classified as TD nonimmigrants. A request for a change of status to TD or an extension of stay of a TD nonimmigrant may be made on the appropriate form together with appropriate filing fees and evidence of the principal alien's current TN status.

(2) The spouse or unmarried minor children of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall be required to present a valid, unexpired TD nonimmigrant visa unless otherwise exempt under 8 CFR 212.1.

(3) The spouse and unmarried minor children of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall be issued confirming documentation bearing the legend ''multiple entry.'' There shall be no fee required for admission of the spouse and unmarried minor children.

(4) The spouse and unmarried minor children of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall not accept employment in the United States unless otherwise authorized under the Act.

(k) *Effect of a strike.* (1) If the Secretary of Labor certifies or otherwise informs the Director of USCIS that a strike or other labor dispute involving a work stoppage of workers is in progress, and the temporary entry of a citizen of Mexico or Canada in TN nonimmigrant status may adversely affect the settlement of any labor dispute or the employment of any person who is involved in such dispute, the United States may refuse to issue an immigration document authorizing the entry or employment of such an alien.

(2) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, or whether USCIS has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(i) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated in the same manner as all other TN nonimmigrants;

(ii) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(iii) Although participation by a TN nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for removal, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to removal.

(3) If there is a strike or other labor dispute involving a work stoppage of workers in progress but such strike or other labor dispute is not certified under paragraph (k)(1) of this section, or USCIS has not otherwise been informed by the Secretary that such a strike or

labor dispute is in progress, Director of USCIS shall not deny a petition or deny entry to an applicant for TN status based upon such strike or other labor dispute.

## PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

■ 4. The authority citation for part 248 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

### § 248.3 [Amended]

■ 5. Section 248.3 is amended by removing the term ''TC'' and adding the term ''TN'' in its place in the first sentence of paragraph (a).

Dated: September 15.

**Michael Chertoff,**

*Secretary.*

[FR Doc. E8–24600 Filed 10–15–08; 8:45 am]

**BILLING CODE 9111–97–P**

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121, 125, 127, and 134

**RIN 3245–AF40**

### The Women-Owned Small Business Federal Contract Assistance Procedures

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Final rule; correction.

**SUMMARY:** The Small Business Administration is correcting a Final rule that appeared in the **Federal Register** on October 1, 2008. The Final rule amends the U.S. Small Business Administration (SBA) regulations governing small business contracting programs to set forth procedures that will govern the new Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures as authorized in the Small Business Act. This notice will correct the **FOR FURTHER INFORMATION CONTACT** section of the rule.

**DATES:** Effective October 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Director, Policy, Planning and Research, Office of Government Contracting, (202) 205–6460.

**SUPPLEMENTARY INFORMATION:**

In FR Doc. E8–23138 appearing on page 56940 in the **Federal Register** of Wednesday, October 1, 2008 (73 FR 56940), the following correction is made:

1. On Page 56940, revise the **FOR FURTHER INFORMATION CONTACT** section to read as follows:

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Director, Policy, Planning and Research, Office of Government Contracting, (202) 205–6460.

**Calvin Jenkins,**

*Deputy Associate Administrator for Government Contracting and Business Development, Associate Administrator/ Disaster Assistance.*

[FR Doc. E8–24602 Filed 10–15–08; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2008–1096; Directorate Identifier 2008–NM–158–AD; Amendment 39–15693; AD 2008–21–09]**

**RIN 2120–AA64**

### Airworthiness Directives; Bombardier Model CL–600–1A11 (CL–600),CL–600–2A12 (CL–601), CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604 (Including CL–605 Marketing Variant)) Airplanes, and Model CL–600–2B19 (Regional Jet Series 100 & 440) Airplanes

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is superseding an existing airworthiness directive (AD) that applies to all Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes and Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) airplanes. The existing AD currently requires revising the airplane flight manuals (AFMs) to include new cold weather operations limitations and procedures. This AD requires revising the AFMs to include a requirement for flightcrew training regarding enhanced take-off procedures and winter operations. This AD results from reports of uncommanded roll during take-off. We are issuing this AD to prevent possible loss of control on take-off resulting from even small amounts of frost, ice, snow, or slush on the wing leading edges or forward upper wing surfaces.

**DATES:** This AD becomes effective October 31, 2008.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 31, 2008.

On April 21, 2008 (73 FR 19989, April 14, 2008), the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive any comments on this AD by November 17, 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 Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada.

**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 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:** Bruce Valentine, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531.

**SUPPLEMENTARY INFORMATION:**

**Discussion**

On April 2, 2008, the FAA issued AD 2008–08–06, amendment 39–15458 (73 FR 19989, April 14, 2008). That AD applies to all Bombardier Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes and Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) airplanes. That AD requires revising the airplane flight manuals (AFMs) to include new cold weather operations limitations and

procedures. That AD resulted from reports of uncommanded roll during take-off. The actions specified in that AD are intended to prevent possible loss of control on take-off resulting from even small amounts of frost, ice, snow, or slush on the wing leading edges or forward upper wing surfaces.

**Actions Since AD Was Issued**

The preamble to AD 2008–08–06 specified that we considered the requirements ''interim action'' and that Transport Canada Civil Aviation (TCCA) advised that it was developing further actions, such as crew awareness and training with regard to winter operations to address the unsafe condition addressed by that AD. That AD explains that we might consider further rulemaking if those further actions are developed, approved, and available. TCCA has now advised us that the manufacturer has developed these actions, and we have determined that further rulemaking is indeed necessary; this AD follows from that determination.

**Relevant Service Information**

Bombardier has issued the temporary revisions (TRs) listed in the ''Temporary Revisions'' table. The temporary revisions describe limitations that include tactile inspections for ice during certain weather conditions, limitations and procedures for use of wing and cowl anti-ice during certain taxiing or take-off conditions, and take-off limitations to reduce high-pitch attitudes during rotation. The temporary revisions also describe a limitation, effective November 1, 2008, that requires flightcrew training regarding enhanced take-off procedures and winter operations. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. TCCA mandated the service information and issued Canadian airworthiness directives CF–2008–15R1 and CF–2008–16R1, both dated August 20, 2008 (referred to after this as ''the MCAI''), to ensure the continued airworthiness of these airplanes in Canada.

TEMPORARY REVISIONS

| For Bombardier model— | Use— | Dated— | To the— |
|---|---|---|---|
| CL–600–2B16 (CL–604) airplanes, serial numbers 5301 through 5699. | Bombardier Temporary Revision 604/24–2. | August 7, 2008 ..... | Bombardier Challenger CL–604 AFM, PSP 604–1. |
| CL–600–2B16 (CL–604) airplanes, serial numbers 5701 and subsequent (might also be referred to by a marketing designation as CL–605). | Bombardier Temporary Revision 605/1–2. | August 7, 2008 ..... | Bombardier Challenger CL–605 AFM, PSP 605–1. |
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600/25–2. | August 7, 2008 ..... | Canadair Challenger CL–600–1A11 AFM. |
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600–1/20–2. | August 7, 2008 ..... | Canadair Challenger CL–600–1A11 AFM (Winglets). |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/17–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 AFM, PSP 601–1B–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/18–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 AFM, PSP 601–1A–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/22–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 AFM, PSP 601–1B. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/29–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2B16 AFM, PSP 601A–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/30–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 AFM. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/30–2. | August 7, 2008 ..... | Canadair Challenger CL–600–2B16 AFM, PSP 601A–1–1. |
| CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. | Canadair Temporary Revision RJ/155–5. | August 7, 2008 ..... | Canadair Regional Jet AFM, CSP A–012. |

**FAA's Determination and Requirements of This AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Therefore, we are issuing this AD to supersede AD 2008–08–06. This new AD retains certain requirements of the existing AD. This AD also requires revising the AFMs to include a requirement for flightcrew training regarding enhanced take-off procedures and winter operations.

**Differences Between This AD and the Canadian Airworthiness Directives**

The Canadian airworthiness directives specify that operators should advise flightcrews of the changes introduced by the TRs; and review the ''Pilot's Checklist'' to ensure that the instructions regarding selection of the wing anti-ice system to ''ON,'' as specified in the AFM Limitations section, are incorporated. We do not require these actions because there is no method to determine compliance with these actions.

**Change to Existing AD**

This AD retains certain requirements of AD 2008–08–06; however, certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

| Requirement in AD 2008–08–06 | Corresponding requirement in this AD |
|---|---|
| Paragraph (f) ..... | Not retained in this AD. |
| Paragraph (g) ..... | Paragraph (f). |
| Paragraph (h) ..... | Paragraph (g). |
| Paragraph (i) ..... | Paragraph (j). |

**FAA's Justification and Determination of the Effective Date**

We are rapidly approaching the ice/snow season and the pilot training regarding enhanced take-off procedures and winter operations must be accomplished before the season begins. Because of our requirement to promote safe flight of civil aircraft and thus, the critical need to prevent uncommanded roll during take-off and the short compliance time involved with this action, this AD must be issued immediately.

Because an unsafe condition exists that requires the immediate adoption of this AD, we find that notice and opportunity for prior public comment hereon are impracticable and that good cause exists for making this amendment effective in less than 30 days.

**Comments Invited**

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments before it becomes effective. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1096; Directorate Identifier 2008–NM–158–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 have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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 Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–15458 (73 FR 19989, April 14, 2008) and adding the following new AD:

**2008–21–09 Bombardier, Inc. (Formerly Canadair)**: Docket No. FAA–2008–1096; Directorate Identifier 2008–NM–158–AD; Amendment 39–15693.

**Effective Date**

(a) This AD becomes effective October 31, 2008.

**Affected ADs**

(b) This AD supersedes AD 2008–08–06.

**Applicability**

(c) This AD applies to all Bombardier Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), CL–600–2B16 (CL–601–3A, CL–601–3R, & CL–604) airplanes, and Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, certificated in any category.

**Note 1:** Some Model CL–600–2B16 (CL–604) airplanes might be referred to by a marketing designation as CL–605.

**Note 2:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (j) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Unsafe Condition**

(d) This AD results from reports of uncommanded roll during take-off. We are issuing this AD to prevent possible loss of control on take-off resulting from even small amounts of frost, ice, snow, or slush on the wing leading edges or forward upper wing surfaces.

**Compliance**

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

**Restatement of AD 2008–08–06**

*Revision to Airplane Flight Manual (AFM)*

(f) Within 7 days after April 21, 2008 (the effective date of AD 2008–08–06), revise the applicable sections of the applicable AFM by inserting a copy of the applicable temporary revision (TR) listed in Table 1 of this AD. Thereafter, operate the airplanes per the limitation specified in the applicable TR, except as provided by paragraphs (h) and (j) of this AD. Doing the revision required by paragraph (h) of this AD terminates the requirements of this paragraph.

(g) When information identical to that in a TR specified in paragraph (f) of this AD has been included in the general revisions of the applicable AFM, the general revisions may be inserted into the AFM, and the TR may be removed from that AFM.

TABLE 1—TEMPORARY REVISIONS FOR AD 2008–08–06

| For Bombardier model— | Use— | Dated— | To the— |
|---|---|---|---|
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600/25–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–1A11 AFM. |
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600–1/20–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–1A11 AFM (Winglets). |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/17–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1B–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/18–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1A–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/22–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1B. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/30–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/29–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2B16 AFM, PSP 601A–1. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/30–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2B16 AFM, PSP 601A–1–1. |
| CL–600–2B16 (CL–604) airplanes, serial numbers 5301 through 5699. | Bombardier Temporary Revision 604/24–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Bombardier Challenger CL–604 AFM, PSP 604–1. |
| CL–600–2B16 (CL–604) airplanes, serial numbers 5701 and subsequent. | Bombardier Temporary Revision 605/1–1. | March 20, 2008 ..... | Limitations and Normal Procedures sections of Bombardier Challenger CL–605 AFM, PSP 605–1. |
| CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. | Canadair Temporary Revision RJ/155–3. | March 25, 2008 ..... | Limitations and Abnormal Procedures sections and Supplement 15 of Canadair Regional Jet AFM, CSP A–012. |

**New Requirements of This AD**

*New Revision to the AFM*

(h) Within 14 days after the effective date of this AD, revise the applicable sections of the applicable AFM by inserting a copy of the applicable TR listed in Table 2 of this AD. Thereafter, operate the airplanes per the limitation specified in the applicable TR, except as provided by paragraph (j) of this AD. Once the applicable temporary revision required by this paragraph is inserted into the AFM, the applicable revision required by paragraph (f) of this AD may be removed from the AFM.

(i) When information identical to that in a TR specified in paragraph (h) of this AD has been included in the general revisions of the applicable AFM, the general revisions may be inserted into the AFM, and the TR may be removed from that AFM.

TABLE 2—CURRENT/NEW TEMPORARY REVISIONS

| For Bombardier model— | Use— | Dated— | To the— |
|---|---|---|---|
| CL–600–2B16 (CL–604) airplanes, serial numbers 5301 through 5699. | Bombardier Temporary Revision 604/24–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Bombardier Challenger CL–604 AFM, PSP 604–1. |
| CL–600–2B16 (CL–604) airplanes, serial numbers 5701 and subsequent (might also be referred to by a marketing designation as CL–605). | Bombardier Temporary Revision 605/1–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Bombardier Challenger CL–605 AFM, PSP 605–1. |
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600/25–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–1A11 AFM. |
| CL–600–1A11 (CL–600) airplanes ..... | Canadair Temporary Revision 600–1/20–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–1A11 AFM (Winglets). |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/17–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1B–1. |

TABLE 2—CURRENT/NEW TEMPORARY REVISIONS—Continued

| For Bombardier model— | Use— | Dated— | To the— |
|---|---|---|---|
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/18–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1A–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/22–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM, PSP 601–1B. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/29–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2B16 AFM, PSP 601A–1. |
| CL–600–2A12 (CL–601) airplanes ..... | Canadair Temporary Revision 601/30–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2A12 AFM. |
| CL–600–2B16 (CL–601–3A, and CL–601–3R) airplanes. | Canadair Temporary Revision 601/30–2. | August 7, 2008 ..... | Limitations and Normal Procedures sections of Canadair Challenger CL–600–2B16 AFM, PSP 601A–1–1. |
| CL–600–2B19 (Regional Jet Series 100 & 440) airplanes. | Canadair Temporary Revision RJ/155–5. | August 7, 2008 ..... | Limitations and Abnormal Procedures sections and Supplement 15 of Canadair Regional Jet AFM, CSP A–012. |

**Alternative Methods of Compliance (AMOCs)**

(j) The Manager, New York Aircraft Certification Office (ACO), 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: Bruce Valentine, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7328; fax (516) 794–5531. 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.

**Related Information**

(k) Canadian airworthiness directives CF–2008–15R1 and CF–2008–16R1, both dated August 20, 2008, also address the subject of this AD.

**Material Incorporated by Reference**

(l) You must use the applicable temporary revisions to the applicable airplane flight manual specified in Table 3 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of the documents listed in Table 4 of this AD in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) On April 21, 2008 (73 FR 19989, April 14, 2008), the Director of the Federal Register approved the incorporation by reference of the documents listed in Table 5 of this AD.

(3) Contact Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada, 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.*

TABLE 3—ALL MATERIAL INCORPORATED BY REFERENCE

| Use— | Dated— | To the— |
|---|---|---|
| Bombardier Temporary Revision 604/24–1 ..... | March 20, 2008 ..... | Bombardier Challenger CL–604 Airplane Flight Manual, PSP 604–1. |
| Bombardier Temporary Revision 604/24–2 ..... | August 7, 2008 ..... | Bombardier Challenger CL–604 Airplane Flight Manual, PSP 604–1. |
| Bombardier Temporary Revision 605/1–1 ..... | March 20, 2008 ..... | Bombardier Challenger CL–605 Airplane Flight Manual, PSP 605–1. |
| Bombardier Temporary Revision 605/1–2 ..... | August 7, 2008 ..... | Bombardier Challenger CL–605 Airplane Flight Manual, PSP 605–1. |
| Canadair Temporary Revision 600/25–1 ..... | March 20, 2008 ..... | Canadair Challenger CL–600–1A11 Airplane Flight Manual. |
| Canadair Temporary Revision 600/25–2 ..... | August 7, 2008 ..... | Canadair Challenger CL–600–1A11 Airplane Flight Manual. |
| Canadair Temporary Revision 600–1/20–1 ..... | March 20, 2008 ..... | Canadair Challenger CL–600–1A11 Airplane Flight Manual (Winglets). |
| Canadair Temporary Revision 600–1/20–2 ..... | August 7, 2008 ..... | Canadair Challenger CL–600–1A11 Airplane Flight Manual (Winglets). |
| Canadair Temporary Revision 601/17–1 ..... | March 20, 2008 ..... | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP601–1B–1. |
| Canadair Temporary Revision 601/17–2 ..... | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B–1. |
| Canadair Temporary Revision 601/18–1 ..... | March 20, 2008 ..... | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1A–1. |
| Canadair Temporary Revision 601/18–2 ..... | August 7, 2008 ..... | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1A–1. |

TABLE 3—ALL MATERIAL INCORPORATED BY REFERENCE—Continued

| Use— | Dated— | To the— |
|---|---|---|
| Canadair Temporary Revision 601/22–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B. |
| Canadair Temporary Revision 601/22–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B. |
| Canadair Temporary Revision 601/29–1 | March 20, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1. |
| Canadair Temporary Revision 601/29–2 | August 7, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1. |
| Canadair Temporary Revision 601/30–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual. |
| Canadair Temporary Revision 601/30–1 | March 20, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1–1. |
| Canadair Temporary Revision 601/30–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual. |
| Canadair Temporary Revision 601/30–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 605–1. |
| Canadair Temporary Revision RJ/155–3 | March 25, 2008 | Canadair Regional Jet Airplane Flight Manual, CSP A–012. |
| Canadair Temporary Revision RJ/155–5 | August 7, 2008 | Canadair Regional Jet Airplane Flight Manual, CSP A–012. |

TABLE 4—NEW MATERIAL INCORPORATED BY REFERENCE

| Use— | Dated— | To the— |
|---|---|---|
| Bombardier Temporary Revision 604/24–2 | August 7, 2008 | Bombardier Challenger CL–604 Airplane Flight Manual, PSP 604–1. |
| Bombardier Temporary Revision 605/1–2 | August 7, 2008 | Bombardier Challenger CL–605 Airplane Flight Manual, PSP 605–1. |
| Canadair Temporary Revision 600/25–2 | August 7, 2008 | Canadair Challenger CL–600–1A11 Airplane Flight Manual. |
| Canadair Temporary Revision 600–1/20–2 | August 7, 2008 | Canadair Challenger CL–600–1A11 Airplane Flight Manual (Winglets). |
| Canadair Temporary Revision 601/17–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B–1. |
| Canadair Temporary Revision 601/18–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1A–1. |
| Canadair Temporary Revision 601/22–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B. |
| Canadair Temporary Revision 601/29–2 | August 7, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1. |
| Canadair Temporary Revision 601/30–2 | August 7, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual. |
| Canadair Temporary Revision 601/30–2 | August 7, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1–1. |
| Canadair Temporary Revision RJ/155–5 | August 7, 2008 | Canadair Regional Jet Airplane Flight Manual, CSP A–012. |

TABLE 5—PREVIOUS MATERIAL INCORPORATED BY REFERENCE

| Use— | Dated— | To the— |
|---|---|---|
| Bombardier Temporary Revision 604/24–1 | March 20, 2008 | Bombardier Challenger CL–604 Airplane Flight Manual, PSP 604–1. |
| Bombardier Temporary Revision 605/1–1 | March 20, 2008 | Bombardier Challenger CL–605 Airplane Flight Manual, PSP 605–1. |
| Canadair Temporary Revision 600/25–1 | March 20, 2008 | Canadair Challenger CL–600–1A11 Airplane Flight Manual. |
| Canadair Temporary Revision 600–1/20–1 | March 20, 2008 | Canadair Challenger CL–600–1A11 Airplane Flight Manual (Winglets). |
| Canadair Temporary Revision 601/17–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B–1. |
| Canadair Temporary Revision 601/18–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1A–1. |
| Canadair Temporary Revision 601/22–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual, PSP 601–1B. |
| Canadair Temporary Revision 601/29–1 | March 20, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1. |
| Canadair Temporary Revision 601/30–1 | March 20, 2008 | Canadair Challenger CL–600–2A12 Airplane Flight Manual. |
| Canadair Temporary Revision 601/30–1 | March 20, 2008 | Canadair Challenger CL–600–2B16 Airplane Flight Manual, PSP 601A–1–1. |

TABLE 5—PREVIOUS MATERIAL INCORPORATED BY REFERENCE—Continued

| Use— | Dated— | To the— |
|---|---|---|
| Canadair Temporary Revision RJ/155–3 ..... | March 25, 2008 ..... | Canadair Regional Jet Airplane Flight Manual, CSP A–012. |

Issued in Renton, Washington, on October 7, 2008.

**Ali Bahrami,**

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

[FR Doc. E8–24549 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–0640; Directorate Identifier 2008–NM–070–AD; Amendment 39–15690; AD 2008–21–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 747–400, 747–400D, and 747–400F Series Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Boeing Model 747–400, 747–400D, and 747–400F series airplanes. This AD requires installing an extension tube to the existing pump discharge port of the scavenge pump on the outboard side of the center fuel tank in the main fuel tank #2. This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent a fire or explosion in the fuel tank and consequent loss of the airplane.

**DATES:** This AD is effective November 20, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 20, 2008.

**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:** Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:**

### Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 747–400, 747–400D, and 747–400F series airplanes. That NPRM was published in the **Federal Register** on June 18, 2008 (73 FR 34663). That NPRM proposed to require installing an extension tube to the existing pump discharge port of the scavenge pump on the outboard side of the center fuel tank in the main fuel tank #2.

### Comments

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

### Support for the NPRM

Boeing concurs with the contents of the NPRM. Air Line Pilots Association, International (ALPA), supports the intent of the NPRM.

### Request To Reduce the Compliance Time

ALPA feels that the 60-month compliance time should be reduced to 24 months. ALPA states that a shorter compliance time should be imposed given the number of affected aircraft and the time required for installation of tubing.

We disagree. In developing the compliance time for this NPRM, we considered not only the safety implications of the identified unsafe condition, but the average utilization rate of the affected fleet, the practical aspects of an orderly modification of the fleet during regular maintenance periods, the availability of required parts, and the time necessary for the rulemaking process. The compliance time is determined to be appropriate. Therefore, we have not changed the AD in this regard.

### Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting the AD as proposed.

### Costs of Compliance

We estimate that this AD affects 31 airplanes of U.S. registry. It takes about 16 work-hours per product to comply with this AD. The average labor rate is $80 per work-hour. Required parts cost about $900 per product. Based on these figures, the cost of this AD to the U.S. operators is $67,580, or $2,180 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

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.

You can find our regulatory evaluation and the estimated costs of compliance 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 adding the following new AD:

**2008–21–06 Boeing**: Amendment 39–15690. Docket No. FAA–2008–0640; Directorate Identifier 2008–NM–070–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective November 20, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Boeing Model 747–400, 747–400D, and 747–400F series airplanes, certificated in any category; as identified in Boeing Special Attention Service Bulletin 747–28–2260, dated March 13, 2008.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent a fire or explosion in the fuel tank and consequent loss of the airplane.

**Compliance**

(e) Comply with this AD within the compliance times specified, unless already done.

**Installation**

(f) Within 60 months after the effective date of this AD, install an extension tube to the existing pump discharge port of the scavenge pump on the outboard side of the center fuel tank in the main fuel tank #2, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–28–2260, dated March 13, 2008.

**Alternative Methods of Compliance (AMOCs)**

(g)(1) The Manager, Seattle Aircraft Certification Office (SACO), FAA, ATTN: Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, SACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using 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 Boeing Special Attention Service Bulletin 747–28–2260, dated March 13, 2008, 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 Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

(3) You may review copies of the service information incorporated by reference 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/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on October 2, 2008.

**Ali Bahrami,**

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

[FR Doc. E8–24130 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–0749; Directorate Identifier 2008–CE–044–AD; Amendment 39–15692; AD 2008–21–08]**

**RIN 2120–AA64**

## Airworthiness Directives; Air Tractor, Inc. Models AT–402, AT–402A, and AT–402B Airplanes

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

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for certain Air Tractor, Inc. (Air Tractor) Models AT–402, AT–402A, and AT–402B airplanes. This AD requires you to repetitively visually inspect the rudder and vertical fin hinge attaching structure for loose fasteners and inspect the rudder or vertical fin skins, spars, hinges, or brackets for cracks and/or corrosion. This AD also requires you to replace any damaged parts found as a result of the inspections and install an external doubler at the upper rudder hinge. Installation of the external doubler at the upper rudder hinge is terminating action for the repetitive inspection requirements. This AD results from a report of a Model AT–402 airplane with a loose upper rudder hinge caused by fatigue. We are issuing this AD to detect and correct loose fasteners; any cracks in the rudder or vertical fin skins, spars, hinges, or brackets; or corrosion of the rudder and vertical fin hinge attaching structure. Hinge failure adversely affects ability to control yaw and has led to the rudder folding over in flight. This condition could allow the rudder to contact the elevator and affect ability to control pitch with consequent loss of control.

**DATES:** This AD becomes effective on November 20, 2008.

On November 20, 2008, the Director of the Federal Register approved the incorporation by reference of Snow Engineering Co. Service Letter #247, revised June 2, 2008, listed in this AD.

As of December 21, 2006 (71 FR 66661, November 16, 2006), the Director of the Federal Register approved the incorporation by reference of Snow Engineering Co. Process Specification Number 145, dated December 6, 1991, listed in this AD.

**ADDRESSES:** For service information identified in this AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas

76374; telephone: (940) 564–5616; facsimile: (940) 564–5612; E-mail: *parts@airtractor.com*; Web site: *http://www.airtractor.com.*

To view the AD docket, go to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://www.regulations.gov.* The docket number is FAA–2008–0749; Directorate Identifier 2008–CE–044–AD.

**FOR FURTHER INFORMATION CONTACT:** Andy McAnaul, Aerospace Engineer, 10100 Reunion Pl, San Antonio, Texas 78216; telephone: (210) 308–3365; fax: (210) 308–3370.

**SUPPLEMENTARY INFORMATION:**

## Discussion

On July 1, 2008, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Air Tractor Models AT–402, AT–402A, and AT–402B airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on July 8, 2008 (73 FR 38933). The NPRM proposed to require you to repetitively visually inspect the rudder and vertical fin hinge attaching structure for loose fasteners and inspect the rudder or vertical fin skins, spars, hinges, or brackets for cracks and/or corrosion. This AD would also require you to replace any damaged parts found as a result of the inspections and install an external doubler at the upper rudder hinge. Installation of the external doubler at the upper rudder hinge is terminating action for the repetitive inspection requirements.

## Comments

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

## Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

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

## Costs of Compliance

We estimate that this AD affects 220 airplanes in the U.S. registry.

We estimate the following costs to do the inspection:

| Labor cost | Parts cost | Total cost per airplane | Total cost on U.S. operators |
|---|---|---|---|
| 1 work-hour × $80 per hour = $80 | Not applicable | $80 | $17,600 |

Any required replacements will vary depending upon the damage found, and any replacements required will vary based on the results of the inspection. Based on this, we have no way of determining the potential replacement costs for each airplane or the number of airplanes that will need the replacements based on the result of the inspections.

We estimate the following costs to do installation of the external doubler at the upper rudder hinge:

| Labor cost | Parts cost | Total cost per airplane | Total cost on U.S. operators |
|---|---|---|---|
| 5 work-hours × $80 per hour = $400 | $217 | $617 | $135,740 |

## 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 AD.

## 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 other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2008–0749; Directorate Identifier 2008 CE–044–AD'' in your request.

## List of Subjects in 14 CFR Part 39

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

## Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**2008–21–08 Air Tractor, Inc.:** Amendment 39–15692; Docket No. FAA–2008–0749; Directorate Identifier 2008–CE–044–AD.

**Effective Date**

(a) This AD becomes effective on November 20, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Models AT–402, AT–402A, and AT–402B airplanes, serial numbers 0694 through 1176, that are certificated in any category.

**Unsafe Condition**

(d) This AD results from a report of a Model AT–402 airplane with a loose upper rudder hinge caused by fatigue. We are issuing this AD to detect and correct loose fasteners; any cracks in the rudder or vertical fin skins, spars, hinges, or brackets; or corrosion of the rudder and vertical fin hinge attaching structure. Hinge failure adversely affects ability to control yaw and has led to the rudder folding over in flight. This condition could allow the rudder to contact the elevator and affect ability to control pitch with consequent loss of control.

**Compliance**

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

| Actions | Compliance | Procedures |
|---|---|---|
| (1) Inspect visually the rudder and vertical fin hinge attachment for loose fasteners; and inspect the rudder or vertical fin skins, spars, hinges, and brackets for cracks and/or corrosion. | Initially inspect when the airplane reaches a total of 3,500 hours time-in-service (TIS) or within the next 100 hours TIS after November 20, 2008 (the effective date of this AD), whichever occurs later. Thereafter, repetitively inspect at intervals not to exceed every 100 hours TIS. Installation of the external doubler at the upper rudder hinge required by paragraph (e)(2)(ii) or (e)(3) of this AD is terminating action for the repetitive inspections required by this AD. | Follow Snow Engineering Co. Service Letter #247, revised June 2, 2008. |
| (2) If you find any damage as a result of any inspection required by paragraph (e)(1) of this AD, you must:<br>(i) Replace any damaged parts with new parts; and<br>(ii) Do the installation of the external doubler at the upper rudder hinge. | Before further flight after any inspection required by paragraph (e)(1) of this AD where you find any damaged parts. The installation of the external doubler at the upper rudder hinge required by paragraph (e)(2)(ii) or (e)(3) of this AD terminates the repetitive inspections required by this AD. | Follow Snow Engineering Co. Service Letter #247, revised June 2, 2008; and Snow Engineering Co. Process Specification Number 145, dated December 6, 1991. |
| (3) Do the installation of the external doubler at the upper rudder hinge. | When the airplane reaches a total of 5,000 hours TIS after November 20, 2008 (the effective date of this AD) or within the next 100 hours TIS after November 20, 2008 (the effective date of this AD), whichever occurs later. The installation of the external doubler at the upper rudder hinge required by paragraph (e)(2)(ii) or (e)(3) of this AD terminates the repetitive inspections required by this AD. | Follow Snow Engineering Co. Service Letter #247, revised June 2, 2008; and Snow Engineering Co. Process Specification Number 145, dated December 6, 1991. |
| (4) Do not install any rudder without the external doubler at the upper rudder hinge required by paragraph (e)(3) of this AD. | As of November 20, 2008 (the effective date of this AD). | Not Applicable. |

**Alternative Methods of Compliance (AMOCs)**

(f) The Manager, Fort Worth Airplane Certification Office, 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: Andrew McAnaul, Aerospace Engineer, ASW–150 (c/o MIDO–43), 10100 Reunion Place, Suite 650, San Antonio, Texas 78216; telephone: (210) 308–3365; facsimile: (210) 308–3370. 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**

(g) You must use Snow Engineering Co. Service Letter #247, revised June 2, 2008; and Snow Engineering Co. Process Specification Number 145, dated December 6, 1991, 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 Snow Engineering Co. Service Letter #247, revised June 2, 2008, under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) On December 21, 2006 (71 FR 66661, November 16, 2006), the Director of the Federal Register approved the incorporation by reference of Snow Engineering Co. Process Specification Number 145, dated December 6, 1991.

(3) For service information identified in this AD, contact Air Tractor, Inc., P.O. Box 485, Olney, Texas 76374; telephone: (940) 564–5616; facsimile: (940) 564–5612; E-mail: *parts@airtractor.com;* Web site: *http://www.airtractor.com.*

(4) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri.

**Kim Smith,**

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

[FR Doc. E8–24137 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–1088; Directorate Identifier 2008–NE–15–AD; Amendment 39–15691; AD 2008–21–07]**

**RIN 2120–AA64**

## Airworthiness Directives; Dowty Propellers R408 Series Propellers

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

**ACTION:** Final rule; request for comments.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) issued 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:

Three in-service propellers have been found to have blades which have lost the bonded metallic leading edge guard. If the leading edge guard comes off as the propeller turns, it could cause secondary damage to aircraft or injury to personnel. For the reasons described above, EASA issued Emergency AD 2007–0223–E to require repetitive inspections of the blade Leading Edge (L/E) guards for correct bonding until they accumulate more than 1,200 flight hours (FH) time in service.

This AD requires actions that are intended to address the unsafe condition described in the MCAI, which could result in the loss of the bonded metallic leading edge guard, and could result in damage to the airplane or injury to personnel.

**DATES:** This AD becomes effective October 31, 2008.

We must receive comments on this AD by November 17, 2008.

The Director of the Federal Register approved the incorporation by reference of Dowty Propellers Alert Service Bulletin (ASB) D8400–61–A69, dated August 15, 2007, and ASB D8400–61–A69, Revision 1, dated September 18, 2007, listed in the AD as of October 31, 2008.

**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:* 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:** Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *terry.fahr@faa.gov;* telephone (781) 238–7155; fax (781) 238–7170.

**SUPPLEMENTARY INFORMATION:**

### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2007–0223 R2, dated October 26, 2007, (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Three in-service propellers have been found to have blades which have lost the bonded metallic leading edge guard. If the leading edge guard comes off as the propeller turns, it could cause secondary damage to aircraft or injury to personnel.

For the reasons described above, EASA issued Emergency AD 2007–0223–E to require repetitive inspections of the blade Leading Edge (L/E) guards for correct bonding until they accumulate more than 1,200 FH time in service. Revision 1 of this AD was issued to clarify the required inspections and follow-up actions depending on findings and to make reference to the latest Dowty Alert Service Bulletin (ASB) revision.

This AD has been further revised for clarification, specifying that blades repaired at the tip are only allowed to continue up to 500 hours in service after repair. This limitation was already in the Dowty ASB and the Note is added to the AD to avoid the impression that the AD does not require the same limitation.

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

### Relevant Service Information

Dowty Propellers has issued Alert Service Bulletins D8400–61–A69, dated August 15, 2007; and Revision 1, dated September 18, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

### FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of the United Kingdom, and is approved for operation in the United States. Pursuant to our bilateral agreement with the United Kingdom, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the United Kingdom and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

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 the required compliance time to detect the unsafe condition is too short for public comment. 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–2008–1088; Directorate Identifier 2008–NE–15–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 adding the following new AD:

**2008–21–07 Dowty Propellers (Formerly Dowty Aerospace Propellers)**: Amendment 39–15691; Docket No. FAA–2008–1088; Directorate Identifier 2008–NE–15–AD.

**Effective Date**

(a) This airworthiness directive (AD) becomes effective October 31, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Dowty Propellers model R408/6–123–F/17 propellers with blades, part numbers (P/Ns) 697071200–18, 697071210–18, 697071227–18, 697071240–18, 697071245–18, or 697071257–18, installed. These propellers are installed on, but not limited to, Bombardier, Inc. (formerly de Havilland Canada) models DHC–8–400, DHC–8–401, and DHC–8–402 series airplanes.

**Reason**

(d) Three in-service propellers have been found to have blades which have lost the bonded metallic leading edge guard. If the leading edge guard comes off as the propeller turns, it could cause secondary damage to aircraft or injury to personnel. For the reasons described above, EASA issued Emergency AD 2007–0223–E to require repetitive inspections of the blade Leading Edge (L/E) guards for correct bonding until they accumulate more than 1,200 flight hours (FH) time in service.

This AD requires actions that are intended to address the unsafe condition described in the MCAI, which could result in the loss of the bonded metallic leading edge guard, which could result in damage to the airplane or injury to personnel.

**Actions and Compliance**

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

(1) Within the next 50 FH or within 1 month after the effective date of this AD, whichever occurs first, inspect all the concerned blade assemblies where the bonded metallic L/E guard has accumulated 1,200 FH or less since installation, in accordance with the instructions of Dowty Propellers ASB No. D8400–61–A69;

(2) Within 50 FH or 1 month after installing a replacement blade, inspect the concerned blade assembly where the bonded metallic L/E guard has accumulated 1,200 FH or less since installation, in accordance with the instructions of Dowty Propellers ASB No. D8400–61–A69;

(3) After the inspection as required by paragraph (1) or (2) of this AD, as applicable, at intervals not to exceed 100 FH, repeat the inspection of the concerned blade assemblies in accordance with the instructions of Dowty Propellers ASB No. D8400–61–A69 until the bonded blade L/E guard has accumulated more than 1,200 FH since installation;

(4) When, during any of the inspections as required by paragraphs (1), (2) or (3) of this AD, disbonding is found, apply the criteria as indicated in Appendix A of Dowty Propellers ASB No. D8400–61–A69 Revision 1 and, within the associated time period, repair or replace the affected blade assembly, as necessary, in accordance with the instructions of Dowty Propellers ASB No. D8400–61–A69 Revision 1.

(f) Blades that have been repaired within the first 101.6 mm (4.0 inches) of the tip of the blade as specified in Appendix D of the referenced ASB are allowed to continue in service for another 500 FH after accomplishment of the repair. Repair does not terminate the repetitive inspection requirements of paragraph (e)(3) of this directive.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Boston Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) *Special Flight Permits:* We are prohibiting special flight permits.

**Related Information**

(h) Refer to MCAI Airworthiness Directive 2007–0223, Revision 2, dated October 26, 2007, and Dowty Propellers Alert Service Bulletin (ASB) D8400–61–A69, dated August 15, 2007 or Revision 1, dated September 18, 2007, for related information.

(i) Contact Terry Fahr, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *terry.fahr@faa.gov;* telephone (781) 238–7155; fax (781) 238–7170, for more information about this AD.

**Material Incorporated by Reference**

(j) You must use the service information specified in Table 1 of this AD 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 Dowty Propellers, Anson Business Park, Cheltenham Road East, Gloucester GL2 9QN, UK; Telephone 44 (0) 1452 716000; fax 44 (0) 1452 716001.

(3) 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 1—MATERIAL INCORPORATED BY REFERENCE

| Alert Service Bulletin No. | Page | Revision | Date |
|---|---|---|---|
| D8400–61–A69, Total Pages—4 | 1 | 1 | September 18, 2007. |
| | 2 | Original | August 15, 2007. |
| | 3 | 1 | September 18, 2007. |
| | 4 | Original | August 15, 2007. |
| D8400–61–A69, Appendix A, Total Pages—4 | 1 | 1 | September 18, 2007. |
| | 2 to 4 | Original | August 15, 2007. |
| D8400–61–A69, Appendix B, Total Pages—1 | All | Original | August 15, 2007. |
| D8400–61–A69, Appendix C, Total Pages—3 | All | Original | August 15, 2007. |
| D8400–61–A69, Appendix D, Total Pages—2 | All | 1 | September 18, 2007. |

Issued in Burlington, Massachusetts, on October 3, 2008.

**Thomas A. Boudreau,**

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

[FR Doc. E8–24252 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 97

**[Docket No. 30631; Amdt. No 3290]**

## Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

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

**ACTION:** Final rule.

**SUMMARY:** This establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding 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 October 16, 2008. The compliance date for each SIAP, associated Takeoff Minimums, and ODP 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 October 16, 2008.

**ADDRESSES:** Availability of matters 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 and Takeoff Minimums and ODPs are available online free of charge. Visit *http://www.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 HeadquartersBuilding, 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 andPrograms Divisions, Flight Standards Service, Federal AviationAdministration, Mike Monroney Aeronautical Center, 6500 SouthMacArthur 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 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or revoking SIAPS, TakeoffMinimums and/or ODPS. The complete regulators' description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C.552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAAForms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, in addition to their complex nature and the need for a special format make publication in the **Federal Register** expensive and impractical. Furthermore, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their depiction on charts printed by publishers of aeronautical materials. The advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA forms is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs and the effective dates of the associated Takeoff Minimums and ODPs. 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, Takeoff Minimums and ODP as contained in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical

charts. The circumstances which created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPS and Takeoff Minimums and ODPS, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPS contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPS and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedures before adopting these SIAPS, Takeoff Minimums and ODPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some 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 October 3, 2008.

**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 (14CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures and/or Takeoff Minimums and/or Obstacle Departure Procedures effective at 0902 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:

**Effective 20 Nov. 2008**

Clinton, AR, Holley Mountain Airpark, Takeoff Minimums and Obstacle DP, Orig
Fayetteville, AR, Drake Field, LDA/DME RWY 34, Amdt 3
Fayetteville, AR, Drake Field, RNAV (GPS) RWY 16, Orig
Fayetteville, AR, Drake Field, RNAV (GPS) RWY 34, Orig
Fayetteville, AR, Drake Field, VOR-A, Amdt 25
Sacramento, CA, Sacramento Executive, ILS OR LOC RWY 2, Amdt 23
Sacramento, CA, Sacramento Executive, RNAV (GPS) RWY 2, Orig
Sacramento, CA, Sacramento Executive, Takeoff Minimums and Obstacle DP, Orig
Sacramento, CA, Sacramento Executive, VOR RWY 2, Amdt 10
San Diego/El Cajon, CA, Gillespie Field, GPS RWY 17, Orig-A, CANCELLED
San Diego/El Cajon, CA, Gillespie Field, RNAV (GPS) RWY 17, Orig
San Diego, CA, San Diego Intl, LOC RWY 27, Amdt 3
San Diego, CA, San Diego Intl, RNAV (GPS) RWY 27, Amdt 1
San Jose, CA, Norman Y. Mineta/San Jose Intl, RNAV (RNP) Z RWY 12R, Orig-A
Wray, CO, Wray Muni, RNAV (GPS) RWY 17, Amdt 1
Wray, CO, Wray Muni, RNAV (GPS) RWY 35, Amdt 1
Orlando, FL, Orlando Sanford Intl, ILS OR LOC RWY 9L, Amdt 3
Orlando, FL, Orlando Sanford Intl, ILS OR LOC RWY 27R, Amdt 1
Alma, GA, Bacon County, RNAV (GPS) RWY 15, Amdt 1
Covington, GA, Covington Muni, GPS RWY 28, Orig-B, CANCELLED
Covington, GA, Covington Muni, NDB RWY 28, Amdt 2
Covington, GA, Covington Muni, RNAV (GPS) RWY 10, Orig
Covington, GA, Covington Muni, RNAV (GPS) RWY 28, Orig
Covington, GA, Covington Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Covington, GA, Covington Muni, VOR/DME RWY 10, Amdt 4
Elberton, GA, Elbert Co-Patz Field, GPS RWY 28, Orig, CANCELLED
Elberton, GA, Elbert Co-Patz Field, RNAV (GPS) RWY 10, Orig
Elberton, GA, Elbert Co-Patz Field, RNAV (GPS) RWY 28, Orig
Elberton, GA, Elbert Co-Patz Field, Takeoff Minimums and Obstacle DP, Orig
Elberton, GA, Elbert Co-Patz Field, VOR/DME RWY 10, Amdt 3
Gooding, ID, Gooding Muni, NDB RWY 25, Amdt 1
Champaign/Urbana, IL, University of Illinois-Willard, RNAV (GPS) RWY 32R, Orig
Chicago, IL, Chicago-O'Hare Intl, ILS OR LOC RWY 9L, ILS RWY 9L (CAT II), ILSRWY 9L (CAT III), Orig
Chicago, IL, Chicago-O'Hare Intl, ILS OR LOC RWY 9R, Amdt 9
Chicago, IL, Chicago-O'Hare Intl, ILS OR LOC RWY 27L, ILS RWY 27L (CAT II),ILS RWY 27L (CAT III), Amdt 28
Chicago, IL, Chicago-O'Hare Intl, ILS OR LOC RWY 27R, ILS RWY 27R (CAT II),ILS RWY 27R (CAT III), Orig
Chicago, IL, Chicago-O'Hare Intl, RNAV (GPS) RWY 9L, Orig
Chicago, IL, Chicago-O'Hare Intl, RNAV (GPS) RWY 9R, Amdt 2
Chicago, IL, Chicago-O'Hare Intl, RNAV (GPS) RWY 27L, Amdt 2
Chicago, IL, Chicago-O'Hare Intl, RNAV (GPS) RWY 27R, Orig
Chicago, IL, Chicago-O'Hare Intl, Takeoff Minimums and Obstacle DP, Amdt 16
Morris, IL, Morris Muni-James R. Washburn Field, RNAV (GPS) RWY 36, Amdt 1
Morris, IL, Morris Muni-James R. Washburn Field, Takeoff Minimums andObstacle DP, Orig
Quincy, IL, Quincy Rgnl-Baldwin Field, ILS OR LOC RWY 4, Amdt 17B
Indianapolis, IN, Eagle Creek Airpark, NDB RWY 21, Amdt 4
Indianapolis, IN, Eagle Creek Airpark, Takeoff Minimums and Obstacle DP, Amdt 1
Indianapolis, IN, Eagle Creek Airpark, VOR-A, Amdt 7
Indianapolis, IN, Mount Comfort, RNAV (GPS) RWY 25, Orig
Hopkinsville, KY, Hopkinsville-Christian County, LOC RWY 26, Amdt 4
Hopkinsville, KY, Hopkinsville-Christian County, NDB RWY 26, Amdt 7
Hopkinsville, KY, Hopkinsville-Christian County, RNAV (GPS) RWY 8, Orig
Hopkinsville, KY, Hopkinsville-Christian County, RNAV (GPS) RWY 26, Orig
New Roads, LA, False River Rgnl, LOC RWY 36, Amdt 1

New Roads, LA, False River Rgnl, NDB RWY 36, Amdt 2
Alpena, MI, Alpena County Rgnl, RNAV (GPS) RWY 1, Orig
Detroit, MI, Willow Run, RNAV (GPS) RWY 23L, Amdt 1
Motley, MN, Morey's, Takeoff Minimums and Obstacle DP, Orig, CANCELLED
St Louis, MO, Lambert-St Louis Intl, ILS OR LOC RWY 12R, Amdt 21D
St Louis, MO, Lambert-St Louis Intl, ILS OR LOC RWY 30L, Amdt 12
Charlotte, NC, Charlotte/Douglas Intl, ILS OR LOC RWY 18C, Amdt 9A
Charlotte, NC, Charlotte/Douglas Intl, ILS OR LOC RWY 18L, Amdt 6A
Charlotte, NC, Charlotte/Douglas Intl, ILS OR LOC RWY 36C, ILS RWY 36C (CATII), ILS RWY 36C (CAT III), Amdt 15C
Charlotte, NC, Charlotte/Douglas Intl, ILS OR LOC RWY 36R, ILS RWY 36R (CATII), ILS RWY 36R (CAT III), Amdt 10A
Charlotte, NC, Charlotte/Douglas Intl, RNAV (GPS) RWY 18C, Amdt 2A
Charlotte, NC, Charlotte/Douglas Intl, RNAV (GPS) RWY 36C, Amdt 2A
Charlotte, NC, Charlotte/Douglas Intl, Takeoff Minimums and Obstacle DP, Amdt 4
Manchester, NH, Manchester, Takeoff Minimums and Obstacle DP, Amdt 9
Wilmington, OH, Clinton Field, RNAV (GPS) RWY 21, Amdt 1
Chester, SC, Chester Catawba Regional, GPS RWY 17, Orig, CANCELLED
Chester, SC, Chester Catawba Regional, GPS RWY 35, Orig, CANCELLED
Chester, SC, Chester Catawba Regional, RNAV (GPS) RWY 17, Orig
Chester, SC, Chester Catawba Regional, RNAV (GPS) RWY 35, Orig
Newberry, SC, Newberry County, NDB RWY 22, Amdt 6
Newberry, SC, Newberry County, Takeoff Minimums and Obstacle DP, Amdt 1
Knoxville, TN, McGhee-Tyson, NDB RWY 5R, Amdt 5A, CANCELLED
Knoxville, TN, McGhee-Tyson, RNAV (GPS) RWY 5R, Amdt 1
Knoxville, TN, McGhee-Tyson, RNAV (GPS) RWY 23L, Amdt 1
Sevierville, TN, Gatlinburg-Pigeon Forge, RNAV (GPS) RWY 10, Orig
Sevierville, TN, Gatlinburg-Pigeon Forge, VOR/DME RWY 10, Amdt 6
Carthage, TX, Panola County-Sharpe Field, NDB RWY 35, Amdt 2
Carthage, TX, Panola County-Sharpe Field, RNAV (GPS) RWY 17, Orig
Carthage, TX, Panola County-Sharpe Field, RNAV (GPS) RWY 35, Orig
Carthage, TX, Panola County-Sharpe Field, Takeoff and Minimums andObstacle DP, Orig
Mason, TX, Mason County, Takeoff Minimums and Obstacle DP, Orig
Pleasanton, TX, Pleasanton Muni, GPS RWY 34, Orig, CANCELLED
Pleasanton, TX, Pleasanton Muni, NDB-A, Amdt 5B, CANCELLED
Pleasanton, TX, Pleasanton Muni, RNAV (GPS) RWY 34, Orig
Pleasanton, TX, Pleasanton Muni, Takeoff Minimums and Obstacle DP, Amdt 1
Victoria, TX, Victoria Rgnl, Takeoff and Minimums and Obstacle DP, Orig
Price, UT, Carbon County Rgnl/Buck Davis Field, ILS OR LOC/DME RWY 36, Orig
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 16C, ILS RWY 16C (CAT II),ILS RWY 16C (CAT III), Amdt 13
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 16L, ILS RWY 16L (CAT II),ILS RWY 16L (CAT III), Amdt 4
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 16R, ILS RWY 16R (CAT II),ILS RWY 16R (CAT III), Orig
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 34C, ILS RWY 34C (CAT II), Amdt 2
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 34L, ILS RWY 34L (CAT II), Orig
Seattle, WA, Seattle-Tacoma Intl, ILS OR LOC RWY 34R, ILS RWY 34R (CAT II), Amdt 1
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 16C, Amdt 1
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 16L, Amdt 2
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 16R, Orig
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 34C, Amdt 1
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 34L, Orig
Seattle, WA, Seattle-Tacoma Intl, RNAV (GPS) RWY 34R, Amdt 1
Seattle, WA, Seattle-Tacoma Intl, Takeoff Minimums and Obstacle DP, Amdt 4
Seattle, WA, Seattle-Tacoma Intl, VOR/DME RWY 16L/C, Amdt 14
Seattle, WA, Seattle-Tacoma Intl, VOR/DME RWY 34C, Amdt 1
La Crosse, WI, La Crosse Muni, ILS OR LOC RWY 18, Amdt 19
La Crosse, WI, La Crosse Muni, NDB RWY 18, Amdt 19
La Crosse, WI, La Crosse Muni, VOR RWY 13, Amdt 30
La Crosse, WI, La Crosse Muni, VOR RWY 36, Amdt 31

**Effective 18 Dec. 2008**

Somerville, NJ, Somerset, Takeoff Minimums and Obstacle DP, Amdt 3

[FR Doc. E8–24110 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 990

**[Docket Number FR–5057–I–01]**

**RIN 2577–AC66**

## Public Housing Operating Fund Program; Increased Terms of Energy Performance Contracts

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule would make conforming amendments to the regulations of the Public Housing Operating Fund Program to reflect recent statutory amendments that allow for: The maximum term of an energy performance contract (EPC) between a public housing authority (PHA) and an entity other than HUD to be up to 20 years, and the extension of an existing EPC, without reprocurement, to a period of no more than 20 years, to allow additional energy conservation improvements. The increase in the maximum EPC term, which is currently limited to 12 years, is provided by statutory amendments and will enable longer payback periods for energy conservation measures.

**DATES:** *Effective Date:* November 17, 2008. *Comment Due Date:* December 15, 2008.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables

HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth Hanson, Deputy Assistant Secretary, Departmental Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 2000, Washington, DC 20410–5000; telephone number 202–475–7949 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

Section 9(e) of the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes an Operating Fund for the purpose of making assistance available to PHAs to operate and manage public housing. HUD's regulations implementing section 9(e) of the 1937 Act are located at 24 CFR part 990 (entitled ''The Public Housing Operating Fund Program''). The part 990 regulations contain the policies and procedures governing the Operating Fund allocation formula used by HUD to distribute operating subsidies to PHAs.

On September 19, 2005, at 70 FR 54984, HUD published a final rule amending the regulations at 24 CFR part 990 to provide a new formula for distributing operating subsidies to PHAs and to establish requirements that PHAs convert to asset management. The September 19, 2005, final rule provides PHAs with incentives for energy conservation and utility rate reduction. The energy conservation methods may include, but are not limited to, physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under a performance contract; or a shared savings agreement with a private energy company. The final rule also provided, in § 990.185(a), that the term of the contract under which these energy conservation measures are taken cannot exceed 12 years.

On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005 (Pub. L. 109–58, 119 Stat. 594) (Energy Policy Act). Subtitle D of the Energy Policy Act amended section 9 of the 1937 Act to promote the use in public housing of innovative approaches to achieve programmatic efficiency and reduce utility costs. Specifically, section 151 of the Energy Policy Act amended section 9(e)(2)(C) of the 1937 Act, which governs the treatment of waste and utility savings under the Operating Fund allocation formula. The amendment made by section 151 of the Energy Policy Act provides that qualifying contracts for energy conservation improvements may have terms of not more than 20 years. (See 119 Stat. 647–648.) The Energy Policy Act also amended the Operating Fund treatment of savings resulting from such contracts. It allows for longer payback periods for retrofits, including windows, heating system replacements, wall insulation, site-based generation, advanced energy saving technologies, including renewable energy generation, and other such retrofits.

The Consolidated Appropriations Act, 2008 (Pub. L. 110–161, 121 Stat. 1844, approved December 26, 2007), amended section 9(e)(2)(C) of the 1937 Act (42 U.S.C. 1437g(e)(2)(C)), by adding the following clause:

''(iv) EXISTING CONTRACTS.—The term of a contract described in clause (i) that, as of the date of enactment of this clause, is in repayment and has a term of not more than 12 years, may be extended to a term of not more than 20 years to permit additional energy conservation improvements without requiring the reprocurement of energy performance, contractors.'' (See administrative provision, section 229, of title II of Division K, at 121 Stat. 2438.)

## II. This Interim Rule

This interim rule amends the regulations at 24 CFR 990.185 to provide that, consistent with the amendment to the 1937 Act by section 151 of the Energy Policy Act, the term of an EPC between a PHA and an entity other than HUD may be up to 20 years. Consistent with the amendment made to section 9(e)(C)(2) by the Consolidated Appropriations Act, 2008, this rule also permits the extension of executed EPCs to a term of not more than 20 years without requiring a new competitive procurement process.

The increased maximum contract terms provided by these statutory amendments permit longer payback periods for energy conservation measures. HUD encourages PHAs to utilize the extended contract terms to achieve additional reductions in utility consumption and costs. These statutory changes to EPC terms, as are being codified by this rule, provide PHAs with the ability to fund additional energy measures with a longer payback period, and also provide additional flexibility by allowing a PHA to extend an existing contract without needing to go through procurement.

The provision for entering into EPCs with terms greater than 12 years and for extending the terms of executed EPCs would commence to apply on the effective date of this rule.

The 20-year contract term, consistent with statutory authority, is the maximum term. If state or local laws or regulations restrict terms of EPCs to a shorter period of time, PHAs would still have to comply with the state or local government requirement.

Consistent with the statute, this rule clarifies that to qualify for the incentives under § 990.185, the financing of energy conservation measures by a party other than HUD must be undertaken pursuant to a contract. This rule also clarifies that the term ''energy performance contract'' encompasses all contracts that qualify under § 990.185, regardless of the energy conservation measure involved or the entity that is the other party to the contract with the PHA.

## III. Justification for Interim Rulemaking

In accordance with its regulations on rulemaking at 24 CFR part 10, HUD ordinarily publishes its rules for advance public comment. Notice and public procedure are omitted, however, if HUD determines that, in a particular case or class of cases, notice and public procedure are ''impracticable, unnecessary, or contrary to the public interest.'' (See 24 CFR 10.1.) In this case, HUD is simply conforming its existing regulations to statutory provisions that are already legally effective. In doing so, HUD is not exercising agency discretion, but rather simply following the statutory mandate. Because this is a conforming regulation, advance public notice and comment is unnecessary. However, while HUD found the statutory language to be clear as to meaning and intent and has incorporated the language without change, PHAs may seek further clarification. HUD specifically welcomes comments on the clarity of the conforming amendments, as well as on any other aspect of the rule. HUD will consider all comments submitted by the public in the final rule that follows this interim rule.

**IV. Findings and Certifications**

*Unfunded Mandates Reform Act*

Title II of 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 the private sector. This proposed rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of UMRA.

*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 Order. This rule does not have federalism implications and would not impose substantial direct compliance costs on state and local governments nor preempt state law within the meaning of the Order.

*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. This rule, consistent with recent statutory amendments, provides PHAs with the flexibility to enter into energy performance contracts with terms of not more than 20 years. These revisions impose no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

*Environmental Impact*

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

*Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance program number is 14.850.

**List of Subjects in 24 CFR Part 990**

Accounting, Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons described in the preamble, HUD amends 24 CFR part 990 as follows:

## PART 990—THE PUBLIC HOUSING OPERATING FUND PROGRAM

■ 1. The authority citation for part 990 continues to read as follows:

**Authority:** 42 U.S.C. 1437g; 42 U.S.C. 3535(d).

■ 2. In § 990.185, revise paragraph (a) introductory text and paragraph (a)(3)(iv), to read as follows:

**§ 990.185 Utilities expense level: Incentives for energy conservation/rate reduction.**

(a) *General/consumption reduction.* If a PHA undertakes energy conservation measures that are financed by an entity other than HUD, the PHA may qualify for the incentives available under this section. For a PHA to qualify for these incentives, the PHA must enter into a contract to finance the energy conservation measures, and must obtain HUD approval. Such approval shall be based on a determination that payments under a contract can be funded from reasonably anticipated energy cost savings. The contract period shall not exceed 20 years. The energy conservation measures may include, but are not limited to: Physical improvements financed by a loan from a bank, utility, or governmental entity; management of costs under the performance contract; or a shared savings agreement with a private energy service company. All such contracts shall be known as energy performance contracts. PHAs may extend an executed energy performance contract with a term of less than 20 years to a term of not more than 20 years, to permit additional energy conservation improvements without the reprocurement of energy performance contractors. The PHA must obtain HUD approval to extend the term of an executed energy performance contract.

* * * * *

(3) * * *

(iv) If energy cost savings are less than the amount necessary to meet amortization payments specified in a contract, the contract term may be extended (up to the 20-year limit) if HUD determines that the shortfall is the result of changed circumstances, rather than a miscalculation or misrepresentation of projected energy savings by the contractor or PHA. The contract term may be extended only to accommodate payment to the contractor and associated direct costs.

* * * * *

Dated: September 11, 2008.

**Paula O. Blunt,**

*General Deputy Assistant Secretary for Public and Indian Housing.*

[FR Doc. E8–24573 Filed 10–15–08; 8:45 am]

**BILLING CODE 4210–67–P**

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4022 and 4044

### Benefits Payable in Terminated Single-Employer Plans; Allocation of Assets in Single-Employer Plans; Interest Assumptions for Valuing and Paying Benefits

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** The Pension Benefit Guaranty Corporation's regulations on Benefits Payable in Terminated Single-Employer Plans and Allocation of Assets in Single-Employer Plans prescribe interest assumptions for valuing and paying benefits under terminating single-employer plans. This final rule amends the regulations to adopt interest assumptions for plans with valuation dates in November 2008. Interest assumptions are also published on the PBGC's Web site (*http://www.pbgc.gov*).

**DATES:** Effective November 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

**SUPPLEMENTARY INFORMATION:** The PBGC's regulations prescribe actuarial assumptions—including interest

assumptions—for valuing and paying plan benefits of terminating single-employer plans covered by title IV of the Employee Retirement Income Security Act of 1974. The interest assumptions are intended to reflect current conditions in the financial and annuity markets.

*Three sets of interest assumptions are prescribed:* (1) A set for the valuation of benefits for allocation purposes under section 4044 (found in Appendix B to Part 4044), (2) a set for the PBGC to use to determine whether a benefit is payable as a lump sum and to determine lump-sum amounts to be paid by the PBGC (found in Appendix B to Part 4022), and (3) a set for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology (found in Appendix C to Part 4022).

This amendment (1) adds to Appendix B to Part 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during November 2008, (2) adds to Appendix B to Part 4022 the interest assumptions for the PBGC to use for its own lump-sum payments in plans with valuation dates during November 2008, and (3) adds to Appendix C to Part 4022 the interest assumptions for private-sector pension practitioners to refer to if they wish to use lump-sum interest rates determined using the PBGC's historical methodology for valuation dates during November 2008.

For valuation of benefits for allocation purposes, the interest assumptions that the PBGC will use (set forth in Appendix B to part 4044) will be 7.09 percent for the first 20 years following the valuation date and 6.16 percent thereafter. These interest assumptions represent an increase (from those in effect for October 2008) of 0.91 percent for the first 20 years following the valuation date and 0.91 percent for all years thereafter.

The interest assumptions that the PBGC will use for its own lump-sum payments (set forth in Appendix B to part 4022) will be 3.75 percent for the period during which a benefit is in pay status and 4.00 percent during any years preceding the benefit's placement in pay status. These interest assumptions represent an increase (from those in effect for October 2008) of 0.50 percent in the immediate annuity rate and are otherwise unchanged. For private-sector payments, the interest assumptions (set forth in Appendix C to part 4022) will be the same as those used by the PBGC for determining and paying lump sums (set forth in Appendix B to part 4022).

The PBGC has determined that notice and public comment on this amendment are impracticable and contrary to the public interest. This finding is based on the need to determine and issue new interest assumptions promptly so that the assumptions can reflect current market conditions as accurately as possible.

Because of the need to provide immediate guidance for the valuation and payment of benefits in plans with valuation dates during November 2008, the PBGC finds that good cause exists for making the assumptions set forth in this amendment effective less than 30 days after publication.

The PBGC has determined that this action is not a ''significant regulatory action'' under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

**List of Subjects**

*29 CFR Part 4022*

Employee benefit plans, Pension insurance, Pensions, Reporting and recordkeeping requirements.

*29 CFR Part 4044*

Employee benefit plans, Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR parts 4022 and 4044 are amended as follows:

## PART 4022—BENEFITS PAYABLE IN TERMINATED SINGLE-EMPLOYER PLANS

■ 1. The authority citation for part 4022 continues to read as follows:

**Authority:** 29 U.S.C. 1302, 1322, 1322b, 1341(c)(3)(D), and 1344.

■ 2. In appendix B to part 4022, Rate Set 181, as set forth below, is added to the table.

**Appendix B to Part 4022—Lump Sum Interest Rates for PBGC Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | | * |
| 181 | 11–1–08 | 12–1–08 | 3.75 | 4.00 | 4.00 | 4.00 | 7 | 8 |

■ 3. In appendix C to part 4022, Rate Set 181, as set forth below, is added to the table.

**Appendix C to Part 4022—Lump Sum Interest Rates for Private-Sector Payments**

* * * * *

| Rate set | For plans with a valuation date | | Immediate annuity rate (percent) | Deferred annuities (percent) | | | | |
|---|---|---|---|---|---|---|---|---|
| | On or after | Before | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | | * |
| 181 | 11–1–08 | 12–1–08 | 3.75 | 4.00 | 4.00 | 4.00 | 7 | 8 |

## PART 4044—ALLOCATION OF ASSETS IN SINGLE-EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

**Authority:** 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry for November 2008, as set forth below, is added to the table.

**Appendix B to Part 4044—Interest Rates Used To Value Benefits**

* * * * *

| For valuation dates occurring in the month— | The values of $i_t$ are: | | | | | |
|---|---|---|---|---|---|---|
| | $i_t$ | for $t$ = | $i_t$ | for $t$ = | $i_t$ | for $t$ = |
| * * * | | * | | * | | * |
| November 2008 | .0709 | 1–20 | .0616 | >20 | N/A | N/A |

Issued in Washington, DC, on this 9th day of October 2008.

**Vincent K. Snowbarger,**

*Deputy Director for Operations,Pension Benefit Guaranty Corporation.*

[FR Doc. E8–24651 Filed 10–15–08; 8:45 am]

**BILLING CODE 7709–01–P**

## DEPARTMENT OF EDUCATION

### 34 CFR Part 5b

**RIN 1880–AA85**

**[Docket ID ED, ED–2008–OM–0004]**

### Privacy Act Regulations

**AGENCY:** Office of Management, Department of Education.

**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations implementing the Privacy Act of 1974, as amended (Privacy Act). These changes are intended to exempt from certain Privacy Act requirements investigative material in a new system of records maintained by the Department that will be known as the Office of Inspector General Data Analytics System (ODAS) (18–10–02). Specifically, the exemption applies to materials compiled by the Department's Office of Inspector General (OIG) for law enforcement purposes to identify internal control weaknesses and system issues and to improve methods of data modeling and annual audit planning in order to detect and investigate fraud, waste, and mismanagement in Department programs and operations.

**DATES:** These regulations are effective November 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Shelley Shepherd, Office of Inspector General, U.S. Department of Education, 400 Maryland Avenue, SW., room 8166, Washington, DC 20202–5920. Telephone: (202) 245–7077.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**SUPPLEMENTARY INFORMATION:** On May 8, 2008 the Secretary published a notice of proposed rulemaking (NPRM) for this part in the **Federal Register** (73 FR 26056). In the summary to the NPRM, on pages 26056 and 26507, the Secretary discussed how the proposed regulations would amend the Department's Privacy Act regulations to exempt from certain Privacy Act requirements investigative material in a new system of records. The new system of records is the Office of Inspector General Data Analytics System (ODAS) and the exemption would apply to materials compiled by the Office of Inspector General (OIG) for law enforcement purposes.

There are no differences between the NPRM and these final regulations.

### Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, the Department received no comments on the proposed regulations.

### Executive Order 12866

We have reviewed these final regulations in accordance with Executive Order 12866. Under the terms of the order we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those we have determined to be necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of these final regulations, we have determined that the benefits of the regulations justify the costs.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We summarized the potential costs and benefits of these final regulations in the NPRM at 73 FR 26058.

### Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

### Electronic Access to This Document

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(Catalog of Federal Domestic Assistance Number does not apply.)

Dated: October 10, 2008.

**Christopher P. Marston,**

*Assistant Secretary for Management.*

■ For the reasons discussed in the preamble, the Secretary amends Part 5b of title 34 of the Code of Federal Regulations as follows:

## PART 5b—PRIVACY ACT REGULATIONS

■ 1. The authority citation for part 5b continues to read as follows:

**Authority:** 5 U.S.C. 301, 5 U.S.C. 552a.

■ 2. Section 5b.11 is amended by revising paragraph (c)(1) introductory text to read as follows:

**§ 5b.11 Exempt systems.**

* * * * *

(c) *Specific systems of records exempted under (k)(2).* (1) The Department exempts the Investigative Files of the Inspector General ED/OIG (18–10–01), the Hotline Complaint Files of the Inspector General ED/OIG (18–10–04), and the Office of Inspector General Data Analytics System (ODAS) (18–10–02) from the following provisions of 5 U.S.C. 552a and this part to the extent that these systems of records consist of investigatory material and complaints that may be included in investigatory material compiled for law enforcement purposes:

* * * * *

[FR Doc. E8–24608 Filed 10–15–08; 8:45 am]

BILLING CODE 4000–01–P

## POSTAL SERVICE

## 39 CFR Part 111

## Revised Standards for Postage and Fee Refunds

**AGENCY:** Postal Service.™

**ACTION:** Final rule.

**SUMMARY:** This rule modifies the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 604.9.0 to establish a minimum dollar amount for the issuance of checks by the USPS® for the refund of unused postage value in postage meters and PC Postage® accounts. In addition, we provide specific time frames and procedures for refunds of different types of postage produced by PC Postage and postage meter systems.

**DATES:** This rule is effective November 6, 2008.

**FOR FURTHER INFORMATION CONTACT:** Daniel J. Lord, Manager, Postage Technology Management, U.S. Postal Service, at 202–268–4281.

**SUPPLEMENTARY INFORMATION:** The final rule establishes a $25.00 minimum for USPS issuance of individual customer refund checks for the unused postage value in postage meters and PC postage accounts. In addition, the final rule provides a 60-day limit for submission of physical refunds for both PC Postage and postage meter indicia; specifies a 10-day limit and procedure for requesting refunds processed electronically for items bearing a Product Identification Code (PIC) produced by a PC Postage system; and establishes a refund procedure for unused, undated PC Postage indicia.

A revised proposed revision of DMM 604.9.0 was published for comment in the **Federal Register**, May 9, 2008 (Vol. 73, No. 91, pages 26353–26355).

*Comments:*

No comments were received on the revised proposed rule.

**List of Subjects in 39 CFR Part 111**

Administrative practice and procedure, Postal Service.

■ Accordingly, 39 CFR Part 111 is amended as follows:

## PART 111—[AMENDED]

■ 1. The authority citation for 39 CFR Part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM), as follows:

*Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM)

* * * * *

**600 Basic Standards for All Mailing Services**

* * * * *

**604 Postage Payment Methods**

* * * * *

**9.0 Refunds and Exchanges**

* * * * *

*9.2 Postage and Fee Refunds*

* * * * *

**9.2.8 Ruling on Refund Request**

Refund requests are decided based on the specific type of postage or mailing:

* * * * *

[*Revise items b and c by changing ''licensing post office'' to ''local post office'' and changing ''licensee'' to ''authorized user'' as follows:*]

b. Dated metered postage, except for PC Postage systems, under 9.3. The postmaster at the local Post Office grants or denies requests for refunds for dated metered postage under 9.3. The authorized user may appeal an adverse ruling within 30 days through the manager, Postage Technology Management, USPS Headquarters (see 608.8.0 for address), who issues the final agency decision. The original meter indicia must be submitted with the appeal.

c. Undated metered postage under 9.3. The manager, business mail entry at the district Post Office overseeing the mailer's local Post Office, or designee authorized in writing, grants or denies requests for refunds for undated metered postage under 9.3. The authorized user may appeal an adverse ruling within 30 days through the manager, business mail entry, or designee, to the Pricing and Classification Service Center (PCSC) manager who issues the final agency decision. The original meter indicia must be submitted with the appeal.

[*Revise item d as follows:*]

d. PC Postage systems under 9.3. The system provider grants or denies a request for a refund for indicia printed by PC Postage systems under 9.3 using established USPS criteria. The authorized user may appeal an adverse ruling within 30 days through the manager, Postage Technology Management, USPS Headquarters, who issues the final agency decision. The original indicia must be submitted with the appeal.

* * * * *

**9.3 Refund Request for Postage Evidencing Systems and Metered Postage**

**9.3.1 Unused Postage Value in Postage Evidencing Systems**

[*Revise 9.3.1 to restrict refunds to amounts of $25.00 or more and to change ''licensee'' to ''authorized user'' as follows:*]

The unused postage value remaining in a postage evidencing system when withdrawn from service may be refunded, depending upon the circumstance and the ability of the USPS to make a responsible determination of the actual or approximate amount of the unused postage value. If the postage evidencing system is withdrawn because of faulty operation, a final postage adjustment or refund will be withheld pending the system provider's report of the cause to the USPS and the USPS determination of whether or not a refund is appropriate and, if so, the amount of the refund. No refund is given for faulty operation caused by the authorized user. When a postage evidencing system that is damaged by fire, flood, or similar disaster is returned to the provider, postage may be refunded or transferred when the registers are legible and accurate, or the register values can be reconstructed by the provider based on adequate supporting documentation. When the damaged system is not available for return, postage may be refunded or transferred only if the provider can accurately determine the remaining postage value based on adequate supporting documentation. The authorized user may be required to provide a statement on the cause of the

damage and to attest that there has not been reimbursement by insurance or otherwise, and that the authorized user will not seek such reimbursement. Refunds for unused postage value are granted for postage evidencing systems specified in 4.0 in accordance with the following procedures:

a. All postage evidencing systems except for PC Postage systems. Authorized users must notify their provider to withdraw the system and to refund any unused postage value remaining on their system or account. The postage evidencing system must be examined to verify the amount before any funds are cleared from the meter. Based on what is found, a refund or credit is initiated for unused postage value, or additional money is collected to pay for postage value used. The provider forwards the refund request to the USPS for payment or may credit the amount to the authorized user's account. The USPS will not issue individual customer refund checks for unused postage value less than $25.00 remaining in a postage evidencing system.

b. PC Postage systems. Authorized users must notify their provider to withdraw the system and to refund any unused postage value remaining in their account. The provider refunds the unused postage value remaining on the user's system on behalf of the USPS. The USPS will not issue individual customer refund checks for unused postage value less than $25.00 remaining in a postage evidencing system.

**9.3.2 Unused, Dated Postage Evidencing System Indicia, Except PC Postage Indicia**

* * * All other metered postage refund requests must be submitted as follows:

[*Revise items a through e only as follows:*]

a. Authorized users must submit the request to their local Post Office. The refund request must include proof that the person or entity requesting the refund is the authorized user of the postage meter that printed the indicia. Acceptable proof includes a copy of the lease, rental agreement, or contract.

b. Authorized users must include the items bearing the unused postage with their request to their local Post Office. The items must be sorted by meter used and then by postage value shown in the indicia, and must be properly faced and bundled in groups of 100 identical items when quantities allow. The request is processed by the USPS. The postmaster approves or denies the refund request.

c. Authorized users must submit the refund request within 60 days of the date(s) shown in the indicia.

d. When unused metered postage is affixed to a mailpiece, the refund request must be submitted with the entire envelope or wrapper. For those items with postage affixed to a large container (i.e., cardboard box), a sufficient portion of the container with the postage affixed must be included to validate that the item was never deposited with the USPS. The unused metered postage must not be removed from the mailpiece once applied.

e. Indicia printed on labels or tapes not adhered to wrappers or envelopes must be submitted loose and must not be stapled together or attached to any paper or other medium. Self-adhesive labels printed without a backing may be submitted on a plain sheet of paper.

* * * * *

**9.3.3 Unused, Dated PC Postage Indicia**

* * * The refund request must be submitted as follows:

[*Revise 9.3.3 a, b, and c only as follows:*]

a. Only authorized PC Postage users may request the refund. Users must submit the request to their system provider. The request is processed by the provider, not the USPS.

b. Requests for refund of PC Postage indicia that contain a valid Postal Identification Code (PIC) must be submitted by authorized users to their provider electronically in accordance with procedures available from their provider. Valid PICs include any form of Delivery Confirmation, Signature Confirmation, Express Mail, or Confirm Code service. Authorized users must initiate requests for electronic refunds within ten (10) days of printing the indicia. Refunds for postage associated with a PIC may only be submitted electronically. Physical submissions are not permitted.

c. Requests for refund of PC Postage indicia which do not have an associated PIC must be physically submitted by authorized users to their provider, along with the items bearing the unused postage, in accordance with procedures available from their provider. Authorized users must submit the refund request within sixty (60) days of the date(s) shown in the indicia. The refund request must be submitted as required in 9.3.2d through 9.3.2g.

* * * * *

[Revise heading of 9.3.4 as follows:]

**9.3.4 Unused, Undated Metered Postage**

* * * The refund request must be submitted as follows:

[*Revise text of items a and c only as follows:*]

a. Only the authorized user, or the commercial entity that prepared the mailing for the authorized user, may request the refund. The request must include a letter signed by the authorized user, or the commercial entity that prepared the mailing, explaining why the mailpieces were not mailed.

* * * * *

c. The authorized user, or the commercial entity that prepared the mailing for the authorized user, must submit the request, along with the items bearing the unused postage and the required documentation, to the manager, business mail entry at the district Post Office overseeing the mailer's local Post Office, or to a designee authorized in writing. The manager or designee approves or denies the refund request.

* * * * *

[*Renumber current 9.3.5 through 9.3.7 as new 9.3.6 through 9.3.8, and add new 9.3.5 as follows:*]

**9.3.5 Unused, Undated PC Postage Indicia**

Refunds will not normally be provided for valid, undated, serialized PC Postage indicia containing commonly used postage values. If the authorized user believes there are extraordinary circumstances, requests for such refunds must be made by the authorized user in accordance with the procedures outlined in 9.3.3.c, along with a detailed description of the extraordinary circumstances. Requests will be considered by the provider on a case by case basis.

**9.3.6 Ineligible Metered Postage Items**

The following metered postage items are ineligible for refunds:

* * * * *

[*Revise item d of renumbered 9.3.6 to change ''licensing Post Office'' to ''local Post Office'' as follows:*]

d. Indicia lacking identification of the local Post Office or other required information.

* * * * *

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. E8–24537 Filed 10–15–08; 8:45 am]

**BILLING CODE 7710–12–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R06–OAR–2008–0420; FRL–8730–3]**

## Approval and Promulgation of Air Quality Implementation Plans; Texas; Dallas/Fort Worth 1-Hour Ozone Nonattainment Area; Determination of Attainment of the 1-Hour Ozone Standard

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA has determined that the Dallas/Fort Worth (DFW) 1-hour ozone nonattainment area is currently attaining the 1-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 1-hour ozone NAAQS for the 2004–2006 monitoring period. In addition, quality controlled and quality assured ozone data for 2007 and 2008 that are available in the EPA Air Quality System database show this area continues to attain the 1-hour ozone NAAQS. The requirements for this area to submit an attainment demonstration or 5% Increment of Progress (IOP) plan, a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plans (SIPs) related to attainment of the 1-hour ozone NAAQS are suspended for so long as the area continues to attain the 1-hour ozone NAAQS.

**DATES:** This final rule is effective on November 17, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2008–0420. All documents in the docket are listed at *www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act (FOIA) Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

**FOR FURTHER INFORMATION CONTACT:** Ms. Carrie Paige, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6521, fax (214) 665–7263, e-mail address *paige.carrie@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, ''we,'' ''us,'' and ''our'' means EPA. This **SUPPLEMENTARY INFORMATION** section is arranged as follows:



### I. What Action Is EPA Taking?

We are determining that the Dallas/Fort Worth (DFW) 1-hour ozone nonattainment area is currently attaining the 1-hour ozone National Ambient Air Quality Standard (NAAQS). This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 1-hour ozone NAAQS for the 2004–2006 monitoring period. In addition, quality controlled and quality assured ozone data for 2007 and 2008 that are available in the EPA Air Quality System databases show this area continues to attain the 1-hour ozone NAAQS.

The rationale for our action is explained in the Notice of Proposed Rulemaking (NPR) published on July 11, 2008 (73 FR 39897) and will not be restated here. No public comments were received on the NPR.

### II. What Is the Effect of This Action?

Pursuant to our determination of attainment and in accordance with our Clean Data Policy [1], this determination suspends the requirements for the DFW area to submit an attainment demonstration, a RFP plan, or in this case a 5% IOP plan, (40 CFR 51.905(a)), section 172(c)(9) and section 182(c)(9) contingency measures, and other SIPs related to attainment of the 1-hour ozone NAAQS for so long as the area is attaining the standard.

### III. Final Action

We find that the DFW 1-hour ozone nonattainment area has attained the 1-hour ozone standard. Thus the requirements for submitting the attainment demonstration or 5% IOP plan, RFP plan, section 172(c)(9) and section 182(c)(9) contingency measures, and other SIPs related to attainment of the 1-hour ozone NAAQS are suspended for so long as the area is attaining the standard.

### IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action makes a determination based on air quality data, and results in the suspension of certain Federal requirements. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*).

Because this rule makes a determination based on air quality data, and results in the suspension of certain Federal requirements, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in

[1] Our Clean Data Policy is set forth in a May 10, 1995 EPA memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, entitled ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone Ambient Air Quality Standard''.

Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely makes a determination based on air quality data and results in the suspension of certain Federal requirements, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it determines that air quality in the affected area is meeting Federal standards.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply because it would be inconsistent with applicable law for EPA, when determining the attainment status of an area, to use voluntary consensus standards in place of promulgated air quality standards and monitoring procedures that otherwise satisfy the provisions of the Clean Air Act. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Under Executive Order 12898, EPA finds that this rule involves a determination of attainment based on air quality data and will not have disproportionately high and adverse human health or environmental effects on any communities in the area, including minority and low-income communities.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 15, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to reclassify the HGB area as a severe ozone nonattainment area and to adjust applicable deadlines may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 8, 2008.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

■ 40 CFR part 52 is amended as follows:

## PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

## Subpart SS—Texas

■ 2. Section 52.2275 is amended by adding paragraph (f) to read as follows:

**§ 52.2275 Control strategy and regulations: Ozone.**

* * * * *

(f) Determination of Attainment. Effective November 17, 2008 EPA has determined that the Dallas/Fort Worth (DFW) 1-hour ozone nonattainment area has attained the 1-hour ozone standard. Under the provisions of EPA's Clean Data Policy, this determination suspends the requirements for this area to submit an attainment demonstration or 5% increment of progress plan, a reasonable further progress plan, contingency measures, and other State Implementation Plans related to attainment of the 1-hour ozone NAAQS for so long as the area continues to attain the 1-hour ozone NAAQS.

[FR Doc. E8–24592 Filed 10–15–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 80

**[EPA–HQ–2005–0036; FRL–8729–7]**

**RIN 2060–A089**

## Control of Hazardous Air Pollutants From Mobile Sources:Early Credit Technology Requirement Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to revise the February 26, 2007 mobile source air toxics rule's requirements that specify which benzene control technologies a refiner may utilize to qualify to generate early benzene credits. This action will allow another specific benzene control technology, benzene alkylation, in addition to the four operational or technological changes specified in the current rule. This action also includes a general provision that allows a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits.

**DATES:** This final rule is effective on December 15, 2008.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–HQ–2005–0036. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Eastern Standard Time, Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** Christine Brunner, Office of Transportation and Air Quality, Assessment and Standards Division, Environmental Protection Agency, 2000 Traverwood, Ann Arbor, MI 48105; telephone number: (734) 214–4287; fax

number: (734) 214–4816; e-mail address: *brunner.christine@epa.gov*. Alternative contact: Assessment and Standards Division Hotline, telephone number: (734) 214–4636; e-mail address: *asdinfo@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Does This Action Apply to Me?**

This action may affect you if you produce gasoline. The following table gives some examples of entities that may have to follow the regulations.

| Category | NAICS [1] codes | SIC [2] codes | Examples of potentially regulated entities |
|---|---|---|---|
| Industry | 324110 | 2911 | Petroleum Refiners. |

[1] North American Industry Classification System (NAICS).
[2] Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also be affected. To decide whether your organization might be affected by this action, you should carefully examine today's action and the existing regulations in 40 CFR part 80. If you have any questions regarding the applicability of this action to a particular entity, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

**Outline of This Preamble**



## I. Background

The Control of Hazardous Air Pollutants From Mobile Sources final rule (also known as the Mobile Source Air Toxics rule or MSAT2) was published on February 26, 2007 (72 FR 8428). That rule requires that refiners and importers produce gasoline that has an annual average benzene content of 0.62 volume percent (vol%) or less, beginning in 2011. (See § 80.1230(a).) The rule also requires that no refiner or importer have an actual average gasoline benzene level greater than 1.3 vol%. After achieving an actual annual average benzene level of 1.3 vol%, refiners and importers may use benzene credits to reduce their average benzene level to 0.62 vol%. Refiners may generate benzene credits for their own use or to sell to others, in two ways. Once the program begins in 2011, a refiner generates credits (known as standard credits) when its average annual gasoline benzene level is less than 0.62 vol%.

Refiners may also generate credits prior to 2011. These credits are called early credits, and are the subject of this final rule. The MSAT2 rule allows early benzene credits to be generated in any annual averaging period prior to 2011 (i.e., 2008, 2009, and 2010), as well as for the partial year period June 1–December 31, 2007. Early credits are generated on a refinery basis. In order to generate early credits, a refinery must meet several requirements:

(1) Establish a benzene baseline based on the average benzene level of the gasoline produced at the refinery during the two-year period 2004–05. (See § 80.1285.)

(2) Achieve an annual average benzene level at least 10% lower than its baseline level. (See § 80.1275(a).)

(3) Make operational changes or improvements in benzene control technology that will result in real benzene reductions. (See § 80.1275(d).)

Any refining or operational changes may be utilized to comply with the average benzene content requirement. However, in order to generate early credits, the rule specifies four types of operational changes and benzene control technology improvements that would allow a refinery to qualify if it implemented the changes/improvements after 2005 (and if it also met the other related requirements). § 80.1275(d)(1). These operational changes and technology improvements are:

(1) Treating the heavy straight run naphtha entering the reformer using light naphtha splitting and/or isomerization.

(2) Treating the reformate stream exiting the reformer using benzene extraction or benzene saturation.

(3) Directing additional refinery streams to the reformer for treatment as described in (1) and (2) above.

(4) Directing reformate streams to other refineries with treatment capabilities as described in (2) above.

A refinery needs to implement at least one of these listed changes/improvements in order to generate early credits.

This list includes all the strategies we thought would reduce fuel benzene (and thus benzene emissions) and be cost-effective. The provision was intended to preclude refineries from generating early credits solely by benzene reductions achieved through ethanol blending.

The final rule does not provide a way for EPA to consider alternative means of reducing fuel benzene and generating early credits, no matter how effective the alternative. Soon after the rule was finalized, it was brought to our attention that at least one refinery had plans to install benzene alkylation technology (also known as reformate alkylation). Benzene alkylation involves converting benzene into other aromatic compounds by the addition of alkyl groups to the benzene ring. Xylene, toluene and cumene are typical products formed by benzene alkylation. Benzene alkylation is not one of the four operational or technological changes enumerated in the final rule. Although EPA regarded benzene alkylation as a legitimate benzene reduction technology, and one which can be used to comply with the standard, we did not include it in the list of technologies for generation of early credits merely because we did not expect refiners to use it. (See the Regulatory Impact Analysis (EPA420–R–07–002, February 2007), Chapter 6, page 36.)

We therefore considered a request to include benzene alkylation on the list of

early credit-generating technologies to have merit, and on March 12, 2008, we published a direct final rulemaking and a parallel proposal that would have revised the February 26, 2007 MSAT2 requirement regarding the benzene control technologies that qualify a refiner to generate early benzene credits to allow benzene alkylation in addition to the four operational or technological changes allowed by the MSAT2 rule. The direct final rule would have also allowed a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits.

We stated that if we received adverse comment by April 11, 2008, the direct final rule would not take effect and we would publish a timely withdrawal in the **Federal Register**. Commenters did in fact submit significant adverse comment and we accordingly published a withdrawal of the direct final rule on May 9, 2008. (See 73 FR 26325.) We stated in the direct final rule and the parallel proposed rule that we would address comments in any subsequent final action, which would be based on the parallel proposed rule, without a second comment period on the action. Today's action is based on the parallel proposed rule, and finalizes that proposal, so that refiners using benzene alkylation may generate early credits, and refiners can make site-specific demonstrations to EPA which may result in other technologies being eligible to generate early credits.

## II. Response to Comments

We received comments from the Northeast States for Coordinated Air Use Management (NESCAUM) and the New York State Department of Environmental Conservation (NYDEC). The commenters expressed several concerns with the rule. First, they were concerned that the rule continued the 2007 rule's focus on gasoline benzene content rather than benzene vehicle emissions. Second, commenters expressed the related concern that although benzene alkylation reduces gasoline benzene levels, it may not reduce benzene vehicle emissions. One commenter suggested that early credits be discounted to account for vehicular benzene emissions attributable to re-formed benzene. Commenters also expressed concern about increased aromatics emissions from vehicles. Finally, commenters opposed allowing other future refinery operational changes to be approved after petition to and review by EPA for the purpose of generating early credits.

As will be discussed below, benzene alkylation meaningfully reduces gasoline benzene levels and thus directly reduces benzene emissions. For this reason, we believe that allowing refiners to qualify to generate early credits through the use of benzene alkylation is consistent with the intent of technology requirement associated with the early credit provisions. Use of benzene alkylation will not have the adverse effects of concern to the commenters: benzene vehicle emissions will be reduced, and there will not be appreciable increases in aromatics emissions from vehicles.

Fuel aromatics and fuel benzene levels both affect vehicle benzene emissions, but not to anywhere near the same degree. Fuel benzene has more than a 20-fold [1] greater impact on benzene emissions from vehicles than other fuel components, including fuel aromatics levels. In the March 29, 2006 proposed rule, we discussed how non-benzene aromatics account for about 30% by volume of gasoline and contribute about 30% of benzene emissions while benzene constitutes only about one volume percent of the fuel but is responsible for about 25% of the benzene emissions. (The remaining benzene emissions are formed from other (non-aromatic) compounds. See 71 FR 15864). Based on evaluations using the Complex Model, we concluded there that a 20% reduction in aromatics would be needed to achieve the same level of benzene emissions reductions as the 0.62 vol% standard. (See 71 FR 15864.) [2] Thus, in the 2007 final rule, we concluded that fuel benzene control is the most effective means of reducing benzene and overall MSAT emissions because it offers measurable and certain benzene reductions that are not affected by ''changes in fuel composition or vehicle technology.'' (See 72 FR 8477.)

Reducing fuel benzene through alkylation or any other benzene reduction technology results in greater than 95% reduction in benzene exhaust emissions compared to the benzene emissions caused by the fuel benzene removed. We estimate that there is less than a 1% difference among benzene reduction technologies in their effectiveness at reducing benzene emissions.[3] Because benzene emissions reductions are significant regardless of the fuel benzene reduction technology, there is no reason to discourage the use of one technology over another. For the same reason, we do not agree with the suggestion to discount early credits generated by use of benzene alkylation to account for vehicular emissions.

The commenters' concern about increases in vehicle non-benzene aromatic emissions is also somewhat misplaced. Again, given the small amount of benzene in gasoline (1 vol%) relative to total aromatics (20–40 vol%), the additional contribution of aromatics attributable to alkylating the benzene is minimal, as would be any increase in aromatic emissions. In addition, as we discussed in the 2007 rule, fuel aromatics levels are expected to decrease because of increased ethanol use, so aromatics emission levels should be dropping in any event.

Thus, based on the analyses in the 2007 rule of the impacts of fuel benzene and aromatics reductions on emissions, the slight increase in fuel aromatics content that could result from refineries using benzene alkylation for the purposes of generating early credits under this rule should reduce benzene emissions that would otherwise not be reduced at this time. No deleterious vehicle emissions impacts are expected. It thus is appropriate for refiners using benzene alkylation to reduce fuel benzene levels to be eligible to generate early credits.

With respect to the other portion of today's rule, we continue to believe that allowing a refiner to petition us to use

[1] Based on mg/mi benzene emissions per volume fraction of the fuel component (benzene, aromatics, other) in gasoline.

[2] Though this effect can be seen through Complex Model runs (which is based on 1990 vehicle technology), in the 2007 rulemaking, we found that tailpipe benzene emissions from Tier 2 vehicles have a similar response, in that significantly greater reductions in fuel aromatics levels are needed to get the same benzene reduction emissions impact that results from the MSAT2 benzene standard. See Control of Hazardous Air Pollutants from Mobile Sources, Regulatory Impact Analysis, Chapter 6, ''Feasibility of the Benzene Control Program,'' February 2007.

[3] Data collected from a recent test program (described in Chapter 6.11 of the Regulatory Impact Analysis of the 2007 MSAT rule) suggest that a typical Tier 2 vehicle emits approximately 3.10 mg/mi of benzene when burning gasoline with 1 vol% benzene and 30 vol% aromatics. Simulations done using the Complex Model for gasoline compliance (described in 40 CFR 80.45) suggest that approximately 25 wt% of exhaust benzene emission is due to benzene in the fuel (typically about 1 vol%), about 30 wt% of exhaust benzene emission is due to aromatics in the fuel (typically about 30 vol%), and the remaining 45 wt% of exhaust benzene emission is from the rest of the fuel (i.e., non-aromatic compounds). Given this information, and making the assumption that alkylation would be used to convert 0.4 vol% of benzene to 0.4 vol% aromatics (to take pool benzene from 1.0 vol% to 0.60 vol%, slightly overcomplying with the new standard), we can estimate that a vehicle's tailpipe benzene emissions would be reduced from 3.10 mg/mi to 2.80 mg/mi if alkylation were used to reduce fuel benzene, compared to 2.79 mg/mi if another method of benzene reduction were used that did not create additional aromatics. This difference is less than 1%, and is relatively insensitive to the original emission level of the vehicle or the amount of fuel benzene reduction occurring. The difference is even smaller if one includes evaporative benzene emission, which is reduced by an identical amount for any method of benzene reduction.

an operating change not currently listed in order to qualify to generate early benzene credits is appropriate. A refiner would have to show in the petition that the operating change would reduce fuel benzene levels which, as just discussed, is the best means of reducing benzene vehicle emissions. The MSAT2 program encourages early fuel benzene reductions in order to get early benzene emissions reductions. This action is not about permitting a refinery to implement a new technology or make an operating change—those actions can happen at any time within or outside of the early credit generation window, regardless of the refinery's intent vis-a-vis generating early credits. Today's action requires the petitioner to show that the change they intend to make reduces fuel benzene levels which directly and significantly reduces benzene vehicle emissions more than any other fuel compositional change. The petition process has the added value of being more timely than a rulemaking, which is important since early credits can only be generated through 2010, and refiners must apply to generate early credits before the start of the annual averaging period in which they first want to generate early credits.

## III. This Action

We published a Questions and Answers document related to the MSAT2 program on August 16, 2007. (*http://epa.gov/otaq/regs/toxics/420f07053.pdf*) In that document, we specifically addressed benzene alkylation and indicated that benzene alkylation meets the intent of the technology requirement for early credits. As discussed in the preamble of the final rule, early credits are generated based on innovations in gasoline benzene control technology that result in real benzene reductions prior to the start of the program in 2011. (See 72 FR 8486.) The use of benzene alkylation directly results in lower gasoline benzene levels.

Today's action revises § 80.1275(d)(1) to include benzene alkylation in the list of acceptable reduction operational and technological strategies. We have also included a general provision that allows a refiner to petition EPA to use an operational or technological change that is not listed in the regulation for the purpose of generating early credits. The refiner must demonstrate that the benzene control technology improvement or operational change results in a net reduction in the refinery's average gasoline benzene level, exclusive of benzene reductions due simply to blending practices. The petition must be submitted to EPA prior to the start of the first averaging period in which the refinery plans to generate early credits. EPA expects it would act on such a petition before the end of that averaging period. The refiner must also provide additional information requested by EPA.

The other requirements for generating early credits are unchanged. These include submitting a benzene baseline, reducing the refinery's baseline benzene level by at least 10% in a given averaging period, and not moving gasoline or blendstock streams between refineries for the purpose of generating early credits. (See 72 FR 8486.)

## IV. Environmental and Economic Impact

This action allows companies that have alternative means or strategies for reducing gasoline benzene to request EPA approval to use them for the purpose of generating early benzene credits. Average gasoline benzene levels from such refiners will decrease faster and earlier than if they had not generated early credits leading to lower benzene emissions than would have been achieved otherwise. Such credits will also help provide for a robust credit pool when the program starts in 2011. Vehicle benzene emissions will be reduced and there will not be significant increases in vehicle emissions of other aromatics.

## V. Statutory and Executive Order Reviews

### *A. Executive Order 12866: Regulatory Planning and Review*

This action revises the February 26, 2007 mobile source air toxics rule's requirements that specify the benzene control technologies that qualify a refiner to generate early benzene credits. It allows another specific benzene control technology, benzene alkylation, to be used for the purpose of generating early credits, and allows a refiner to submit a request to EPA to approve other benzene-reducing operational changes or technologies for the purpose of generating early credits. This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* because the amendments in this rule do not change the information collection requirements of the underlying rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this action on small entities, small entity is defined as: (1) A petroleum refining company with fewer than 1,500 employees or a petroleum wholesaler or broker with fewer than 100 employees, based on the North American Industrial Classification System (NAICS); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule, I certify that this action will not have a significant economic impact on a substantial number of small entities.

### *D. Unfunded Mandates Reform Act*

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–

1538 for State, local, or tribal governments or the private sector. EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's action simply modifies the original rule in a limited manner, and does not significantly change the original rule. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This action only applies to parties that produce gasoline.

*E. Executive Order 13132: Federalism*

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The rule amends existing regulatory provisions applicable only to producers of gasoline and does not alter State authority to regulate these entities. The amendments will impose no direct costs on State or local governments. Thus, Executive Order 13132 does not apply to this rule.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This rule amends existing regulatory provisions applicable only to producers of gasoline and will impose no direct costs on tribal governments. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks*

Executive Order 13045: ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined in Executive Order 12866.

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

This action is not subject to Executive Order 13211 (66 FR 18355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. This rule provides additional means for refiners to qualify to generate early credits by implementing a benzene reducing technology or operational mode. This in turn will reduce vehicle benzene emissions.

*K. Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A Major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This final rule will be effective on December 15, 2008.

## VI. Statutory Provisions and Legal Authority

The statutory authority for the fuels controls in today's final rule can be found in sections 202(l) and 211(c) of the Clean Air Act (CAA), as amended. Support for any procedural and enforcement-related aspects of the fuel controls in today's rule, including

recordkeeping requirements, comes from sections 114(a) and 301(a) of the CAA.

**List of Subjects in 40 CFR Part 80**

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Fuel additives, Gasoline, Imports, Labeling, Motor vehicle fuel, Motor vehicle pollution, Penalties, Reporting and recordkeeping requirements.

Dated: October 9, 2008.

**Stephen L. Johnson,**

*Administrator.*

■ For the reasons set forth in the preamble, 40 CFR part 80 is amended as set forth below:

## PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

**Authority:** 42 U.S.C. 7414, 7542, 7545 and 7601(a).

■ 2. Section 80.1275 is amended as follows:

■ a. By adding paragraph (d)(1)(v).

■ b. By redesignating paragraph (d)(2) as paragraph (d)(3).

■ c. By adding paragraph (d)(2).

**§ 80.1275 How are early benzene credits generated?**

* * * * *

(d) * * *

(1) * * *

(v) Providing for benzene alkylation.

(2)(i) A refiner may petition EPA to approve, for purposes of paragraph (d)(1) of this section, the use of operational changes and/or improvements in benzene control technology that are not listed in paragraph (d)(1) of this section to reduce gasoline benzene levels at a refinery.

(ii) The petition specified in paragraph (d)(2)(i) of this section must be sent to: U.S. EPA, NVFEL–ASD, Attn: MSAT2 Early Credit Benzene Reduction Technology, 2000 Traverwood Dr., Ann Arbor, MI 48105.

(iii) The petition specified in paragraph (d)(2)(i) of this section must show how the benzene control technology improvement or operational change results in a net reduction in the refinery's average gasoline benzene level, exclusive of benzene reductions due simply to blending practices.

(iv) The petition specified in paragraph (d)(2)(i) of this section must be submitted to EPA prior to the start of the first averaging period in which the refinery plans to generate early credits.

(v) The refiner must provide additional information as requested by EPA.

* * * * *

[FR Doc. E8–24591 Filed 10–15–08; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### 42 CFR Part 73

**RIN 0920–AA09**

## Possession, Use, and Transfer of Select Agents and Toxins

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This document completes the biennial review and republication of the lists of biological agents and toxins regulated by the U.S. Department of Health and Human Services (HHS), as well as those biological agents and toxins regulated by both HHS and the U.S. Department of Agriculture (USDA). Because USDA has chosen to no longer regulate ten biological agents and toxins which HHS still believes have the potential to pose a severe threat to public health and safety, we have moved those ten biological agents and toxins from the overlap select agents and toxins section to the HHS select agents and toxins section of the select agent regulations.

In a companion document published in this issue of the **Federal Register**, the USDA has established corresponding final rules regarding the select agents and toxins regulated only by the USDA, as well as those overlap select agents and toxins regulated by both agencies.

**DATES:** The final rule is effective November 17, 2008.

**FOR FURTHER INFORMATION CONTACT:** Robbin Weyant, Director, Division of Select Agents and Toxins, Centers for Disease Control and Prevention, 1600 Clifton Rd., MS A–46, Atlanta, GA 30333. Telephone: (404) 718–2000.

**SUPPLEMENTARY INFORMATION:** The *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Subtitle A of Public Law 107–188 (42 U.S.C. 262a) (the Bioterrorism Preparedness Act),* requires the HHS Secretary to establish by regulation a list of each biological agent and each toxin that has the potential to pose a severe threat to public health and safety. In determining whether to include an agent or toxin on the list, the HHS Secretary considers the effect on human health of exposure to an agent or toxin; the degree of contagiousness of the agent and the methods by which the agent or toxin is transferred to humans; the availability and effectiveness of pharmacotherapies and immunizations to treat and prevent illnesses resulting from an agent or toxin; the potential for an agent or toxin to be used as a biological weapon; and the needs of children and other vulnerable populations. The Bioterrorism Preparedness Act requires that the HHS Secretary review and republish the list of select agents and toxins on at least a biennial basis.

The HHS Secretary promulgated the current select agents and toxins lists in a final rule, published on March 18, 2005, and made effective on April 18, 2005. The select agents and toxins lists found in Part 73 are found in two sections. The biological agents and toxins listed in section 73.3 (HHS select agents and toxins) are those biological agents and toxins regulated only by HHS. The biological agents and toxins listed in section 73.4 (Overlap select agents and toxins) are those biological agents and toxins regulated both by HHS and USDA under the provisions of the Agricultural Bioterrorism Protection Act of 2002.

The *Agricultural Bioterrorism Protection Act of 2002, Subtitle B of Public Law 107–188 (7 U.S.C. 8401) (the Agricultural Bioterrorism Protection Act),* requires the USDA Secretary to establish by regulation a list of each biological agent and each toxin that the Secretary determines has the potential to pose a severe threat to animal or plant health or animal or plant products. In determining whether to include an agent or toxin on the list, the USDA Secretary considers the effect of exposure to the agent or toxin on animal or plant health, and on the production and marketability of animal or plant products; the pathogenicity of the agent or the toxicity of the toxin and the methods by which the agent or toxin is transferred to animals and plants; the availability and effectiveness of pharmacotherapies and prophylaxis to treat and prevent any illness caused by the agent or toxin; and the potential of an agent or toxin for use as a biological weapon. The USDA Secretary is also required to conduct a biennial review of the USDA select agents and toxins list.

To assist with the biennial review, HHS reviewed recommendations provided by subject matter experts and the Intragovernmental Select Agents and

Toxins Technical Advisory Committee (ISATTAC). The ISATTAC is comprised of Federal government employees from the CDC, the National Institutes of Health (NIH), the Food and Drug Administration (FDA), the USDA/Animal and Plant Health Inspection Service (APHIS), USDA/Agricultural Research Service (ARS), USDA/CVB (Center for Veterinary Biologics) and the Department of Defense (DOD).

HHS completed its biennial review on February 22, 2007 and on August 28, 2007, we published in the **Federal Register** (72 FR 49244) a proposal to neither add nor remove any agents or toxins from our select agents and toxins lists. However, we did advise that HHS intended to continue to regulate ten biological agents and toxins that USDA was proposing to no longer regulate.

After conducting its biennial review, on August, 28, 2007 (72 FR 49231) USDA proposed that it would no longer regulate ten of the biological agents and toxins currently listed by them as ''overlap'' select agents and toxins. Published in today's **Federal Register** is USDA's final rule that removes from Part 121 of Title 9 of the Code of Federal Regulations the following agents and toxins: Botulinum neurotoxins, Botulinum neurotoxin producing species of *Clostridium, Coxiella burnetti, Francisella tularensis, Coccidioides immitis,* Eastern equine encephalitis virus, T–2 toxin, Staphylococcal enterotoxins, Shigatoxin, and *Clostridium perfringens* epsilon toxin.

For the proposed rule, we provided for a 60-day comment period for written comments that ended October 29, 2007. Relevant issues raised by the comments are discussed below. Based on the rationale set forth in the proposed rule, we are affirming the provisions of the proposed rule as a final rule.

Commenters recommended that the following biological agents and toxins be removed from the HHS list to mirror their removal by USDA: (1) Botulinum neurotoxin producing species of *Clostridium*, (2) Eastern equine encephalitis virus, (3) Botulinum neurotoxins; and (4) *Clostridium perfringens* epsilon toxin because ''they are found naturally in the U.S. and most are ubiquitous and the proposed rule does not give the basis for maintaining these naturally occurring agents.'' One commenter further argued that *Clostridium perfringens* epsilon toxin should be removed because ''the use of this toxin as a bioterrorism weapon is highly unlikely due to several factors including the method and effectiveness of administration, the lack of potential secondary transmission to uninfected individuals.'' We made no changes based on these comments. The potential negative impact of exposure to a select agent or toxin to the public health may be different from its impact on agriculture. As a part of its review using subject matter experts, HHS determines whether a select agent or toxin has the potential to pose a significant public health threat based on the effect of the exposure to the agent or toxin to humans, the degree of contagiousness that an agent will have with respect to humans, availability of treatments for humans, and the susceptibility by vulnerable human populations. Based on these criteria, HHS confirmed its prior determination that these agents and toxins have the potential to pose a significant public health threat because they have acute toxicity, have lethality in humans, can easily be produced in large quantities, and can be transferred by an aerosol method. In contrast, USDA's evaluations and determinations that it would remove these agents and toxins from its regulation is detailed in their **Federal Register** notice published on August 28, 2007 (See 72 FR 49231) and today's **Federal Register** that:

- Botulinum neurotoxin producing species of *Clostridium* (*i.e., C. botulinum, C. butyricum* and *C. baratii*) are widely distributed in soil, sediments of lakes and ponds, and decaying vegetation. The species may be found in any region of the world and some species may occasionally colonize the intestinal tract of birds and mammals under natural conditions. The neurotoxins produced by these agents produce the infectious toxicosis of botulism. There is a well known and established history of infection and toxicosis in agricultural species associated with *C. botulinum* in the United States, and UDSA concluded that Botulinum neurotoxin producing species do not pose a serious threat to American agriculture.
- Based on evidence that transmissibility from animal to animal is negligible and that, historically, outbreaks of botulism occur periodically in the United States, USDA determined that botulinum neurotoxins are a poor agroterrorism weapon, and USDA should therefore remove Botulinum neurotoxins and Botulinum neurotoxin producing species of *Clostridium* from the list of overlap select agents in its regulations in § 121.4(b).
- Eastern equine encephalitis virus has been recognized as an important veterinary pathogen that infects equines and birds during sporadic outbreaks. Infection results in central nervous system dysfunction and may result in moderate to high morbidity and mortality. The virus is maintained naturally in nature in marshes and swamps in an enzootic bird-mosquito-bird cycle, and is endemic in the United States along the Atlantic and Gulf coasts. Eastern equine encephalitis virus does not play a major role in agricultural species of concern, and equine species are considered a dead-end host of the virus.
- Additionally, the working group concluded that because the following overlap select agents and toxins are naturally found in the United States, do not pose a significant impact to animal health, and are not likely candidates for use in an agroterrorism event directed toward animal health, these select agents and toxins would have a limited socio-economic impact on American agriculture, and thus should be removed from the list: Botulinum neurotoxin producing species of *Clostridium, Clostridium perfringens* epsilon toxin, *Francisella tularensis*, Staphylococcal enterotoxin, shigatoxin, and T–2 toxin.

One commenter further proposed that (1) ''CDC provides an exemption for the use of the agents noted above in the manufacture of veterinary biologics in facilities licensed by the USDA's Center for Veterinary Biologics (CVB) or their investigational use by biologics firms under CVB supervision,'' (2) ''that they remain on the overlap list'' or (3) ''if they remain on the CDC Select Agent list and are removed from the Overlap list that CDC utilize the CVB for oversight and inspection of CVB licensed firms.'' We made no changes based on these comments. The regulations currently provide that products that are, bear, or contain listed select agents or toxins that are cleared, approved, licensed, or registered under the Virus-Serum-Toxin Act (21 U.S.C. 151–159) are exempt from the provisions of this part insofar as their use meets the requirements of that Act. Veterinary biologics licensed by USDA's Center for Veterinary Biologics are licensed under the authority of the Virus-Serum-Toxin Act. The regulations also provide that on a case-by-case basis the HHS Secretary may exempt from the requirements of the part 73 regulations an investigational product that is, bears, or contains a select agent or toxin, when such product is being used in an investigation authorized under any Federal Act and additional regulation under part 73 is not necessary to protect public health and safety. See 42 CFR 73.5(d). While we and USDA do everything we can to minimize disruption due to select agent oversight, CDC has determined that it would not be appropriate to utilize CVB for oversight and inspection of registered

entities that only have select agents and toxins on the HHS list.

Several commenters noted a typographical error on page 49245 that listed the aggregate amount for Botulinum neurotoxins as ''05. mg.'' This was a typographical error and we were not proposing to change the aggregate amount for Botulinum neurotoxins under the control of a principal investigator, a treating physician or veterinarian, or a commercial manufacturer or distributor that would meet the exclusion provisions for part 73. The maximum aggregate amount of Botulinum neurotoxins under the control of a principal investigator, a treating physician or veterinarian, or a commercial manufacturer or distributor that meets the requirement for exclusion under 42 CFR 73.4 will continue to be 0.5 mg.

**Regulatory Analyses**

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the HHS consider the impact of paperwork and other information collection burdens imposed on the public. We have determined no new information collection requirements are associated with this proposed rule.

*Executive Order 12866 and Regulatory Flexibility Act*

This final rule has been reviewed under Executive Order 12866, and has been determined not to be significant. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. This rule will have no costs because it merely changes the designation of ten select agents and toxins from being regulated by both HHS and USDA to being regulated solely by HHS. We hereby certify this proposed rule will not have a significant economic impact on a substantial number of small businesses.

*Unfunded Mandates*

The Unfunded Mandates Reform Act at 2 U.S.C. 1532 requires that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted for inflation) in any given year. This proposed rule is not expected to result in any one-year expenditure that would exceed this amount.

**Executive Order 12988**

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

*Executive Order 13132*

This Final Rule has been reviewed under Executive Order 13132, Federalism. The notice does not propose any regulation that would preempt State, local, and Indian tribe requirements, or that would have any substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

**List of Subjects in 42 CFR Part 73**

Biologics, Incorporation by reference, Packaging and containers, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: September 22, 2008.

**Michael O. Leavitt,**

*Secretary.*

■ For the reasons stated in the preamble, we have amended 42 CFR part 73 as follows:

## PART 73—SELECT AGENTS AND TOXINS

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 42 U.S.C. 262a; sections 201–204, 221 and 231 of Title II of Public Law 107–188, 116 Stat. 637 (42 U.S.C. 262a).

■ 2. In § 73.3, revise paragraphs (b), (d)(3), and (f)(3)(i) to read as follows:

**§ 73.3 HHS select agents and toxins.**

* * * * *

(b) HHS select agents and toxins:

Abrin
Botulinum neurotoxins
Botulinum neurotoxin producing species of *Clostridium*
Cercopithecine herpesvirus 1 (Herpes B virus)
*Clostridium perfringens* epsilon toxin
*Coccidioides posadasii/Coccidioides immitis*
Conotoxins
*Coxiella burnetii*
Crimean-Congo haemorrhagic fever virus
Diacetoxyscirpenol
Eastern Equine Encephalitis virus
Ebola viruses
*Francisella tularensis*
Lassa fever virus
Marburg virus
Monkeypox virus
Ricin
*Rickettsia prowazekii*
*Rickettsia rickettsii*
Saxitoxin
Shiga-like ribosome inactivating proteins
Shigatoxin
South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito)
Staphylococcal enterotoxins
T–2 toxin
Tetrodotoxin
Tick-borne encephalitis complex (flavi) viruses (Central European Tick-borne encephalitis, Far Eastern Tick-borne encephalitis [Russian Spring and Summer encephalitis, Kyasanur Forest disease, Omsk Hemorrhagic Fever])
Variola major virus (Smallpox virus) and Variola minor virus (Alastrim)
*Yersinia pestis*

* * * * *

(d) * * *

(3) HHS toxins under the control of a principal investigator, treating physician or veterinarian, or commercial manufacturer or distributor, if the aggregate amount does not, at any time, exceed the following amounts: 100 mg of Abrin; 0.5 mg of Botulinum neurotoxins; 100 mg of *Clostridium perfringens* epsilon toxin; 100 mg of Conotoxins; 1,000 mg of Diacetoxyscirpenol; 100 mg of Ricin; 100 mg of Saxitoxin; 100 mg of Shiga-like ribosome inactivating proteins; 100 mg of Shigatoxin; 5 mg of Staphylococcal enterotoxins; 1,000 mg of T–2 toxin; or 100 mg of Tetrodotoxin.

* * * * *

(f) * * *

(3) * * *

(i) The seizure of Botulinum neurotoxins, Ebola viruses, *Francisella tularensis,* Lassa fever virus, Marburg virus, South American Haemorrhagic Fever virus (Junin, Machupo, Sabia, Flexal, Guanarito), Variola major virus (Smallpox virus), Variola minor (Alastrim), or *Yersinia pestis* must be reported within 24 hours by telephone, facsimile, or e-mail. This report must be followed by submission of APHIS/CDC Form 4 within seven calendar days after seizure of the select agent or toxin.

* * * * *

■ 3. In § 73.4, revise paragraphs (b) and (f)(3)(i), and remove paragraph (d)(3) to read as follows:

**§ 73.4 Overlap select agents and toxins.**

* * * * *

(b) Overlap select agents and toxins:

*Bacillus anthracis*
*Brucella abortus*
*Brucella melitensis*
*Brucella suis*
*Burkholderia mallei* (formerly *Pseudomonas mallei*)
*Burkholderia pseudomallei* (formerly *Pseudomonas pseudomallei*)
Hendra virus
Nipah virus
Rift Valley fever virus
Venezuelan Equine Encephalitis virus

* * * * *

(f) * * *

(3) * * *

(i) The seizure of *Bacillus anthracis, Brucella melitensis,* Hendra virus, Nipah virus, Rift Valley fever virus, or Venezuelan equine encephalitis virus must be reported within 24 hours by telephone, facsimile, or e-mail. This report must be followed by submission of APHIS/CDC Form 4 within seven calendar days after seizure of the select agent or toxin.

* * * * *

■ 4. In § 73.5 revise paragraph (a)(3)(i) to read as follows:

**§ 73.5 Exemptions for HHS select agents and toxins.**

(a) * * *

(3) * * *

(i) The identification of any of the following HHS select agents or toxins must be immediately reported by telephone, facsimile, or e-mail: Botulinum neurotoxins, Ebola viruses, *Francisella tularensis,* Lassa fever virus, Marburg virus, South American Haemorrhagic Fever viruses (Junin, Machupo, Sabia, Flexal, Guanarito), Variola major virus (Smallpox virus), Variola minor (Alastrim), or Yersinia pestis. This report must be followed by submission of APHIS/CDC Form 4 within seven calendar days after identification.

* * * * *

■ 5. In § 73.6, revise paragraph (a)(3)(i) to read as follows:

**§ 73.6 Exemptions for overlap select agents and toxins.**

(a) * * *

(3) * * *

(i) The identification of any of the following overlap select agents or toxins must be immediately reported by telephone, facsimile, or e-mail: *Bacillus anthracis, Brucella melitensis,* Hendra virus, Nipah virus, Rift Valley fever virus, or Venezuelan equine encephalitis virus. This report must be followed by submission of APHIS/CDC Form 4 within seven calendar days after identification.

* * * * *

[FR Doc. E8–24623 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 679

**[Docket No. 071106673–8011–02]**

**[ID 101008A]**

## Fisheries of the Exclusive Economic Zone Off Alaska; Atka Mackerel in the Bering Sea and Aleutian Islands Management Area

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

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for Atka mackerel in the Eastern Aleutian District and the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI) by vessels participating in the BSAI trawl limited access fishery. This action is necessary to fully use the 2008 total allowable catch (TAC) of Atka mackerel in these areas specified for vessels participating in the BSAI trawl limited access fishery.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 10, 2008, through 1200 hrs, A.l.t., October 13, 2008. Comments must be received at the following address no later than 4:30 p.m., A.l.t., October 27, 2008.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''ID 101008A,'' by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907–586–7269.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for Atka mackerel by vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea on September 1, 2008 (73 FR 51242, September 2, 2008).

NMFS has determined that approximately 152 mt of the 2008 Atka mackerel TAC specified for vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea remain in the directed fishing allowance. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2008 TAC of Atka mackerel in these areas specified for vessels participating in the BSAI trawl limited access fishery, NMFS is terminating the previous closure and is opening directed fishing for Atka mackerel by vessels participating in the BSAI trawl limited access fishery in the Eastern Aleutian District and the Bering Sea subarea. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 72 hours. Consequently, NMFS is prohibiting directed fishing for the 2008 TAC of Atka mackerel in these areas specified for vessels participating in the BSAI trawl limited access fishery

effective 1200 hrs, A.l.t., October 13, 2008.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of the Atka mackerel fishery in the Eastern Aleutian District and the Bering Sea subarea for vessels participating in the BSAI trawl limited access fishery. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 8, 2008. The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for Atka mackerel fishery in the Eastern Aleutian District and the Bering Sea subarea by vessels participating in the BSAI trawl limited access fishery to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until October 27, 2008.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 10, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–24585 Filed 10–10–08; 4:15 pm]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 679

**[Docket No. 071106671–8010–02]**

**[ID 101008B]**

## Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 of the Gulf of Alaska

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

**ACTION:** Temporary rule; modification of a closure.

**SUMMARY:** NMFS is opening directed fishing for pollock in Statistical Area 610 of the Gulf of Alaska (GOA) for 48 hours. This action is necessary to fully use the 2008 total allowable catch (TAC) of pollock specified for Statistical Area 610 of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), October 12, 2008, through 1200 hrs, A.l.t., October 14, 2008. Comments must be received at the following address no later than 4:30 p.m., A.l.t., October 27, 2008.

**ADDRESSES:** Send comments to Sue Salveson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by ''ID 101008B,'' by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: (907) 586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe portable document file (pdf) formats only.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907–586–7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

NMFS closed the directed fishery for pollock in Statistical Area 610 of the GOA under § 679.20(d)(1)(iii) on October 6, 2008 (73 FR 59538, October 9, 2008).

NMFS has determined that approximately 750 metric tons of pollock remain in the directed fishing allowance. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C), and (a)(2)(iii)(D), and to fully utilize the 2008 TAC of pollock in Statistical Area 610, NMFS is terminating the previous closure and is reopening directed fishing for pollock in Statistical Area 610 of the GOA. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached after 48 hours. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA effective 1200 hrs, A.l.t., October 14, 2008.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the opening of pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 9, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of

prior notice and opportunity for public comment.

Without this inseason adjustment, NMFS could not allow the fishery for pollock in Statistical Area 610 of the GOA to be harvested in an expedient manner and in accordance with the regulatory schedule. Under § 679.25(c)(2), interested persons are invited to submit written comments on this action to the above address until October 27, 2008.

This action is required by § 679.20 and § 679.25 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 10, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–24584 Filed 10–10–08; 4:15 pm]

**BILLING CODE 3510–22–S**

# Proposed Rules

Federal Register
Vol. 73, No. 201
Thursday, October 16, 2008

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.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121, 125, 127, and 134

### The Women-Owned Small Business Federal Contract Assistance Procedures

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Proposed rule; correction.

**SUMMARY:** The Small Business Administration is correcting a proposed rule that appeared in the **Federal Register** on October 1, 2008. The proposed rule is seeking comments on a data issue involving the Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures. This notice will make corrections to the RIN, the Subject Heading, the **ADDRESSES** and the **FOR FURTHER INFORMATION CONTACT** section of the rule.

**DATES:** Effective October 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Director, Policy, Planning and Research, Office of Government Contracting, (202) 205–6460.

**SUPPLEMENTARY INFORMATION:** In FR Doc. E8–23139 appearing on page 57014 in the **Federal Register** of Wednesday, October 1, 2008 (73 FR 57014), the following corrections are made:

1. On page 57014, in the Headings section a RIN needs to be added to read as follows:

***RIN 3245–AF80***

2. On Page 57014, in the Headings section revise the Subject Heading to read as follows:

The Women-Owned Small Business Federal Contract Assistance Procedures—Eligible Industries

3. On Page 57014, revise the **ADDRESSES** section to read as follows:

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Dean Koppel, Assistant Director, Policy, Planning and Research, Office of Government Contracting, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

All comments will be posted on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI) as defined in the User Notice at *http://www.regulations.gov,* please submit the comments to Dean Koppel and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published.

4. On Page 57015, revise the **FOR FURTHER INFORMATION CONTACT** section to read as follows:

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Director, Policy, Planning and Research, Office of Government Contracting, (202) 205–6460.

**Calvin Jenkins,**

*Deputy Associate Administrator for Government Contracting and Business Development, Associate Administrator/ Disaster Assistance.*

[FR Doc. E8–24604 Filed 10–15–08; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 39

**[Docket No. FAA–2008–1098; Directorate Identifier 2008–NM–108–AD]**

**RIN 2120–AA64**

### Airworthiness Directives; Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP Series Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes. This proposed AD would require adding two new indicator lights on the P10 panel to inform the captain and first officer of a low pressure condition in the left and right override/ jettison pumps of the center wing tanks. This proposed AD would also require replacing the left and right override/ jettison switches on the M154 fuel control module on the P4 panel with improved switches and doing the associated wiring changes. This proposed AD would also require a revision to the FAA-approved maintenance program to incorporate airworthiness limitation No. 28–AWL–22. This proposed AD results from fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent uncommanded operation of the override/jettison pumps of the center wing tanks, which could lead to an unwanted ignition source inside the center wing tank. This condition, in combination with flammable fuel vapors, could result in a center fuel tank explosion and consequent loss of the airplane.

**DATES:** We must receive comments on this proposed AD by December 1, 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:** Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; 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–2008–1098; Directorate Identifier 2008–NM–108–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**

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: Single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Currently, there are lights on the flight engineer's P4 panel to provide pressure indication for the override/jettison pumps of the left and right center wing tanks. These lights are illuminated to inform the flight engineer that a low pressure or no fuel flow condition exists. A pump uncommanded-on is an event that may result in the pump running dry and illumination of the associated low pressure light. This event requires the flight engineer to manually pull the pump circuit breaker to shut off the pump. To limit the potential of the pump running dry for an extended period of time, Boeing has found that two new indicator lights must be added to the forward panel on the flight deck to inform the captain and first officer of a low pressure condition in the override/jettison pumps. The P4 panel must also be modified to provide the flight engineer with switches to shut off the override/jettison pumps and the new indicator lights.

Uncommanded operation of the override/jettison pumps of the center wing tanks could lead to an unwanted ignition source inside the center wing tank. These conditions, if not corrected, in combination with flammable fuel vapors, could result in a center fuel tank explosion and consequent loss of the airplane.

**Other Related Rulemaking**

On April 28, 2008, we issued AD 2008–10–07, amendment 39–15513 (73 FR 25977, May 8, 2008), applicable to certain Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes. That AD requires revising the FAA-approved maintenance program by incorporating new airworthiness limitations (AWLs) for fuel tank systems to satisfy SFAR 88 requirements. That AD also requires the initial accomplishment of certain repetitive AWL inspections to phase in those inspections, and repair if necessary. As an optional action, that AD also allows incorporating AWL No. 28–AWL–22 into the FAA-approved maintenance program. Incorporating AWL No. 28–AWL–22 into the FAA-approved maintenance program in accordance with paragraph (g) of AD 2008–10–07 would terminate the action specified in paragraph (g) of this proposed AD.

**Relevant Service Information**

We have reviewed Boeing Alert Service Bulletin 747–28A2288, dated March 20, 2008. The service bulletin describes procedures for adding two indicator lights on the P10 panel to inform the captain and first officer of a low pressure condition in the left and right override/jettison pumps of the center wing tanks. The service bulletin also describes procedures for replacing the left and right override/jettison switches on certain M154 fuel control modules on the P4 panel with improved switches, and doing the associated wiring changes.

For airplanes equipped with certain other M154 fuel control modules, Boeing Alert Service Bulletin 747–28A2288 refers to the BAE Systems service bulletins in the following table as additional sources of service information for replacing the switches and doing the associated wiring changes, as applicable:

ADDITIONAL SOURCES OF SERVICE INFORMATION

| Service Bulletin | Date |
|---|---|
| BAE Systems Service Bulletin 65B46124–28–01 | February 16, 2006. |
| BAE Systems Service Bulletin 65B46124–28–02 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46124–28–03 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46214–28–01 | February 16, 2006. |
| BAE Systems Service Bulletin 65B46214–28–02 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46214–28–03 | March 28, 2007. |

We have also reviewed the Boeing 747–100/200/300/SP Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–13747–CMR, Revision March 2008 (hereafter referred to as ''Document D6–13747–CMR''). (For the purposes of Document D6–13747–CMR, the Model 747SR series airplane is basically a Model 747–100 series airplane with certain modifications to improve fatigue life.) Section D of Document D6–13747–CMR describes AWLs for fuel tank systems. Section D of Document D6–13747–CMR includes fuel system AWL No. 28–AWL–22, which is a repetitive inspection (test) to verify continued functionality of the low pressure indicator lights on the P10 panel for the override/jettison pumps of the center wing tanks.

**FAA's Determination and Requirements of This Proposed AD**

We are proposing this AD because we evaluated all relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the(se) same type design(s). This proposed AD would require accomplishing the following actions:

- Adding two new indicator lights on the P10 panel to inform the captain and first officer of a low pressure condition in the left and right override/jettison pumps of the center wing tanks.
- Replacing the left and right override/jettison switches on the M154 fuel control module on the P4 panel with improved switches and doing the associated wiring changes.
- Revising the FAA-approved maintenance program to incorporate AWL No. 28–AWL–22, which is a repetitive inspection to verify continued functionality of the low pressure indicator lights on the P10 panel for the override/jettison pumps of the center wing tanks.

**Costs of Compliance**

We estimate that this proposed AD would affect 185 airplanes of U.S. registry. We also estimate that it would take up to 28 work-hours per product to comply with this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost up to $2,668 per product. Based on these figures, we estimate the cost of this proposed AD to the U.S. operators up to $907,980, or $4,908 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 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 this 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.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

**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 FAA amends § 39.13 by adding the following new AD:

**Boeing:** Docket No. FAA–2008–1098; Directorate Identifier 2008–NM–108–AD.

**Comments Due Date**

(a) We must receive comments by December 1, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Boeing Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747SR, and 747SP series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 747–28A2288, dated March 20, 2008.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include a new inspection. Compliance with this inspection is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this inspection, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (j) of this AD. The request should include a description of changes to the required inspection that will ensure the continued operational safety of the airplane.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent uncommanded operation of the override/jettison pumps of

the center wing tanks, which could lead to an unwanted ignition source inside the center wing tank. This condition, in combination with flammable fuel vapors, could result in a center fuel tank explosion and consequent loss of the airplane.

**Compliance**

(e) Comply with this AD within the compliance times specified, unless already done.

**Installation of Indicator Lights and Replacement of Switches**

(f) Within 36 months after the effective date of this AD: Add two new indicator lights on the P10 panel to inform the captain and first officer of a low pressure condition in the left and right override/jettison pumps of the center wing tanks; and replace the left and right override/jettison switches on the M154 fuel control module on the P4 panel with improved switches and do the associated wiring changes; by accomplishing all of the applicable actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 747–28A2288, dated March 20, 2008.

**Note 2:** For airplanes equipped with certain M154 fuel control modules, paragraph 2.C.2 of Boeing Alert Service Bulletin 747–28A2288 refers to the BAE Systems service bulletins identified in Table 1 of this AD, as applicable, as additional sources of service information for replacing the switches.

TABLE 1—ADDITIONAL SOURCES OF SERVICE INFORMATION

| Service Bulletin | Date |
|---|---|
| BAE Systems Service Bulletin 65B46124–28–01 | February 16, 2006. |
| BAE Systems Service Bulletin 65B46124–28–02 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46124–28–03 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46214–28–01 | February 16, 2006. |
| BAE Systems Service Bulletin 65B46214–28–02 | March 28, 2007. |
| BAE Systems Service Bulletin 65B46214–28–03 | March 28, 2007. |

**Maintenance Program Revision**

(g) Concurrently with accomplishing the actions required by paragraph (f) of this AD, revise the FAA-approved maintenance program by incorporating Airworthiness Limitation (AWL) No. 28–AWL–22 of Section D of the Boeing 747–100/200/300/SP Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–13747–CMR, Revision March 2008.

**No Alternative Inspections or Inspection Intervals**

(h) After accomplishing the action specified in paragraph (g) of this AD, no alternative inspections or inspection intervals may be used unless the inspections or inspection intervals are approved as an AMOC in accordance with the procedures specified in paragraph (j) of this AD.

**Terminating Action for Maintenance Program Revision**

(i) Incorporating AWL No. 28–AWL–22 into the FAA-approved maintenance program in accordance with paragraph (g) of AD 2008–10–07, amendment 39–15513, terminates the action required by paragraph (g) of this AD.

**Alternative Methods of Compliance (AMOCs)**

(j)(1) The Manager, Seattle ACO, FAA, ATTN: Sulmo Mariano, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6501; fax (425) 917–659; has the authority to approve AMOCs for this AD, if requested using 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 October 7, 2008.

**Ali Bahrami,**

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

[FR Doc. E8–24542 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–1079; Directorate Identifier 2008–NM–116–AD]**

**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), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed 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:

Fuel system reassessment, performed according to RBHA–E88/SFAR–88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by November 17, 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**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 proposed AD, 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.

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

**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–2008–1079; Directorate Identifier 2008–NM–116–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 based on 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**

On June 13, 2008, we issued AD 2008–13–14, Amendment 39–15577 (73 FR 35904, June 25, 2008). That AD requires actions intended to address an unsafe condition on the products listed above.

The preamble to AD 2008–13–14 explains that we were considering further rulemaking to address tasks 28–41–01–720–001–A00 and 28–41–04–720–001–A00 because the tasks are related to a functional check of the component rather than the aircraft system. Those tasks are specified in EMBRAER EMB135/ERJ140/EMB145 Maintenance Review Board Report MRB–145/1150, Revision 11, dated September 19, 2007 (which we referred to as the appropriate source of service information for the existing AD). We now have determined that further rulemaking is indeed necessary, and this proposed AD follows from that determination. We have proposed to require those tasks with compliance times based on the component flight hours in paragraph (g) of this proposed AD.

**Removed Reference to ''Later Revisions'' of Service Information**

We have removed the reference to ''later revisions'' of the applicable service information in paragraph (f)(4) of this AD to be consistent with FAA policy and Office of the **Federal Register** regulations. We might consider approving the use of later revisions of the service information as an alternative method of compliance with this AD, as provided by paragraph (h)(1) of this AD.

**FAA's Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**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 proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 668 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $53,440, or $80 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 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 this 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.

**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 FAA amends § 39.13 by removing Amendment 39–15577 (73 FR 35904, June 25, 2008) and adding the following new AD:

**Empresa Brasileira de Aeronautica S.A. (EMBRAER):** Docket No. FAA–2008–

1079; Directorate Identifier 2008–NM–116–AD.

**Comments Due Date**

(a) We must receive comments by November 17, 2008.

**Affected ADs**

(b) The proposed AD supersedes AD 2008–13–14, Amendment 39–15577.

**Applicability**

(c) This AD applies to 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; except for Model EMB–145LR airplanes modified according to Brazilian Supplemental Type Certificate 2002S06–09, 2002S06–10, or 2003S08–01.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (h) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 28: Fuel.

**Reason**

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

Fuel system reassessment, performed according to RBHA–E88/SFAR–88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems.

**Restatement of Requirements of AD 2008–13–14**

(f) Unless already done, do the following actions.

(1) The term ''MRBR,'' as used in this AD, means the EMBRAER EMB135/ERJ140/EMB145 Maintenance Review Board Report (MRBR) MRB–145/1150, Revision 11, dated September 19, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MRBR. Except as required by paragraph (g) of this AD, for all tasks identified in Section A2.5.2 of Appendix 2 of the MRBR, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in Section A2.5.2 of Appendix 2 of the MRBR, except as provided by paragraphs (f)(4) and (h) of this AD.

TABLE 1—INITIAL INSPECTIONS

| Reference No. | Description | Compliance time (whichever occurs later) | |
|---|---|---|---|
| | | Threshold | Grace period |
| 28–11–00–720–001–A00. | Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements. | Before the accumulation of 30,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–17–01–720–001–A00. | Functionally Check critical bonding integrity of Fuel Pump, VFQIS and Low Level SW connectors at tank wall by conductivity measurements. | Before the accumulation of 30,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–21–01–220–001–A00. | Inspect Electric Fuel Pump Connector .... | Before the accumulation of 10,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–23–03–220–001–A00. | Inspect Pilot Valve harness inside the conduit. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–23–04–220–001–A00. | Inspect Vent Valve harness inside the conduit. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–27–01–220–001–A00. | Inspect Electric Fuel Transfer Pump Connector. | Before the accumulation of 10,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–41–03–220–001–A00. | Inspect FQIS harness for clamp and wire jacket integrity. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–41–07–220–001–A00. | Inspect VFQIS and Low Level SW Harness for clamp and wire jacket integrity. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |

(3) Within 90 days after July 30, 2008 (the effective date of AD 2008–13–14), whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (h) of this AD.

**New Requirements of This AD: Actions and Compliance**

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

(1) For tasks 28–41–01–720–001–A00 and 28–41–04–720–001–A00 identified in Section A2.5.2 of Appendix 2 of the MRBR, do the tasks at the later of the applicable ''Threshold'' and ''Grace Period'' times specified in Table 2 of this AD; and repeat the inspections thereafter at the applicable interval specified in Table 2 of this AD; except as provided by paragraphs (g)(2) and (h) of this AD.

TABLE 2—INSPECTIONS

| Reference No. | Description | Compliance time (whichever occurs later) | | Repeat inspection interval |
|---|---|---|---|---|
| | | Threshold | Grace period | |
| 28–41–01–720–001–A00. | Functionally Check Fuel Conditioning Unit (FCU). | Before the accumulation of 10,000 total flight hours on the FCU. | Within 90 days after December 16, 2008. | 10,000 flight hours on the FCU since the last functional check. |
| 28–41–04–720–001–A00. | Functionally Check Ventral Fuel Conditioning Unit (VFCU). | Before the accumulation of 10,000 total flight hours on the VFCU. | Within 90 days after December 16, 2008. | 10,000 flight hours on the VFCU since the last functional check. |

(2) After accomplishing the actions specified in paragraphs (g)(1) of this AD, no alternative inspections, or inspection intervals, may be used unless the inspections or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (h) of this AD.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows:

(1) The MCAI specifies a compliance date of ''Before December 31, 2008'' for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for coordinated implementation of these regulations and this AD, we are using this same compliance date in this AD.

(2) EMBRAER EMB135/ERJ140/EMB145 Maintenance Review Board Report MRB–145/1150, Revision 11, dated September 19, 2007, specifies compliance times to do tasks 28–41–01–720–001–A00 and 28–41–04–720–001–A00 for certain components based on flight hours of the airplane. This AD requires that the tasks be done at compliance times based on flight hours of the component.

**Other FAA AD Provisions**

(h) 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; 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**

(i) Refer to Brazilian Airworthiness Directive 2007–08–02, effective September 27, 2007; and Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MRBR; for related information.

Issued in Renton, Washington, on September 25, 2008.

**Michael Kaszycki,**

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

[FR Doc. E8–24582 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–1080; Directorate Identifier 2008–NM–118–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed 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:

Fuel system reassessment, performed according to RBHA–E88/SFAR–88 (Regulamento Brasileiro de Homologacao Aeronautica 88/Special Federal Aviation Regulation No. 88), requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by November 17, 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 W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**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 proposed AD, 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.

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton,

Washington 98057–3356; telephone (425) 227–1405; fax (425) 227–1149.

**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–2008–1080; Directorate Identifier 2008–NM–118–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 based on 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**

On June 13, 2008, we issued AD 2008–13–15, Amendment 39–15578 (73 FR 35908, June 25, 2008). That AD requires actions intended to address an unsafe condition on the products listed above.

The preamble to AD 2008–13–15 explains that we were considering further rulemaking to address tasks 28–41–01–720–001–A00 and 28–46–05–720–001–A00 because the tasks are related to a functional check of the component rather than the aircraft system. Those tasks are specified in EMBRAER Legacy BJ—Maintenance Planning Guide MPG–1483, Revision 5, dated March 22, 2007 (which we referred to as the appropriate source of service information for the existing AD). We now have determined that further rulemaking is indeed necessary, and this proposed AD follows from that determination. We have proposed to require those tasks with compliance times based on the component flight hours in paragraph (g) of this proposed AD.

**Removed Reference to ''Later Revisions'' of Service Information**

We removed the reference to ''later revisions'' of the applicable service information in paragraph (f)(4) of this AD to be consistent with FAA policy and Office of the **Federal Register** regulations. We might consider approving the use of later revisions of the service information as an alternative method of compliance with this AD, as provided by paragraph (h)(1) of this AD.

**FAA's Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**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 proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 41 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,280, or $80 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 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 this 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.

**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 FAA amends § 39.13 by removing Amendment 39–15578 (73 FR 35908, June 25, 2008) and adding the following new AD:

**Empresa Brasileira de Aeronautica S.A. (EMBRAER):** Docket No. FAA–2008–1080; Directorate Identifier 2008–NM–118–AD.

**Comments Due Date**

(a) We must receive comments by November 17, 2008.

**Affected ADs**

(b) The proposed AD supersedes AD 2008–13–15, Amendment 39–15578.

**Applicability**

(c) This AD applies to all EMBRAER Model EMB–135BJ airplanes, certificated in any category.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (h) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

**Subject**

(d) Air Transport Association (ATA) of America Code 28: Fuel.

**Reason**

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

Fuel system reassessment, performed according to RBHA–E88/SFAR–88, requires the inclusion of new maintenance tasks in the Critical Design Configuration Control Limitations (CDCCL) and in the Fuel System Limitations (FSL), necessary to preclude ignition sources in the fuel system. * * * The corrective action is revising the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness (ICA) to incorporate new limitations for fuel tank systems.

**Restatement of Requirements of AD 2008–13–15**

(f) Unless already done, do the following actions.

(1) The term ''MPG,'' as used in this AD, means the EMBRAER Legacy BJ—Maintenance Planning Guide (MPG) MPG–1483, Revision 5, dated March 22, 2007.

(2) Before December 16, 2008, revise the ALS of the ICA to incorporate Section A2.5.2, Fuel System Limitation Items, of Appendix 2 of the MPG. Except as required by paragraph (g) of this AD, for all tasks identified in Section A2.5.2 of Appendix 2 of the MPG, the initial compliance times start from the applicable times specified in Table 1 of this AD; and the repetitive inspections must be accomplished thereafter at the interval specified in Section A2.5.2 of Appendix 2 of the MPG, except as provided by paragraphs (f)(4) and (h) of this AD.

TABLE 1—INITIAL INSPECTIONS

| Reference No. | Description | Compliance time (whichever occurs later) | |
|---|---|---|---|
| | | Threshold | Grace period |
| 28–11–00–720–001–A00 | Functionally Check critical bonding integrity of selected conduits inside the wing tank, Fuel Pump and FQIS connectors at tank wall by conductivity measurements. | Before the accumulation of 30,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–13–01–720–002–A00 | Functionally Check Aft Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements. | Before the accumulation of 30,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–15–04–720–001–A00 | Functionally Check Fwd Fuel tank critical bonding integrity of Fuel Pump, FQGS and Low Level SW connectors at tank wall by conductivity measurements. | Before the accumulation of 30,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–21–01–220–001–A00 | Inspect Wing Electric Fuel Pump Connector. | Before the accumulation of 10,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–23–03–220–001–A00 | Inspect Pilot Valve harness inside the conduit. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–23–04–220–001–A00 | Inspect Vent Valve harness inside the conduit. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–41–03–220–001–A00 | Inspect FQIS harness for clamp and wire jacket integrity. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–46–02–220–001–A00 | Aft Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |
| 28–46–04–220–001–A00 | Fwd Fuel Tank Internal Inspection: FQGS harness and Low Level SW harness for clamp and wire jacket integrity. | Before the accumulation of 20,000 total flight hours. | Within 90 days after December 16, 2008. |

(3) Within 90 days after July 30, 2008 (the effective date of AD 2008–13–15), whichever occurs first, revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG.

(4) After accomplishing the actions specified in paragraphs (f)(2) and (f)(3) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (h) of this AD.

**New Requirements of This AD: Actions and Compliance**

(g) Unless already done, do the following actions.

(1) For tasks 28–41–01–720–001–A00 and 28–46–05–720–001–A00 identified in Section A2.5.2 of Appendix 2 of the MPG, do the tasks at the later of the applicable ''Threshold'' and ''Grace Period'' times specified in Table 2 of this AD; and repeat the inspections thereafter at the applicable interval specified in Table 2 of this AD; except as provided by paragraphs (g)(2) and (h) of this AD.

TABLE 2—INSPECTIONS

| Reference No. | Description | Compliance time (whichever occurs later) | | Repeat inspection interval |
|---|---|---|---|---|
| | | Threshold | Grace period | |
| 28–41–01–720–001–A00 .. | Functionally Check Fuel Conditioning Unit (FCU). | Before the accumulation of 10,000 total flight hours on the FCU. | Within 90 days after December 16, 2008. | 10,000 flight hours on the FCU since the last functional check. |
| 28–46–05–720–001–A00 .. | Functionally Check Auxiliary Fuel Conditioning Unit (VFCU). | Before the accumulation of 10,000 total flight hours on the auxiliary FCU. | Within 90 days after December 16, 2008. | 10,000 flight hours on the auxiliary FCU since the last functional check. |

(2) After accomplishing the actions specified in paragraphs (g)(1) of this AD, no alternative inspections, or inspection intervals, may be used unless the inspections or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (h) of this AD.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows:

(1) The MCAI specifies a compliance date of ''Before December 31, 2008'' for doing the ALI revisions. We have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for coordinated implementation of these regulations and this AD, we are using this same compliance date in this AD.

(2) The MCAI specifies a compliance time of 180 days to revise the ALS of the ICA to incorporate items 1, 2, and 3 of Section A2.4 of Appendix 2 of the MPG. This AD requires a compliance time of 90 days to do this revision. This difference has been coordinated with ANAC.

(3) EMBRAER Legacy BJ—Maintenance Planning Guide MPG–1483, Revision 5, dated March 22, 2007, specifies compliance times to do tasks 28–41–01–720–001–A00 and 28–46–05–720–001–A00 for certain components based on flight hours of the airplane. This AD requires that the tasks be done at compliance times based on flight hours of the component.

**Other FAA AD Provisions**

(h) 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: Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1405; 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**

(i) Refer to Brazilian Airworthiness Directive 2007–08–01, effective September 27, 2007; and Sections A2.5.2, Fuel System Limitation Items, and A2.4, Critical Design Configuration Control Limitation (CDCCL), of Appendix 2 of the MPG; for related information.

Issued in Renton, Washington, on September 26, 2008.

**Michael Kaszycki,**

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

[FR Doc. E8–24583 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2007–28035; Directorate Identifier 2006–NM–293–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 767 Airplanes

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

**ACTION:** Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

**SUMMARY:** We are revising an earlier proposed airworthiness directive (AD) for certain Boeing Model 767 airplanes. The original NPRM would have required sealing certain fasteners and stiffeners in the fuel tank, and changing certain wire bundle clamp configurations on the fuel tank walls. The original NPRM resulted from fuel system reviews conducted by the manufacturer. This action revises the original NPRM by adding inspections, for certain airplanes, of additional fasteners in the fuel tanks and of the method of attachment of the vortex generators, and corrective action if necessary. We are proposing this supplemental NPRM to prevent possible ignition sources in the auxiliary fuel tank, main fuel tanks, and surge tanks caused by a wiring short or lightning strike, which could result in fuel tank explosions and consequent loss of the airplane.

**DATES:** We must receive comments on this supplemental NPRM by November 10, 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:** Judy Coyle, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6497; 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–2007–28035; Directorate Identifier 2006–NM–293–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**

We issued a notice of proposed rulemaking (NPRM) (the ''original NPRM'') to amend 14 CFR part 39 to include an airworthiness directive (AD) that would apply to certain Boeing Model 767 airplanes. That original NPRM was published in the **Federal Register** on April 30, 2007 (72 FR 21166). That original NPRM proposed to require sealing certain fasteners and stiffeners in the fuel tank, and changing certain wire bundle clamp configurations on the fuel tank walls.

**Actions Since Original NPRM Was Issued**

The NPRM referred to Boeing Alert Service Bulletins 767–57A0102, dated October 25, 2006, and 767–57A0100, dated August 21, 2006, as the appropriate sources of service information for the proposed requirements. Since we issued the NPRM, Boeing revised the service bulletins.

Service Bulletin 767–57A0102, Revision 1, dated November 27, 2007, provides the following changes:

- Corrects the specified location of fasteners that must be sealed on the rear spar in the auxiliary fuel tank;
- Corrects the specified location of fasteners that must be sealed at rib 28 on the front spar;
- Adds work packages, for airplanes on which the original issue of the service bulletin was accomplished, for general visual inspections of the sealant of the fasteners in the auxiliary fuel tank center bay and the fasteners at rib 28 of the left and right main fuel tanks, and sealing any unsealed fasteners;
- Identifies additional access doors necessary for access to the fuel tanks; and
- Specifies permitted alternative fuel tank sealants.

The new work packages are necessary because the original issue of this service bulletin specified incorrect locations for certain fasteners on the rear spar of the auxiliary fuel tank and the front spar of the main wing. If the correct fasteners are not sealed, there is a risk that arcing from a short can enter the fuel tank and become an ignition source. We have revised paragraphs (c) and (g) of this supplemental NPRM to refer to Revision 1 of the service bulletin.

Service Bulletin 767–57A0100, Revision 1, dated June 19, 2008, adds procedures for certain airplanes (Group 3 airplanes) for a general visual inspection to determine the method of attachment of the vortex generators. For vortex generators attached with adhesive alone, no more work is necessary. For vortex generators attached with fasteners, the service bulletin provides procedures for sealing the fasteners.

**Comments**

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

**Support for the NPRM**

Continental Airlines has no objection to the NPRM. The Air Transport Association (ATA) agrees with the intent of the NPRM. American Airlines understands and agrees with our efforts to prevent the identified unsafe condition.

**Request for Warranty Coverage**

Hawaiian Airlines questions why Service Bulletin 767–57A0102 is not covered under warranty. The commenter states that the original equipment manufacturer (OEM) should cover the costs to do the required extra protection for fuel ignition shorts. The commenter added that 335 work hours and about $2,000 for parts per airplane is very costly for airline operators.

We have no involvement in warranty agreements between the airlines and the OEM. We have not changed the final rule regarding this issue.

**Request To Extend Compliance Time**

The ATA and American Airlines request that we extend the proposed compliance time from 60 months to 72 months. The longer interval would minimize fuel tank entry and corresponds to the existing ''4C'' maintenance interval established by the Boeing 767 Maintenance Review Board (MRB), when significant maintenance (such as maintenance requiring fuel tank entry) is scheduled. The ATA states that the use of that interval would avoid the need to accomplish the proposed actions in portions of airline inventories during unique, unscheduled visits. American Airlines states that its cost to comply with the AD would be 7 percent higher with the proposed 60-month compliance time (versus a 72-month compliance time).

While we agree that reducing fuel tank entries minimizes both the potential for damage and the disruption to operators' maintenance schedules, we find that extending the compliance time is not appropriate. In developing the compliance time for this AD action, we considered not only the safety implications of the identified unsafe condition, but the average utilization rate of the affected fleet, the practical aspects of accomplishing the AD on the fleet during regular maintenance periods, the availability of required parts, and the time necessary for the rulemaking process. The proposed compliance time was determined to be appropriate. However, paragraph (h) of this supplemental NPRM would provide operators the opportunity to request adjustments to the compliance time and submit data to substantiate that such an adjustment would provide an acceptable level of safety. We have not changed this supplemental NPRM regarding this issue.

**Clarification of Inspection Type**

In this supplemental NPRM, the ''general visual inspection'' specified in Revision 1 of the referenced service information is referred to as a ''detailed inspection.'' We have included the definition for a detailed inspection in a note in the supplemental NPRM.

**FAA's Determination and Proposed Requirements of the Supplemental NPRM**

We are proposing this supplemental NPRM because we evaluated all pertinent information and determined that an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

**Costs of Compliance**

There are about 925 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD. There are no U.S.-registered airplanes in Group 3 of Service Bulletin 767–57A0102. The average labor rate is $80 per work hour.

ESTIMATED COSTS

| Service Bulletin | Group | Work hours | Parts | Cost per airplane | Number of U.S.-registered airplanes | Fleet cost |
|---|---|---|---|---|---|---|
| 767–57A0100 | 1 | 6 | minimal | $480 | 341 | $163,680 |
| | 2 | 114 | minimal | 9,120 | 21 | 191,520 |
| | 3 | 1 | none | 80 | 17 | 1,360 |
| 767–57A0102 | 1 | 246 | 1,632 | 21,312 | 341 | 7,267,392 |
| | 2 | 874 | 1,304 | 71,224 | 21 | 1,495,704 |
| | 3 | 24 | 338 | 2,258 | 0 | 0 |

**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 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 this 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.

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

**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 FAA amends § 39.13 by adding the following new AD:

**Boeing:** Docket No. FAA–2007–28035; Directorate Identifier 2006–NM–293–AD.

**Comments Due Date**

(a) We must receive comments by November 10, 2008.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Model 767–200, −300, −300F, and −400ER series airplanes; certificated in any category; as identified in Boeing Alert Service Bulletin 767–57A0100, Revision 1, dated June 19, 2008; and Boeing Service Bulletin 767–57A0102, Revision 1, dated November 27, 2007.

**Unsafe Condition**

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent possible ignition sources in the auxiliary fuel tank, main fuel tanks, and surge tanks caused by a wiring short or lightning strike, which could result in fuel tank explosions and consequent 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.

**Fastener Sealant Application**

(f) For airplanes identified in Boeing Alert Service Bulletin 767–57A0100, Revision 1, dated June 19, 2008: Within 60 months after the effective date of this AD, do the actions in paragraphs (f)(1) and (f)(2) of this AD. Do the actions in accordance with the Accomplishment Instructions of the service bulletin, as applicable.

(1) For Groups 1 and 2 airplanes: Seal the ends of the fasteners on the brackets that hold the vortex generators, and seal the ends of the fasteners on certain stiffeners on the rear spar, as applicable.

(2) For Group 3 airplanes: Do a detailed inspection to determine the method of attachment of the vortex generators, and, before further flight, do all applicable specified corrective actions.

**Wire Bundle Sleeve and Clamp Installation and Fastener Sealant Application**

(g) For airplanes identified in Boeing Service Bulletin 767–57A0102, Revision 1, dated November 27, 2007: Within 60 months after the effective date of this AD, do the actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, as applicable. Do the actions in accordance with the Accomplishment Instructions of the service bulletin.

(1) Change the wire bundle clamp configurations at specified locations on the fuel tank walls.

(2) Seal the fasteners and certain stiffeners at specified locations on the fuel tank.

(3) Do a detailed inspection of the sealant of the fasteners in the auxiliary tank center bay and rib 28 of the left and right main fuel tanks. Seal any unsealed fasteners before further flight.

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

**Alternative Methods of Compliance (AMOCs)**

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Judy Coyle, Aerospace Engineer, ANM–140S, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6497; fax (425) 917–6590; 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 October 6, 2008.

**Ali Bahrami,**

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

[FR Doc. E8–24579 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R09–OAR–2008–0693; FRL–8729–4]**

## Approval and Promulgation of Implementation Plans: 1-Hour Ozone Extreme Area Plan for San Joaquin Valley, CA

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve state implementation plan revisions submitted by the State of California to meet the Clean Air Act (CAA) requirements applicable to the San Joaquin Valley (SJV), California 1-hour ozone nonattainment area. These requirements applied to the SJV following its reclassification from severe to extreme for the 1-hour ozone national ambient air quality standard on April 16, 2004. Although EPA subsequently revoked the 1-hour ozone standard effective June 15, 2005, the requirement to submit a plan for that standard remains in effect for the SJV. EPA is proposing to approve the SIP revisions for the SJV as meeting applicable CAA requirements except for the provision addressing the reasonably available control technology requirements that the State has withdrawn.

**DATES:** Comments may be submitted until November 17, 2008.

**ADDRESSES:** Submit comments, identified by docket number EPA–R09–OAR–2008–0693, by one of the following methods:

1. *Agency Web site: http://www.regulations.gov.* EPA prefers receiving comments through this electronic public docket and comment system. Follow the on-line instructions to submit comments.

2. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

3. *E-mail: wicher.frances@epa.gov*

4. *Mail or deliver:* Marty Robin, Office of Air Planning (AIR–2), U.S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, CA 94105–3901.

*Instructions:* All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through the agency Web site, eRulemaking portal, or e-mail. The agency Web site and eRulemaking portal are anonymous access systems, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

*Docket:* The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region 9, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available in either location (*e.g.*, CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

**FOR FURTHER INFORMATION CONTACT:** Frances Wicher, U.S. EPA Region 9, 415–972–3957, *wicher.frances@epa.gov* or *http://www.epa.gov/region09/air/actions.*

**SUPPLEMENTARY INFORMATION:** Throughout this document, the terms ''we,'' ''us,'' and ''our'' mean U.S. EPA.

**Table of Contents**



## I. Background

### *A. What is the history of 1-hour ozone air quality planning in the SJV?*

The San Joaquin Valley 1-hour ozone nonattainment area (SJV) includes the following counties in California's central valley: San Joaquin, part of Kern, Fresno, Kings, Madera, Merced, Stanislaus and Tulare. 40 CFR 81.305.

Upon enactment of the 1990 Clean Air Act Amendments, the SJV was classified by operation of law as a serious nonattainment area with an attainment date of no later than November 15, 1999. 56 FR 56694 (November 6, 1991). On November 15, 1994, the California Air Resources Board (ARB) submitted ''The 1994 California State Implementation Plan for Ozone'' (1994 SIP), a comprehensive ozone plan for the State of California that included a local nonattainment plan developed for the SJV by the San Joaquin Valley Air Pollution Control District (SJVAPCD or the District). On January 8, 1997, EPA approved the 1994 SIP. 62 FR 1150.

On November 8, 2001, EPA found that the SJV had failed to attain the 1-hour ozone standard by the serious area deadline of November 15, 1999 and reclassified the area by operation of law to severe. 66 FR 56476. In the final

reclassification action to severe, EPA explained that the State would need to submit by May 31, 2002 a SIP revision addressing the severe area requirements including, but not limited to, a demonstration of attainment of the 1-hour ozone standard by November 15, 2005 and a rate of progress (ROP) demonstration of creditable ozone precursor emission reductions of at least 3 percent per year until attainment. *Id.*

On October 2, 2002, EPA found that the State failed to submit by May 31, 2002 several severe area SIP revisions for the SJV including a demonstration of attainment and a ROP demonstration. 67 FR 61784. The State subsequently requested a reclassification to extreme and submitted all of the severe area requirements except for the attainment demonstration. See 69 FR 8126 (February 23, 2004).[1] On April 16, 2004, EPA granted the State's request to voluntarily reclassify the SJV from a severe to an extreme 1-hour ozone nonattainment area and required the State to submit by November 15, 2004 an extreme area plan providing for the attainment of the ozone standard as expeditiously as practicable, but no later than November 15, 2010. 69 FR 20550.

*B. What are the elements in the new plan?*

The SJVAPCD adopted the ''Extreme Ozone Attainment Demonstration Plan'' on October 8, 2004 and amended it on October 20, 2005 to, among other things, substitute for the original chapter a new ''Chapter 4: Control Strategy.'' The State submitted the plan (with the exception of Chapter 8 [2]) and amendment on November 15, 2004 and March 6, 2006, respectively. See letters from Catherine Witherspoon, ARB, to Wayne Nastri, EPA, November 15, 2004 and March 6, 2006. The plan and amendment, collectively, will be referred to as the ''2004 SIP'' in this proposed rule. The 2004 SIP addresses CAA requirements for extreme 1-hour ozone areas, including emission inventories, modeling, control measures, contingency measures, and ROP and attainment demonstrations.

The 2004 SIP relies in part on the ''Final 2003 State and Federal Strategy for the California State Implementation Plan,'' which identifies ARB's regulatory agenda to reduce ozone and particulate matter in California and includes defined statewide control measures to be reflected in future SIPs and provisions specific to air quality plans for the San Joaquin Valley. On October 23, 2003, ARB adopted the ''Final 2003 State and Federal Strategy for the California State Implementation Plan,'' which consists of two elements: (1) The Proposed 2003 State and Federal Strategy for the California State Implementation Plan (released August 25, 2003); and (2) ARB Board Resolution 03–22 which approves the Proposed 2003 State and Federal Strategy with the revisions to that Strategy set forth in Attachment A. On January 9, 2004, ARB submitted to EPA the ''Final 2003 State and Federal Strategy for the California State Implementation Plan.'' Letter from Catherine Witherspoon, ARB, to Wayne Nastri, EPA, January 9, 2004.[3]

In this proposed rule we refer to the two documents comprising the ''Final State and Federal Strategy for the California State Implementation Plan'' after the withdrawal of the South Coast portions, collectively, as the ''Final 2003 State Strategy'' or individually as the ''State Strategy'' and ''ARB Resolution 03–22'', respectively.

On August 21, 2008, the SJVAPCD adopted ''Clarifications Regarding the 2004 Extreme Ozone Attainment Demonstration Plan'' (2008 SIP Clarification). The State submitted the 2008 SIP Clarification on September 5, 2008. Letter from James N. Goldstene, ARB, to Wayne Nastri, EPA, with enclosures, September 5, 2008. The 2008 SIP Clarification provides updates to the 2004 SIP related to RACT, control measures adopted by the SJVAPCD, the rate of progress demonstration, and contingency measures.

*C. What Clean Air Act requirements apply to this extreme area 1-hour ozone plan?*

The requirements for extreme 1-hour ozone areas are found in section 182 of the CAA and the general planning and control requirements for nonattainment plans are found in sections 110 and 172. These requirements are discussed in Section II of this proposed rule. EPA has issued a General Preamble describing our preliminary views on how the Agency intends to review SIPs submitted to meet the CAA's requirements for 1-hour ozone plans. ''General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990.'' 57 FR 13498 (April 16, 1992). EPA has also issued other guidance documents related to 1-hour ozone plans which we cited as necessary when discussing our evaluation of the 2004 SIP.

In an April 30, 2004 final rule, EPA designated and classified most areas of the country under the 8-hour ozone national ambient air quality standard (NAAQS) promulgated in 40 CFR 50.10. 69 FR 23858. On April 30, 2004, EPA also issued a final rule entitled ''Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 1'' (Phase 1 Rule). 69 FR 23951. Among other matters, this rule revoked the 1-hour ozone NAAQS in the SJV (as well as in most other areas of the country), effective June 15, 2005. See 40 CFR 50.9(b); 69 FR at 23996 and 70 FR 44470 (August 3, 2005). The Phase 1 Rule also set forth anti-backsliding principles to ensure continued progress toward attainment of the 8-hour ozone NAAQS by identifying which 1-hour requirements remain applicable in an area after revocation of the 1-hour ozone NAAQS. Among the requirements not retained was the requirement to implement contingency measures pursuant to CAA sections 172(c)(9) and 182(c)(9) for failure to make reasonable further progress (RFP) toward attainment of the 1-hour NAAQS or for failure to attain that NAAQS. See 69 FR 23951 (April 30, 2004) and 70 FR 30592 (May 26, 2005).

On December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Rule. *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (DC Cir. 2006). Subsequently, in *South Coast Air Quality Management Dist.* v. *EPA,* 489 F.3d 1295 (DC Cir. 2007) in response to several petitions for rehearing, the court clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. With respect to the challenges to the anti-backsliding provisions of the rule (codified in 40 CFR 51.905), the court vacated several provisions that would have allowed states to remove from the SIP or to not adopt several 1-hour obligations once

[1] The submittals included the District's ''Amended 2002 and 2005 Ozone Rate of Progress Plan for the San Joaquin Valley'' (submitted April 10, 2003 and found complete on September 4, 2003). On July 10, 2003, we found adequate for transportation conformity purposes the motor vehicle emission budgets (MVEBs) in this plan. Letter, Jack P. Broadbent, EPA Region 9 to Catherine Witherspoon, ARB, July 10, 2003. A table attached to the letter summarized our adequacy determination. Our notice of adequacy for these budgets was published in the **Federal Register** on July 24, 2003 at 68 FR 43724 and was effective 15 days later, on August 8, 2003.

[2] Chapter 8 ''California Clean Air Act Triennial Progress Report and Plan Review'' was included in the plan to meet a State requirement to report every three years on the area's progress toward meeting California's air quality standards. Nothing in the chapter was intended to address federal Clean Air Act requirements.

[3] On February 13, 2008, ARB withdrew from EPA consideration specified portions of the ''Final 2003 State and Federal Strategy for the California State Implementation Plan'' as they relate to the 2003 SIP for the South Coast Air Basin. These withdrawals do not affect the 2003 Strategy as it relates specifically to the San Joaquin Valley. Letter from James N. Goldstene, ARB, to Wayne Nastri, EPA, February 13, 2008.

the 1-hour ozone NAAQS was revoked, among them, contingency measures to be implemented pursuant to CAA sections 172(c)(9) and 182(c)(9).

The provisions in 40 CFR 51.905(a)–(c) remain in effect and areas must continue to meet those anti-backsliding requirements for the 1-hour ozone NAAQS. However, the contingency measure provision noted previously, which is specified in 51.905(e), was vacated by the court. As a result, states must continue to meet the obligation for 1-hour ozone contingency measures.

## II. Review of the 2004 SIP, the SJV Elements of the Final 2003 State Strategy and the 2008 SIP Clarification

### *A. Did the SJVAPCD and ARB meet the CAA procedural requirements?*

1. What are the applicable CAA provisions?

CAA section 110 requires SIP submissions to be adopted by the state after reasonable notice and public hearing. EPA has promulgated specific requirements for SIP submissions in 40 CFR part 51, subpart F.

2. How does the plan address these provisions?

The District provided the requisite notice and public comment periods prior to adoption of the 2004 SIP and 2008 SIP Clarification. The State provided the requisite notice and public comment period prior to adoption of the 2004 SIP, Final 2003 State Strategy and 2008 SIP Clarification. See January 9, 2004, November 15, 2004 and March 6, 2006 letters from Catherine Witherspoon, ARB, to Wayne Nastri, EPA, with enclosures and September 5, 2008 letter from James. N. Goldstene to Wayne Nastri, with enclosures.

3. Does the plan meet the CAA procedural requirements for SIP submissions?

The submittal packages for the 2004 SIP, Final 2003 State Strategy and 2008 SIP Clarification include evidence of public notice and hearing, District and ARB responses to public comments, and evidence of District and ARB adoption. Based on our review of these materials, we find that the procedural requirements of CAA section 110 and 40 CFR part 51, subpart F have been met.

4. Are the plan submittals complete?

CAA section 110(k)(1) requires EPA to determine whether a plan is complete within 60 days of receipt and any plan that has not been determined to be complete or incomplete within 6 months shall be deemed complete by operation of law. EPA's completeness criteria are found in 40 CFR part 51, subpart *V*.

The 2004 SIP, comprised of the original and subsequent amendment, was deemed complete by operation of law on May 15, 2005 and September 6, 2006. On February 18, 2004, we determined the Final 2003 State Strategy to be complete. Letter from Deborah Jordan, EPA, to Catherine Witherspoon, CARB, February 18, 2004. We found the 2008 SIP Clarification complete on September 23, 2008. Letter from Deborah Jordan, EPA, to James N. Goldstene, ARB, September 23, 2008.

### *B. Do the baseline and projected emission inventories meet CAA requirements?*

1. What are the applicable CAA provisions?

CAA sections 172(c)(3) and 182(a)(1) require nonattainment areas to submit a comprehensive, accurate, and current inventory of actual emissions from all sources, in accordance with guidance provided by EPA. The inventory is to represent weekday emissions during the ozone season. General Preamble at 13502. EPA guidance for 1-hour ozone SIP emission inventories includes, in addition to the General Preamble: ''Procedures for the Preparation of Emission Inventories for Carbon Monoxide and Precursors of Ozone, Volume I: General Guidance for Stationary Sources,'' EPA—450/4–91–016; and ''Procedures for Emission Inventory Preparation, Volume IV: Mobile Sources,'' EPA—450/5–91–026d Revised.

2. How does the plan address these provisions?

Chapter 3 of the 2004 SIP presents the baseline and projected emission inventories. This chapter also discusses the methodology used to determine 1999 emissions and identifies the growth and control factors used to project emissions for the 2000 baseline inventory and the 2008 and 2010 projected year inventories. The plan presents weekday summer inventories for 2000, 2008 and 2010 for all major source categories. Emissions are calculated for the two major ozone precursors—oxides of nitrogen ($NO_X$) and volatile organic compounds (VOC)—as well as for the less significant precursor, carbon monoxide (CO). 2004 SIP at Table 3–1. Motor vehicle emissions were based on estimates of vehicle miles traveled (VMT) provided by the regional transportation planning agencies and the California Department of Transportation. The plan uses ARB's EMission FACtor (EMFAC) 2002, version 2.2, to calculate the emission factors for cars, trucks and buses. On April 1, 2003, we approved EMFAC 2002 for use in SIP development. 68 FR 15720.

3. Does the plan meet the CAA provisions for the emission inventories?

We have determined that the emission inventories in the 2004 SIP were comprehensive, accurate, and current at the time the SIP was submitted. Accordingly, we propose to approve the emissions inventories in the 2004 SIP as consistent with the CAA and applicable EPA guidelines.

### *C. Is the air quality modeling consistent with the CAA and EPA's modeling guidelines?*

1. What are the applicable CAA provisions and EPA's guidelines?

Areas classified as extreme for the 1-hour ozone standard such as the SJV must demonstrate attainment ''as expeditiously as practicable'' but not later than November 15, 2010 as specified in CAA section 181(a). For purposes of demonstrating attainment, CAA section 182(c)(2)(A) requires extreme areas to use photochemical grid modeling or an analytical method EPA determines to be as effective.

EPA guidance identifies the features of a modeling analysis that are essential to obtain credible results.[4] The photochemical grid modeling analysis is performed for days when the meteorological conditions are conducive to the formation of ozone. For purposes of developing the information to put into the model, the state must select days in the past with elevated ozone levels that are representative of the ozone pollution problem in the nonattainment area and a modeling domain that encompasses the nonattainment area. The state must then develop both meteorological data describing atmospheric conditions for the selected days and an emission inventory to evaluate the model's ability to reproduce the monitored air quality values. Finally, the state needs to verify

[4] EPA has issued the following guidance regarding air quality modeling used to demonstrate attainment of the 1-hour ozone NAAQS: ''Guideline for Regulatory Application of the Urban Airshed Model,'' EPA–450/4–91–013 (July 1991); ''Guidance on Use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS,'' EPA–454/B–95–007 (June 1996); ''Guidance for the 1-hour Ozone Nonattainment Areas that Rely on Weight-of-Evidence for Attainment Demonstrations, Mid-Course Review Guidance'' (March 28, 2002); and ''Guidance for Improving Weight-of-Evidence Through Identification of Additional Emission Reductions Not Modeled'' (Nov 99). Copies of these documents may be found on EPA's Web site at *http://www.epa.gov/ttn/scram* and in the docket for this proposed rule.

that the model is properly simulating the chemistry and atmospheric conditions through diagnostic analyses and model performance tests.

Once these steps are satisfactorily completed, the model can be used to generate future year air quality estimates to support an attainment demonstration. A future-year emissions inventory, which includes growth and controls through the attainment year, is developed for input to the model to predict air quality in the attainment year.

For the 1-hour ozone standard, the modeled attainment test compares model-predicted 1-hour daily maximum ozone concentrations in all grid cells for the attainment year to the level of the NAAQS. For the 1-hour ozone NAAQS, a predicted concentration above 0.124 parts per million (ppm) indicates that the area is expected to exceed the standard in the attainment year and a prediction at or below 0.124 ppm indicates that the area is expected to attain the standard.

Attainment is demonstrated when all predicted concentrations inside the modeling domain are at or below the NAAQS or at an acceptable upper limit above the NAAQS permitted under certain conditions by EPA's guidance. When the predicted concentrations are above the NAAQS, a weight of evidence determination, which incorporates other analyses such as air quality and emissions trends, may be used to address the uncertainty inherent in the application of photochemical grid models.

2. How does the plan address these provisions?

EPA recommended that states use the Urban Airshed Model (UAM) version IV as the ozone model of choice for the grid-point modeling required by the CAA for 1-hour ozone attainment demonstrations.[5] Other models are allowed if the state shows that they are scientifically valid and they perform (*i.e.*, are just as reliable) as well as, or better than, UAM IV. California selected the Comprehensive Air Quality Model with Extensions (CAMx) based on slightly better performance for the SJV than the other tested models. Details on the model and its selection can be found in Appendix D to the 2004 SIP. The meteorological modeling was based on a hybrid approach, using the Meso-scale Model 5 (MM5) and Calmet models, because of the ability of this modeling system to reproduce the measured design value near the Fresno monitoring site.

Information on how the CAMX modeling meets EPA guidance is summarized here and detailed in the State's submittals. 2004 SIP at Chapter 5 and Appendix D. The air quality modeling domain extends from the Oregon border in the north to Los Angeles County in the south, and from the Pacific Ocean in the west to Nevada in the east.

EPA's Guideline on the use of photochemical grid models recommends that areas model three or more episodes, including the types of weather conditions most conducive to ozone formation. The final photochemical grid modeling submitted by California focused on the CAMx modeling for one several day episode, July 27 to August 2, 2000. This episode represents high measured ozone, with a peak measured concentration of 151 parts per billion (ppb) at Bakersfield on August 2, 2000. The episode was typical of the worst case meteorology (*i.e.*, the highest potential for ozone formation) of episodes in the San Joaquin Valley.

The CAMx model was run using the MM5/CALMET meteorological processor with State emission inventories for the 2000 base year and with projected emissions representing grown and controlled emissions for the attainment year. The projected 2010 emissions inventory was developed for modeling simulations and included the effects of projected growth and control measures, as discussed in section II.B. above.

The CAMx simulation for July 30, with the emission inventory for the year 2010, was used to develop targets for reduction of VOC and $NO_X$ in the attainment year.

3. Does the air quality modeling meet EPA's modeling guidelines?

EPA has established the following guidelines for model performance: unpaired peak ratio 0.80–1.2, normalized bias +/−15%, and gross error less than 35%. The model performance is presented in Appendix D to the 2004 SIP for the Fresno and Bakersfield areas, representing areas of highest 1-hour ozone levels in the SJV and shows that the CAMx model predicts ozone within the quality limits set by EPA guidance on most days for most subregions of the modeling domain. On those days for which a subregion had peak measured ozone concentrations above 125 ppb, the model performance meets the EPA criteria.

We conclude that the modeling is consistent with the CAA and EPA modeling guidance; therefore, we propose to approve the modeling analysis that underlies the attainment demonstration in the 2004 SIP. We discuss the attainment demonstration in more detail later in this proposed rule. See also ''Technical Support Document for the Extreme One-Hour Ozone Attainment Plan Modeling for the San Joaquin Valley Nonattainment Area,'' EPA Region 9, September 2008, found in the docket for this proposed rule.

*D. Do the control measures meet CAA requirements?*

1. What are the applicable CAA provisions?

The CAA section 172(c)(1) requires nonattainment area plans to provide for the implementation of all reasonably available control measures (RACM) including reasonably available control technology (RACT). EPA has previously provided guidance interpreting the RACM requirement in the General Preamble at 13560 and a memorandum entitled ''Guidance on the Reasonably Available Control Measure Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas,'' John Seitz, Director, OAQPS to Regional Air Directors, November 30, 1999. In summary, EPA guidance requires that states, in addressing the RACM requirement, should consider all potential measures for source categories in the nonattainment area to determine whether they are reasonably available for implementation in that area and whether they would advance the area's attainment date.

Under the CAA, RACT is required for major VOC sources and for all VOC source categories for which EPA has issued Control Techniques Guideline (CTG) documents. In addition, EPA has issued Alternative Control Techniques (ACT) documents to help states in making RACT determinations. CAA sections 172(c)(1), 182(a)(2)(A), 182(b)(2), and 183(a) and (b). CAA section 182(f) requires that RACT also apply to major stationary sources of $NO_X$. In extreme areas, such as the SJV, a major source is one that emits or has the potential to emit 10 tons of VOC or $NO_X$ per year. CAA section 182(e).

The CAA also requires that SIPs ''shall include enforceable emission limitations, and such other control measures, means or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment * * * by the applicable attainment date. * * *'' CAA section 172(c)(6). CAA section 110(a)(2)(A) contains almost identical language.

[5] EPA has not recommended a model for attainment demonstrations for the 8-hour ozone standard.

Finally, CAA section 182(d)(1)(A) requires that extreme areas submit transportation control measures (TCMs) sufficient to offset any growth in emissions from growth in VMT or the number of vehicle trips, and to provide (along with other measures) the reductions needed to meet ROP. EPA interprets this CAA provision to allow areas to meet the requirement by demonstrating that emissions from motor vehicles decline each year through the attainment year. General Preamble at 13522.

2. How does the plan address these provisions?

a. RACM

To determine which measures would be feasible for the SJV, the District looked at measures implemented in other areas (including the South Coast Air Basin, the San Francisco Bay Area, and the Houston-Galveston area), documents produced by ARB, as well as measures suggested by the public at workshops. The District then screened the identified measures and rejected those that affected few or no sources in the SJV, had already been adopted as rules or were in the process of being adopted. The remaining measures were evaluated using baseline inventories, available control technologies, and potential emission reductions as well as whether the measure could be implemented on a schedule that would contribute to attainment of the 1-hour ozone standard by the deadline of 2010. 2004 SIP at section 4.2.1.

Based on this evaluation, the District developed an expeditious rule adoption schedule listing 21 measures involving adoption of eight new rules and revisions to over 20 existing rules. 2004 SIP, Table 4–1. Since submittal of the SIP in 2004, the District has completed action on all of these rules and submitted all except one of the adopted rules to EPA for approval. 2008 SIP Clarification, Table 1 and Table 1 below.[6]

In addition to the District's efforts, the eight San Joaquin Valley Regional Transportation Planning Agencies (RPTAs) also conducted a RACM evaluation for transportation sources. This evaluation, described in section 4.6.3. of the 2004 SIP, resulted in extensive local government commitments to implement programs to reduce auto travel and improve traffic flow. 2004 SIP at section 4.6 and Appendix C. The local governments also provide reasoned justifications for any measures that they did not adopt. See 2004 SIP at Appendix C.

The 2004 SIP relies on the Final 2003 State Strategy to address mobile and area source categories not under the District's jurisdiction. 2004 SIP at section 4.7. Table I–1 in the State Strategy shows the impressive list of both mobile and area source measures that have been adopted by California between 1994 and 2003, along with the mobile source rules that have been adopted by EPA during this period. Table I–2 lists proposed new State measures, most of which have already been adopted.[7] This list of new State measures was developed through a public process intended to identify and refine new emission reductions strategies for California. State Strategy at ES–5.

b. RACT

The 2004 SIP includes a brief section 4.2.5 discussing the RACT obligation and specific source categories where further analysis and potential future controls may be required in order to ensure that RACT levels of control are applied to sources down to the 10 tons per year (tpy) level. The District concluded that only a few categories would need additional work, since the District's existing rules already applied a stringent degree of control to sources with relatively low levels of emissions.

Subsequently, the District adopted, on August 17, 2006, and the State submitted on January 31, 2007, an 8-hour ozone RACT SIP addressing sources down to the 25 tpy size. In submitting the 2008 SIP Clarification, the State formally withdrew the RACT portion of the 2004 SIP, specifically section 4.2.5, stating that the District would fill the resulting 1-hour ozone RACT gap with the revised 8-hour ozone RACT SIP now under further development. The District intends to address sources down to the 10 tpy level of emissions in this revised 8-hour RACT SIP. 2008 SIP Clarification, page 3. Because the State has withdrawn this portion of the 2004 SIP and has not yet submitted a revised RACT SIP to address the extreme area requirements, we are not acting on RACT in this action.

c. Enforceable Limitations and Other Control Measures

i. Adopted Regulations

The 2004 SIP's modeling analysis determined that attainment of the 1-hour ozone standard required reducing 2000 baseline emissions from 556.8 tons per day (tpd) $NO_X$ and 443.5 tpd VOC to 343.5 tpd $NO_X$ and 314.4 tpd VOC. 2004 SIP at 3–7 through 3–11 and 5–9 through 5–12 and ''Proposed 2004 State Implementation Plan for Ozone in the San Joaquin Valley,'' September 28, 2004, Air Resources Board Staff Report (ARB Staff Report for the 2004 SIP) at Table III–6.

As shown in Table 3 below, of the 213.3 tpd $NO_X$ and 129.1 tpd VOC needed for attainment, approximately 160 tpd of $NO_X$ and 78.4 tpd of VOC reductions come from rules and regulations that were already adopted when the plan was submitted in 2004.

ii. Commitments

The 2004 SIP contains both State and District commitments to adopt control measures to achieve specified emissions reductions. The Final 2003 State Strategy, adopted prior to the 2004 SIP, includes an enforceable commitment to reduce $NO_X$ emissions in the SJV by 10 tpd by 2010.[8] State Strategy at I–24 through I–26. Possible measures to achieve these reductions are described and listed in the State Strategy at I–14 through I–26 and ARB Resolution 03–22, Attachment A. The State Strategy also states that beyond its emission reduction commitment, new commitments to achieve further VOC[9] and $NO_X$ reductions would be needed for the future SJV 1-hour ozone plan (which the SJVAPCD and ARB subsequently adopted as the 2004 SIP) and would be considered as part of that plan. State Strategy at I–26. To that end, the 2004 SIP incorporates the Final 2003 State Strategy as it applies to the SJV and includes an additional commitment by the State to achieve by 2010 emissions reductions of 10 tpd $NO_X$ and 15 tpd VOC.

Although the Final 2003 State Strategy identifies possible control measures that could deliver these reductions, the State's commitment is only to achieve these $NO_X$ and VOC emission reductions in the aggregate by 2010. Thus, the State's total enforceable

[6] The current set of the District's adopted regulations is available at: *http://www.valleyair.org/rules/1ruleslist.htm.* The current status of EPA approval of the District's rules is posted at: *http://yosemite.epa.gov/R9/r9sips.nsf/Agency?ReadForm&count=500&state=California&cat=San+Joaquin+Valley+Unified+APCD-Agency-Wide+Provisions.*

[7] See chapter 3 (page 38) of the ''Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan,'' Revised Draft (Release date: April 26, 2007) for a list of adopted State measures.

[8] The State Strategy makes clear that this commitment was intended for immediate inclusion in the 2003 PM–10 plan for the San Joaquin Valley and for later inclusion in the 1-hour ozone plan for the SJV. State Strategy at I–23 and I–26.

[9] The State uses the term ''reactive organic gases'' (ROG) in its documents. For the purposes of this proposed rule, VOC and ROG are interchangeable.

commitments in the 2004 SIP are to achieve 20 tpd $NO_X$ and 15 tpd VOC emission reductions in the aggregate by 2010. See State Strategy at I–7 through I–9 and I–26; ARB Board Resolution 04–29, October 28, 2004; ARB Staff Report for the 2004 SIP at 29–30; 2004 SIP at section 4.7 (including Table 4–3 which duplicates Table I–2 in the State Strategy).[10]

In the 2004 SIP, the District commits to adopt specific rules by specified dates (quarter and year), to submit the rules within one month of adoption to ARB for submittal to EPA, and to achieve from each measure the specified reductions in 2010. 2004 SIP at Table 4–1 and SJVAPCD Resolution No. 5–10–12 (October 20, 2005) p. 4, item 9. This information is updated in Table 1 of the 2008 SIP Clarification which shows not only the original commitment in the 2004 SIP but also the date on which the District adopted the rule associated with each commitment and the actual emissions reductions achieved by each rule. A summary of the information found in Table 1 in the 2008 SIP Clarification is presented in our Table 1. Table 1 below also gives the date the rule was submitted to EPA or the date on which EPA approved the rule into the SIP.

TABLE 1—SAN JOAQUIN VALLEY AIR POLLUTION CONTROL DISTRICT 2004 EXTREME OZONE ATTAINMENT PLAN "NEW MEASURE" COMMITMENTS

| Rule #, description and commitment ID from 2004 SIP | 2004 SIP commitment (2010–tpd) | Achieved emission reductions (2010–tpd) | Local adoption | Submittal date or approval cite/date |
|---|---|---|---|---|
| **$NO_X$ Control Measures** | | | | |
| 9310 Fleet rule-School buses (C) | 0.1 | 1.6 | 9/21/06 | 12/29/06 |
| 9510, 3180 Indirect Source Mitigation (D) | 4.0 | 4.0 | 12/15/05 | 12/29/06 |
| 4307 Small Boilers (2–5 MMBTU) (E) | 1.0 | 5.1 | 4/20/06 | 72 FR 29887 (5/30/07) |
| 4352 Solid fuel boilers (G) | 0.0 | 0.0 | 5/18/06 | 72 FR 29887 (5/30/07) |
| 4702 Stat. IC engines (H) | 8.0 | 16.8 | 1/18/07 | 73 FR 1819 (1/10/08) |
| 4309 Commercial Dryers (I) | 1.0 | 0.7 | 12/15/05 | 72 FR 29887 (5/30/07) |
| New Rule 4308—Water Heaters 0.075 (N) | 0.2 | 0.8 | 10/20/05 | 72 FR 29887 (5/30/07) |
| 4103 Open Burning (Q) | 1.1 | 1.7 | 5/17/07 | |
| 4703 Sta. Gas Turbines (S) | 0.6 | 1.9 | 8/17/06 | 12/29/06 |
| $NO_X$ Totals | 16.0 | 32.6 | | |
| EPA-Approved $NO_X$ Reductions | 10.2 | 23.4 | | |
| $NO_X$ Reductions Not Approved by EPA | 5.8 | 9.2 | | |
| **VOC Control Measures** | | | | |
| Rule # and Description: | | | | |
| 4409 Oil & Gas Fug. (A) | 4.7 | 5.1 | 4/20/05 | 71 FR 14653 (3/23/06) |
| 4455 Ref. & Chem. Fug. (B) | 0.2 | 0.3 | 4/20/05 | 71 FR 14653 (3/23/06) |
| 4694 Wineries (F) | 0.7 | 0.8 | 12/15/05 | 6/16/06 |
| 4565 Composting/Biosolids (J) | 0.1 | 0.3 | 3/15/07 | 8/24/07 |
| 4612 Automotive Coating (incorporates Rule 4602) (K) | 0.1 | 1.0 | 9/20/07 | 3/7/08 |
| 4570 CAFO Rule (L) | 15.8 | 17.7 | 6/15/06 | 10/5/06 |
| 4662 Org. Solvent Degreasing (M) | | | | |
| 4663 Org. Sol. Cleaning (M) | | | | |
| 4603 Metal Parts/Products (M) | | | | |
| 4604 Can and Coil Coating (M) | 1.3 | 3.1 | 9/20/07 | 3/7/08 |
| 4605 Aerospace Coating (M) | | | | |
| 4606 Wood Products Coating (M) | | | | |
| 4607 Graphic Arts (M) | | | | |
| 4612 Automotive Coating (M) | | | | |
| 4653 Adhesives (M) | | | | |
| 4684 Polyester Resin Operation (M) | | | | |
| 4401 Steam-Enhanced Oil-well (O) | 1.4 | 0.3 | 12/14/06 | 5/8/07 |
| 4651 Soil Decontamination (P) | <0.5 | 0.0 | 9/20/07 | 3/7/08 |
| 4103 Open Burning (Q) | 2.9 | 3.9 | 5/17/07 | — |
| 4682 Polymeric Foam Mfg. (R) | 0.1 | 0.1 | 9/20/07 | 3/7/08 |
| 4621 & 4624 Gasoline storage & trans. (T & U) | 0.9 | 1.9 | 12/20/07 | 3/7/08 |
| VOC totals | 28.2 | 34.5 | | |
| EPA-Approved VOC Reductions | 4.9 | 5.2 | | |
| VOC Reductions Not Approved by EPA | 23.3 | 29.3 | | |

In addition to the emission reductions associated with the rules listed in Table 1 above, the District also commits to achieve an additional 5 tpd $NO_X$ and 5 tpd VOC reductions in aggregate by

[10] In these documents the State's commitment is sometimes referred to as 20 tpd $NO_X$ and sometimes as 10 tpd $NO_X$. The 20 tpd reference is to ARB's commitment for 10 tpd $NO_X$ in the Statewide Strategy and ARB's additional commitment for 10 tpd $NO_X$ in the 2004 SIP at section 4.7 and ARB Board Resolution 04–29. See also ARB Staff Report for the 2004 SIP at 29. The 10 tpd reference is to ARB's additional commitment for 10 tpd $NO_X$ in the 2004 SIP at section 4.7 and ARB Resolution 04–29.

2010 from long-term measures. 2004 SIP at Table 5–1.

d. TCMs To Offset Growth in Motor Vehicle Emissions Under 182(d)(1)

The 2008 SIP Clarification provides a demonstration that emissions from motor vehicles in the San Joaquin Valley decline each year from 2000 to 2011. This demonstration is reproduced in Table 2 below. 2008 SIP Clarification at 8. The emissions derive from the emissions inventory used in the modeling analysis for the 2004 SIP, and so are calculated using EMFAC2002, version 2.2, and the same transportation activity projections used in the 2004 SIP.

TABLE 2—BASELINE MOTOR VEHICLE EMISSIONS, 2000–2011

[San Joaquin Valley, Summer Planning, in tons per day]

| Year | 00 | 01 | 02 | 03 | 04 | 05 | 06 | 07 | 08 | 09 | 10 | 11 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| VOC | 115 | 107 | 100 | 93 | 88 | 82 | 77 | 72 | 67 | 63 | 59 | 54 |
| $NO_X$ | 223 | 218 | 211 | 201 | 192 | 184 | 176 | 166 | 157 | 148 | 137 | 127 |

3. Does the plan meet the CAA provisions for control measures?

a. RACM

As described above, the District evaluated a range of potentially available measures for inclusion in its 2004 SIP and committed to adopt those it found to be feasible for attaining the 1-hour standard. The process and the criteria the District used to select certain measures and reject others are consistent with EPA's RACM guidance. We also describe above the measure evaluation process undertaken by the RPTAs and the local jurisdictions. This process is also consistent with EPA's RACM guidance. Based on our review of results of these RACM analyses, the State Strategy, and the resulting commitments to adopt and implement controls, we propose to find that there are, at this time, no additional reasonably available measures that would advance attainment of the 1-hour ozone standard in the SJV. Therefore, we also propose to find that the 2004 SIP, together with the Final 2003 State Strategy, provides for the implementation of RACM as required by CAA section 172(c)(1). This proposed finding does not affect the District's continuing obligation under the CAA to implement RACT for its major sources of VOC and $NO_X$ and sources covered by an EPA CTG document.

b. RACT

As discussed above, the State has withdrawn the RACT portion of the 2004 Plan with the intent to fill the resulting 1-hour ozone RACT gap with the revised 8-hour ozone RACT SIP now under further development by the District. The District intends that this revised RACT SIP will, among other things, address sources down to the 10 tpy level of emissions as required for extreme areas. We agree with the District and the State that this approach is an efficient way to deal with the remaining RACT issues. See Letter, Deborah Jordan, EPA to Seyed Sadredin, SJVAPCD, September 9, 2008.

c. Enforceable Limitations and Other Control Measures

As stated above, measures already adopted by the District and State provide the majority of emission reductions needed to demonstrate attainment. The balance of the needed reductions is in the form of enforceable commitments by the District and ARB. EPA believes, consistent with past practice, that the CAA allows approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures.[11] Once EPA determines that circumstances warrant consideration of an enforceable commitment, EPA considers three factors in determining whether to approve the enforceable commitment: (a) Does the commitment address a limited portion of the statutorily-required program; (b) is the state capable of fulfilling its commitment; and (c) is the commitment for a reasonable and appropriate period of time.[12]

We believe that circumstances here warrant the consideration of enforceable commitments. As discussed above, the bulk of emission reductions needed for attainment comes from regulations already fully adopted by the District and the State. These previously adopted measures include ARB regulations governing area and mobile sources and SJVAPCD rules governing stationary sources.

Moreover, as shown above and discussed further below, the 2008 SIP Clarification demonstrates that the District has fulfilled its commitments in the 2004 SIP to achieve the identified emission reductions from specific rules and to achieve an additional 5 tpd VOC and 5 tpd $NO_X$ reductions in the aggregate from long-term measures.

As a result of District's and ARB's previous efforts, the vast majority of sources in the SJV are already subject to stringent, adopted rules and it is increasingly difficult to develop regulations for the remaining universe of uncontrolled sources. Although the State is continuing its efforts to increase the stringency of existing controls on mobile sources and consumer products, the diverse nature of these source categories makes them difficult to regulate. As a result, rule development places an increasing burden on the State

[11] Commitments approved by EPA under section 110(k)(3) of the CAA are enforceable by EPA and citizens under, respectively, sections 113 and 304 of the CAA. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments: See, *e.g., American Lung Ass'n of N.J.* v. *Kean*, 670 F. Supp. 1285 (D.N.J. 1987), aff'd, 871 F.2d 319 (3rd Cir. 1989); *NRDC, Inc.* v. *N.Y. State Dept. of Env. Cons.*, 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Env't* v. *Deukmejian*, 731 F. Supp. 1448, recon. granted in par, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air* v. *South Coast Air Quality Mgt. Dist.*, No. CV 97–6916–HLH, (C.D. Cal. Aug. 27, 1999). Further, if a state fails to meet its commitments, EPA could make a finding of failure to implement the SIP under CAA Section 179(a), which starts an 18-month period for the State to correct the nonimplementation before mandatory sanctions are imposed.

CAA section 110(a)(2)(A) provides that each SIP ''shall include enforceable emission limitations and other control measures, means or techniques * * * as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirement of the Act.'' Section 172(c)(6) of the Act, which applies to nonattainment SIPs, is virtually identical to section 110(a)(2)(A). The language in these sections of the CAA is quite broad, allowing a SIP to contain any ''means or techniques'' that EPA determines are ''necessary or appropriate'' to meet CAA requirements, such that the area will attain as expeditiously as practicable but no later than the designated date. Furthermore, the express allowance for ''schedules and timetables'' demonstrates that Congress understood that all required controls might not have to be in place before a SIP could be fully approved.

[12] The U.S. Court of Appeals for the Fifth Circuit upheld EPA's interpretation of CAA sections 110(a)(2)(A) and 172(c)(6) and the Agency's use and application of the three factor test in approving enforceable commitments in the Houston-Galveston ozone SIP. *BCCA Appeal Group et al.* v. *EPA et al.*, 355 F.3d 817 (5th Cir. 2003).

to analyze advanced technologies and develop increasingly complex control approaches, and several years may be required to complete the tasks prerequisite to successful regulation. We, therefore, believe it is appropriate to allow an additional short period of time in order for them to determine which sources should be regulated and how.

Finally, the SJV does not rely on these enforceable commitments to meet the required rate of progress milestones. The 2008 SIP Clarification demonstrates achievement of the required ROP without the need for any reductions from commitments. See discussion in section II.E. below.

Having concluded that the circumstances warrant consideration of enforceable commitments, we consider below the three factors in determining whether to approve the submitted commitments.

i. The commitments address a limited portion of the 2004 SIP. Table 1 in the 2008 SIP Clarification and Table 1 above show that all of the District's commitments in Table 4–1 of the 2004 SIP have been converted to adopted rules, all but one has been submitted to EPA, and many have been approved by EPA. These tables demonstrate that the rules the District has adopted pursuant to these commitments will achieve 32.6 tpd $NO_X$ and 34.5 tpd VOC. These reductions amount to 16.6 tpd $NO_X$ and 6.3 tpd VOC more than the District originally committed to achieve in the 2004 Plan and are not only sufficient to meet all of its original emission reduction commitments from specified measures but also to satisfy the District's long-term measure commitment to achieve additional 5 tpd $NO_X$ and 5 tpd VOC by 2010.

The EPA-approved rules in Table 1 account for 23.4 tpd $NO_X$ and 5.2 tpd VOC. Table 3 below shows that the reductions from commitments needed to attain the 1-hour ozone NAAQS are 17.7 tpd $NO_X$ (8.3%) and 43.1 tpd VOC (33.4%).

TABLE 3—COMMITMENT PORTION OF THE 2004 SIP REDUCTIONS IN TONS PER DAY FOR 2010

| | $NO_X$ | VOC |
|---|---|---|
| 2000 baseline emissions | 556.8 | 443.5 |
| 2010 attainment target | 343.5 | 314.4 |
| Reductions needed to attain | 213.3 | 129.1 |
| Reductions from baseline measures adopted by 9/02 [13] | 160.0 | 78.4 |
| Reductions needed from commitments in 2004 SIP | 53.3 | 50.7 |
| Reductions achieved from EPA-approved rules [14] | 35.6 | 7.6 |
| Reductions needed to attain from commitments | *17.7* | *43.1* |
| Percent of reductions needed to attain from commitments (row 3) | 8.3% | 33.4% |

Sources: ARB Staff Report for the 2004 SIP, Table III–6; 2008 SIP Clarification, Table 1.

Of the 17.7 tpd $NO_X$ commitments, 9.2 tpd are from measures already adopted by the District but not yet acted on by EPA. Similarly, of the 43.1 tpd VOC commitments, 29.3 tpd are from measures already adopted by the District. This leaves only 8.5 tpd $NO_X$ and 13.8 tpd VOC (or approximately 3% $NO_X$ and 11% VOC) reductions that are needed for attainment from the State's commitments. The State has committed to achieve 20 tpd $NO_X$ and 15 tpd VOC which is more than is needed for attainment in 2010. Given the difficulty of controlling the State's sources and the near term adoption and implementation dates, we believe the portion of reductions from enforceable commitments in the 2004 SIP is acceptable and the first factor is satisfied.

ii. The State and District are capable of fulfilling their commitments. As discussed above, the District has already adopted the rules needed to fulfill the commitments made in its 2004 SIP and the only commitment that remains to be fulfilled is that of the State to achieve 20 tpd $NO_X$ and 15 tpd VOC reductions by 2010. The 2004 SIP at section 4.7 and State Strategy at I–7 through I–9 and I–23 through I–26 identify the State's development, adoption and implementation schedule for achieving its commitment.

Since the development of the 2004 SIP, the State has in fact adopted many controls that have the potential to contribute to meeting this obligation. Previous ARB regulatory achievements are listed in chronological order in a table in chapter 3 (page 38) of the ''Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan,'' Revised Draft (Release date: April 26, 2007). The controls typically represent the most stringent regulations yet enacted in the Country and include In-Use Diesel Agricultural Engine Requirements, Consumer Product Lower Emission Limits, Zero Emission Bus Rule Amendments, etc. Finally, the State has an ongoing rulemaking agenda for 2008 posted at: *http://www.arb.ca.gov/regact/2008calfin.pdf.*

We believe that this consistent record of achievement shows that the State will be able to meet its enforceable commitments to achieve 20 tpd $NO_X$ and 15 tpd VOC by 2010. We, therefore, conclude that the second factor is satisfied.

iii. The commitments are for a reasonable and appropriate period of time. The State is not obligated to fulfill its emission reduction commitments until 2010. This schedule is reasonable given the type of measures that remain to be pursued, *e.g.,* retrofit controls for existing heavy-duty off-road diesel equipment. 2003 State Strategy, Measure OFF–RD CI–1. These types of measures typically require substantial time to develop, adopt and implement. Therefore, the State's schedule is reasonable and appropriate, and we conclude that the third factor is satisfied.

iv. Conclusion. For the above reasons, we believe that the three factors EPA considers in determining whether to approve enforceable commitments are satisfactorily addressed with respect to the District's and the State's commitments. We are therefore proposing to approve the State's enforceable commitment in the 2004 SIP, ARB Board Resolution 04–29 and

[13] The 2004 SIP at Table 5–1 includes 2010 baseline inventory numbers which reflect control measures adopted through September 2002. The ARB Staff Report for the 2004 SIP at Table III–6 refers to the measures adopted as of September 2002 as the adopted measures. Thus, for the 2004 SIP, measures adopted as of September 2002 are considered to be the baseline adopted measures.

[14] Includes the updated VOC and $NO_X$ emissions reductions from the ''Achieved Emission Reductions'' column of Table 1 above and in the 2008 SIP Clarification and 2.4 tpd VOC and 12.2 tpd of $NO_X$ from measures adopted after September 2002, but prior to the adoption of the 2004 SIP by the District and State, and which have since been approved by EPA. See ARB Staff Report for the 2004 SIP at Tables III–6 and III–7, 68 FR 51187, 68 FR 52510, 69 FR 60962, 69 FR 28061, 70 FR 28826, 69 FR 30006, 30026–30027.

Final 2003 State Strategy to achieve 20 tpd NOX and 15 tpd VOC reductions by 2010. We also propose to approve the District's enforceable commitments in the 2004 SIP to adopt specific rules by specified dates to achieve in 2010 the reductions in the column labeled ''Achieved Emission Reductions'' in Table 1 in the 2008 SIP Clarification (and Table 1 above). Final approval of these commitments would make the commitments enforceable by EPA and by citizens.

d. TCMs To Offset Growth in Motor Vehicle Emissions Under 182(d)(1)

Additional information submitted in the 2008 SIP Clarification and reproduced in Table 2 above show that on-road mobile source emissions of VOC and $NO_X$ decline steadily from 2000 to 2011. Because emissions decline each year for both VOC and $NO_X$, the plan need not include TCMs to offset growth; therefore, we propose to find that this CAA requirement is met.

*E. Does the plan show the CAA-required rate of progress?*

1. What are the applicable CAA provisions?

CAA section 172(c) requires nonattainment area plans to provide for reasonable further progress (RFP) which is defined in section 171(1) as such annual incremental reductions in emissions as are required in part D or may reasonably be required by the Administrator in order to ensure attainment of the relevant NAAQS by the applicable date.

CAA sections 182(c)(2) and (e) require that serious and above area SIPs include ROP quantitative milestones that are to be achieved every 3 years after 1996 until attainment. For ozone areas classified as serious and above, section 182(c)(2) requires that the SIP must provide for reductions in ozone-season, weekday VOC emissions of at least 3 percent per year net of growth averaged over each consecutive 3-year period. This is in addition to the 15 percent reduction over the first 6-year period required by CAA section 182(b)(1) for areas classified as moderate and above. The CAA requires that these milestones be calculated from the 1990 inventory after excluding, among other things, emission reductions from ''[a]ny measure related to motor vehicle exhaust or evaporative emissions promulgated by the Administrator by January 1, 1990 and emission reductions from certain federal gasoline volatility requirements.'' CAA section 182(b)(1)(B)–(D). EPA has issued guidance on meeting 1-hour ozone ROP requirements. See General Preamble at 13516 and ''Guidance on the Post-1996 Rate-of-Progress Plan and the Attainment Demonstration,'' EPA–452/R–93–015, OAQPS, EPA, February 18, 1994 (corrected).

CAA section 182(c)(2)(C) allows for $NO_X$ reductions which occur after 1990 to be used to meet the post-1996 ROP emission reduction requirements, provided that such $NO_X$ reductions meet the criteria outlined in the CAA and EPA guidance. The criteria require that: (1) The sum of all creditable VOC and $NO_X$ reductions must meet the 3 percent per year ROP requirement; (2) the substitution is on a percent-for-percent of adjusted base year emissions for the relevant pollutant; and (3) the sum of all substituted $NO_X$ reductions cannot be greater than the cumulative $NO_X$ reductions required by the modeled attainment demonstration. See General Preamble at 13517 and ''$NO_X$ Substitution Guidance,'' OAQPS, EPA, December 1993.

Our guidance in the General Preamble states that by meeting the specific ROP milestones discussed above, the general RFP requirements in CAA section 172(c)(2) will also be satisfied. General Preamble at 13518.

2. How does the plan address these provisions?

Chapter 7 of the 2004 SIP, updated by Table 2 in the 2008 SIP Clarification, provides a demonstration that the SJV meets both the 2008 and 2010 ROP milestones.[15] We have summarized this ROP demonstration in Table 4.

TABLE 4—SAN JOAQUIN RATE OF PROGRESS DEMONSTRATION

[Summer planning tons per day]

| | Base year | Milestone year | |
|---|---|---|---|
| | 1990 | 2008 | 2010 |
| **VOC Calculations** | | | |
| A. 1990 Baseline VOC | 633.2 | 633.2 | 633.2 |
| B. CA Pre-1990 MV standards adjustment | ..... | 120.1 | 123.8 |
| C. Adjusted 1990 baseline VOC in the milestone year (Line A − Line B) | ..... | 513.1 | 509.4 |
| D. Cumulative VOC reductions needed to meet milestone | ..... | 261.7 | 209.4 |
| E. Target level of VOC needed to meet ROP requirement (Line C − Line D) | ..... | 251.4 | 219.0 |
| F. Projected level (baseline) of VOC in milestone year with adopted controls only | ..... | 369.4 | 362.7 |
| G. VOC ROP shortfall (Line F − Line E) | ..... | 118.0 | 143.7 |
| H. VOC ROP shortfall (% of adjusted baseline) | ..... | 23.0% | 28.2% |
| **$NO_X$ Calculations** | | | |
| A. 1990 Baseline $NO_X$ | 805.1 | 805.1 | 805.1 |
| B. CA Pre-1990 MV standards adjustment | ..... | 114.0 | 116.6 |
| C. Adjusted 1990 baseline $NO_X$ in the milestone year (Line A − Line B) | ..... | 691.1 | 688.5 |
| D. Projected level (baseline) of $NO_X$ in milestone year with adopted controls only | ..... | 411.0 | 384.5 |
| E. Change in $NO_X$ since 1990 (Line C − Line D) | ..... | 280.1 | 304.0 |
| F. Change in $NO_X$ since 1990 (% of adjusted baseline) | ..... | 40.5% | 44.2% |
| G. VOC ROP shortfall | ..... | 23.0% | 28.2% |

[15] On January 8, 1997 (62 FR 1150, 1172), we approved the ROP demonstrations for the 1996 and 1999 milestones in the serious area 1-hour ozone SIP for the SJV, which was submitted in November 1994 and revised on July 12, 1996. Following reclassification of the area to severe, ROP demonstrations were prepared and submitted for the 2002 and 2005 milestones as part of the severe area SIP. The District prepared and submitted to EPA milestone compliance reports, as required by CAA section 182(g)(1) and (2), demonstrating achievement of the 2002 and 2005 milestones. See 2004 SIP at section 7.6.2 and letter from Scott Nestor, SJVAPCD, to Catherine Witherspoon, ARB, March 30, 2006, with attachment (''San Joaquin Valley Air Basin Rate of Progress Milestone Compliance Demonstration for 2005 the 1-hr Ozone National Ambient Air Quality Standards'').

TABLE 4—SAN JOAQUIN RATE OF PROGRESS DEMONSTRATION—Continued

[Summer planning tons per day]

| | Base year | Milestone year | |
|---|---|---|---|
| | 1990 | 2008 | 2010 |
| H. % Surplus $NO_X$ reductions after offsetting VOC ROP shortfall available for contingency measures (Line F – Line G) | ..... | 17.5% | 16.0% |

Because there are insufficient VOC reductions to meet the milestones, the ROP demonstration relies on $NO_X$ substitution, consistent with EPA's guidance, to show that the area meets the emission reduction requirements for 2008 and 2010. The demonstration does not depend on reductions from any measures that are in the 2004 SIP [16] or on reductions from any measures that are not creditable under the terms of section 182(b)(1).

3. Does the plan meet the CAA provisions for rate of progress?

The 2008 SIP Clarification follows EPA's guidance on addressing the pre-1990 motor vehicle program adjustments, using the pre-1990 California motor vehicle exhaust and evaporative standards in lieu of the national motor vehicle control program.[17] Because the 2004 SIP and the 2008 SIP Clarification demonstrate that sufficient emission reductions have or will be achieved to meet the 2008 and 2010 ROP milestones, we propose to approve the ROP provisions in these documents. As stated above, if the ROP milestones are met, we deem the general RFP requirements of CAA section 172(c)(2) to also have been met. Therefore, we also propose to approve the ROP provisions as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2).

*F. Does the plan provide for attainment by the CAA-required deadline?*

1. What are the applicable CAA provisions?

One-hour ozone nonattainment areas classified as extreme under CAA section 181(b)(3) must demonstrate attainment ''as expeditiously as practicable'' but not later than the date specified in CAA section 181(a), November 15, 2010. CAA Section 182(c)(2)(A) requires serious, severe and extreme areas to use photochemical grid modeling or an analytical method EPA determines to be as effective.

2. How does the plan address these provisions?

The 2004 SIP's air quality modeling identified the SJV's ''carrying capacity'' or 2010 attainment target as 343.5 tpd $NO_X$ and 314.4 tpd VOC. 2004 SIP at section 5.6; ARB Staff Report for the 2004 SIP at section III.C. See also Table 3 above. We discuss the modeling in section II.C. above. The ''carrying capacity'' represents the maximum level of emissions that can be emitted in the SJV without causing exceedances of the 1-hour ozone standard. The EPA-approved rules and the commitments in the 2004 SIP as updated by the 2008 SIP Clarification and the remaining State commitments for the SJV in the 2003 State Strategy reduce the 2000 projected baseline emissions (556.8 tpd $NO_X$ and 443.5 tpd VOC) to these levels by the 2010 attainment deadline for extreme areas. These levels represent a 38% $NO_X$ and 29% VOC decrease in emissions from the 2000 baseline.

3. Does the plan meet the CAA provisions for attainment?

The 2004 SIP provides an attainment demonstration that shows sufficient reductions will be achieved to attain by the CAA deadline of November 15, 2010. Table 5 provides a summary of the 2004 SIP attainment demonstration. This attainment demonstration is based on air quality modeling that is consistent with the CAA and EPA modeling guidance. See section II.C. of this proposed rule.

TABLE 5—2004 SIP ATTAINMENT DEMONSTRATION SUMMARY AS UPDATED BY 2008 SIP CLARIFICATION

| | $NO_X$ (tpd) | VOC (tpd) |
|---|---|---|
| 2000 Baseline | 556.8 | 443.5 |
| 2010 Attainment Target | 343.5 | 314.4 |
| Total Reductions Needed to Attain in 2010 | 213.3 | 129.1 |
| Reductions from 2004 Baseline Measures, pre-9/02 | 160.0 | 78.4 |
| Reductions from 2004 EPA-Approved Rules | 35.6 | 7.6 |
| Reductions from Remaining District and State Commitments | 29.2 | 44.3 |
| Total Reductions Achieved from Approved Rules and Commitments | 224.8 | 130.3 |

As can be seen from Table 5, the total reductions achieved from EPA-approved rules and the commitments in the 2004 SIP as updated by the 2008 SIP Clarification are greater than the total reductions needed to attain the 1-hour ozone NAAQS by 2010.

The 2004 SIP attainment reductions are not ''backloaded'' but rather derive from ambitious State and District rule development projects to adopt or amend new regulations to tighten controls expeditiously on existing sources and to regulate a few previously uncontrolled sources. Moreover, both agencies typically set tight compliance schedules for amended and newly adopted rules,

[16] The ROP demonstration relies on ''the emission control program as it existed when the Valley's 2004 SIP was submitted * * *.'' 2008 SIP Clarification at 6.

[17] See ''How to calculate non-creditable reductions for motor vehicle programs in California as required for reasonable further progress (RFP) SIPs,'' EPA, Office of Transportation and Air Quality, Transportation and Regional Program Division, September 6, 2007.

requiring full compliance in most cases within one year or less and the District has been able to achieve considerably more reductions than the 2004 SIP anticipated.

Attainment reductions also come from the benefits of mobile source fleet turnover to meet increasingly stringent Federal and State emission standards. California now has in place ambitious programs to accelerate this turnover.[18]

We propose to conclude that the 2004 SIP's demonstration of attainment meets the requirements of CAA sections 172 and 181 that areas classified as extreme demonstrate attainment ''as expeditiously as practicable'' but no later than November 15, 2010.

*G. Do the contingency measures meet CAA requirements?*

1. What are the applicable CAA provisions?

Sections 172(c)(9) and 182(c)(9) of the CAA require that SIPs contain contingency measures that will take effect without further action by the state or EPA if an area fails to attain the NAAQS by the applicable date or fails to meet ROP milestones. The Act does not specify how many contingency measures are needed or the magnitude of emission reductions that must be provided by these measures. However, EPA provided initial guidance interpreting the contingency measure requirements of 172(c)(9) and 182(c)(9) in the General Preamble at 13510. Our interpretation is based upon the language in sections 172(c)(9) and 182(c)(9) in conjunction with the control measure requirements of sections 172(c), 182(b) and 182(c)(2)(B), the reclassification and failure to attain provisions of section 181(b) and other provisions. In the General Preamble, EPA indicated that states with moderate and above ozone nonattainment areas should include sufficient contingency measures so that, upon implementation of such measures, additional emission reductions of up to 3 percent of the emissions in the adjusted base year inventory (or such lesser percentage that will cure the identified failure) would be achieved in the year following the year in which the failure is identified. The states must show that the contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions. In subsequent guidance, EPA stated that contingency measures could be implemented early, *i.e.*, prior to the milestone or attainment date.[19]

2. How does the plan address these provisions?

Table 2 in the 2008 SIP Clarification provides an updated ROP demonstration that shows that, after meeting the VOC ROP milestones for 2008 and 2010 with $NO_X$ substitution, there are still creditable $NO_X$ reductions for both the 2008 and 2010 milestones in excess of the 3 percent sufficient to satisfy the contingency measure requirement. See also Table 4 in this proposed rule. Table 2 in the 2008 SIP Clarification includes reductions from measures adopted before September 2002 and does not rely on any of the measures adopted after September 2002, such as those in Table 1 in the 2008 SIP Clarification (and Table 1 above).

In addition, Table 3 in the 2008 SIP Clarification, which is reproduced as Table 2 above, shows that onroad fleet turnover will continue to deliver substantial reductions in 2011, *i.e.*, an additional 10 tpd $NO_X$ and 5 tpd VOC beyond the reductions shown in Tables 1 and 2 in the 2008 SIP Clarification. These reductions are available to serve as additional contingency reductions in 2011.

3. Does the plan meet the CAA requirements for contingency measures?

We find that there are sufficient excess $NO_X$ reductions shown in Table 2 of the 2008 SIP Clarification and Table 4 above to satisfy the contingency measure requirement for the milestone year 2008. These reductions are above and beyond those needed for ROP for 2008 and occur prior to the year the milestone demonstrations will be made, 2009.

For the attainment year, 2010, the requirement is to show that there are contingency measures that will provide continued ROP, *i.e.*, 3 percent reductions from the pre-1990 adjusted baseline, if attainment is not achieved. Consistent with the ROP demonstration, an additional 3 percent in the attainment year equates to approximately 15.3 tpd of VOC or 20.7 tpd of $NO_X$ with $NO_X$ substitution. These contingency measure reductions would be required by 2011. Table 2 above shows that there are 10 tpd of additional reductions in 2011 beyond the 2010 attainment. Table 5 above shows that there are 11.5 tpd of excess reductions not needed for attainment in 2010. In addition, Tables 2 and 5 show that there are excess VOC reductions of approximately 6 tpd.

Thus, we believe that there are sufficient excess reductions to satisfy the contingency measure requirement for the attainment year which are above and beyond attainment for 2010 and will be achieved prior to the year attainment would be determined, 2011.

As discussed above, the use of excess reductions from already adopted measures to meet the CAA sections 172(c)(9) and 182(c)(9) is consistent with EPA policy and has been approved by EPA in numerous SIPs. See 62 FR 15844 (April 3, 1997); 62 FR 66279 (December 18, 1997); 66 FR 30811 (June 8, 2001); 66 FR 586 and 66 FR 634 (January 3, 2001). The key is that the CAA requires extra reductions that are not relied on for ROP or attainment and that are in the demonstrations to provide a cushion while the plan is being revised. Nothing in the CAA precludes a state from implementing such measures before they are triggered. A recent court ruling upheld this approach. See *LEAN* v. *EPA,* 382 F.3d 575 (5th Cir. 2004). 70 FR 71611, 71651. Thus we propose to approve the contingency measure provisions in Tables 2 and 3 of the 2008 SIP Clarification as meeting the contingency measure requirements in CAA sections 172(c)(9) and 182(c)(9).

*H. Are the motor vehicle emissions budgets approvable?*

1. What are the applicable CAA provisions?

Under section 176(c) of the CAA, transportation plans, programs and projects in nonattainment or maintenance areas that are funded or approved under title 23 U.S.C. and the Federal Transit Laws (49 U.S.C. Chapter 53) must conform to the applicable SIP. In short, a transportation plan and program are deemed to conform to the applicable SIP if the emissions resulting from the implementation of that transportation plan and program are less than or equal to the motor vehicle emissions budgets (MVEBs) established in the control strategy SIPs for the attainment year, ROP years, maintenance year and other analysis years. See, generally, 40 CFR part 93.

[18] The State and District have a variety of regulatory and incentive programs to accelerate the retrofit or replacement of existing sources including the District's school bus fleet regulation (Rule 9310), which is given specific emission reductions in the 2004 SIP. The 2004 SIP does not claim emission reduction credit for incentive programs and from the recently adopted State in-use off-road diesel vehicles rule (available at: *http://www.arb.ca.gov/regact/2007/ordiesl07/frooal.pdf*), ARB's various incentive programs (described at: *http://www.arb.ca.gov/ba/fininfo.htm#grants*), and the District's incentive programs (described at: *http://www.valleyair.org/Grant_Programs/GrantPrograms.htm*).

[19] See Memorandum from G.T. Helms, EPA, to EPA Air Branch Chiefs, Regions I–X, entitled ''Early Implementation of Contingency Measures for Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' August 13, 1993.

In addition to meeting the criteria for attainment, as a control strategy SIP, this ROP and attainment plan must contain MVEBs that, in conjunction with emissions from all other sources, are consistent with attainment. A MVEB is the total emissions from on-road vehicles projected to the attainment year and consistent with the attainment demonstration. The budget must have been developed using the latest planning assumptions and consistent with the control measures in the attainment plan. All of the criteria by which we determine whether a SIP's MVEBs are adequate for transportation conformity purposes are outlined in 40 CFR 93.118(e)(4). We have described our process for determining the adequacy of submitted SIP budgets in the preamble to revisions to EPA's conformity regulations. 68 FR 38974 (June 30, 2003) and 69 FR 40004 (July 1, 2004).

2. How does the plan address these provisions?

The MVEBs for the SJV were developed using emission factors generated using ARB's EMFAC2002 model, version 2.2 (April 2003) and using the latest assumptions regarding VMT. EMFAC2002 was approved by EPA on April 1, 2003, 68 FR 15720, for use in SIPs and transportation conformity analyses. EMFAC2002 produces emissions for a wide range of motor vehicles (passenger cars, trucks, motorcycles, buses and motor homes) for calendar years out to 2040. The MVEBs were developed for the ROP and attainment years of 2008 and 2010, respectively. The MVEBs are for both VOC and $NO_X$ as precursors to ozone formation, and were applicable for the SJV upon the effective date of the MVEB adequacy finding.

The 2004 SIP includes county-by-county subarea MVEBs for 2008 and 2010 for VOC and $NO_X$. The 2004 SIP budgets are summarized in the 2004 SIP at Table 3–4. Additional details regarding the budgets are presented in Appendix A to the 2004 SIP.

3. Does the plan meet the CAA provisions for MVEBs?

On February 7, 2005, we found adequate for transportation conformity purposes the MVEBs in the 2004 SIP. Letter from Deborah Jordan, EPA to Catherine Witherspoon, ARB, February 7, 2005. A table attached to the letter summarized our adequacy determination. Our notice of adequacy for these budgets was published in the **Federal Register** on February 15, 2005, at 70 FR 7734 and was effective 15 days later, on March 2, 2005.

We are now proposing to approve the VOC and $NO_X$ MVEBs contained in the 2004 SIP (and in Table 5 below) for transportation conformity purposes. We propose to approve the budgets because we conclude that they are consistent with and clearly related to the emission inventory and control measures identified in the 2004 SIP, and that the 2004 SIP as a whole demonstrates timely attainment with the 1-hour ozone standard and the required rate of progress. We also propose to approve the individual county level subarea budgets for VOC and $NO_X$, as shown in Table 5 below, consistent with 40 CFR 93.124(d), which allows for a nonattainment area with more than one Metropolitan Planning Organization (MPO) to establish subarea emission budgets for each MPO. Note that if an individual MPO lapses, then the remaining MPOs in the SJV cannot make new conformity determinations.[20] If approved, the 2008 and 2010 MVEBs must be used for transportation conformity purposes. As mentioned earlier, the county subarea motor vehicle emissions budgets that we are proposing to approve are listed in Table 5 below.

TABLE 5—MOTOR VEHICLE EMISSIONS SUBAREA BUDGETS IN THE 2004 SIP

[Tons per day]

| County | VOC | | $NO_X$ | |
|---|---|---|---|---|
| | 2008 | 2010 | 2008 | 2010 |
| Fresno | 15.8 | 13.0 | 33.7 | 27.7 |
| Kern (part) | 11.5 | 9.6 | 32.7 | 27.2 |
| Kings | 2.5 | 2.1 | 6.2 | 5.4 |
| Madera | 3.9 | 3.3 | 8.4 | 7.2 |
| Merced | 5.0 | 4.0 | 11.4 | 9.1 |
| San Joaquin | 9.3 | 7.7 | 22.4 | 17.9 |
| Stanislaus | 8.5 | 7.0 | 17.4 | 14.0 |
| Tulare | 8.5 | 6.9 | 18.8 | 15.3 |
| Total | 65.0 | 53.6 | 151.0 | 123.8 |

While we are proposing to approve these 1-hour ozone budgets into the SIP, it should be noted that we anticipate that these motor vehicle emissions budgets will be used in few, if any, future transportation conformity determinations. Because EPA has revoked the 1-hour ozone standard, transportation conformity determinations are no longer required for that air quality standard. Additionally, while these budgets have been used in the initial conformity determinations in the SJV for the 1997 8-hour ozone standard, these budgets only serve that purpose until motor vehicle emissions budgets are found adequate or are approved for the 8-hour ozone standard.

## III. Summary of Proposed Actions

A. EPA is proposing to approve pursuant to CAA section 110(k)(3) the following elements of the 2004 SIP and the 2008 SIP Clarification:

(1) The emission inventories as meeting the requirements of CAA sections 172(c)(3) and 182(a)(1);

[20] CAA section 176(c) states that conformity applies to SIPs in nonattainment and maintenance areas, rather than individual metropolitan planning areas within a single state. When subarea budgets area created for each MPO, the sum of the subarea budgets equals the total amount of emissions the area can have from the transportation sector and still attain and maintain the NAAQS. When one subarea lapses, then the other MPOs cannot show that their planned transportation activities would conform to the SIP for the whole area until the lapse is resolved. See ''Companion Guidance for the July 1, 2004, Final Transportation Conformity Rule: Conformity Implementation in Multi-Jurisdictional Nonattainment and Maintenance Areas for Existing and New Air Quality Standards'' (EPA 420–B–04–012).

(2) the rate of progress demonstration as meeting the requirements of CAA sections 172(c)(2) and 182(c)(2);

(3) the attainment demonstration as meeting the requirements of 182(c)(2)(A) and 181(a);

(4) the District's commitments in the 2004 SIP to adopt specific rules by specified dates to achieve in 2010 the reductions in the column labeled ''Achieved Emission Reductions'' in Table 1 in the 2008 SIP Clarification as meeting the requirements of CAA sections 110(a)(2)(A) and 172(c)(6);

(5) the contingency measures as meeting the requirements of CAA sections 172(c)(9) and 182(c)(9); and

(6) the VOC and $NO_X$ MVEBs for transportation conformity purposes as meeting the requirements of CAA section 176(c).

B. EPA is proposing to approve pursuant to CAA section 110(k)(3) section 4.7 in the 2004 SIP and the provisions of the Final 2003 State Strategy and ARB Board Resolution 04–29 that relate to aggregate emission reductions in the San Joaquin Valley Air Basin as meeting the requirements of CAA sections 110(a)(2)(A) and 172(c)(6).

C. EPA is proposing to approve pursuant to CAA section 110(k)(3) the 2004 SIP, the Final 2003 State Strategy and the 2008 SIP Clarification as meeting the RACM requirements of CAA section 172(c) only.

## IV. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely proposes to approve a State-adopted attainment plan for the San Joaquin Valley Air Basin and does not impose any additional requirements. Accordingly, the Administrator certifies that this proposed action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this proposed rule does not impose any additional enforceable duty, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This proposed action does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the plan is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. This proposed action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This proposed action merely proposes to approve a State adopted ozone attainment plan and does not alter the relationship or the distribution of power and responsibilities established in the CAA. Executive Order 12898 establishes a Federal policy for incorporating environmental justice into Federal agency actions by directing agencies to identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations. Today's action involves a proposed approval of a State adopted ozone attainment plan. It will not have disproportionately high and adverse effects on any communities in the area, including minority and low-income communities.

This proposed action also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

## List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, National parks, Nitrogen oxides, Volatile organic compounds, Ozone, Particulate matter, Reporting and recordkeeping requirements, Wilderness areas.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: October 7, 2008.

**Wayne Nastri,**

*Regional Administrator, Region IX.*

[FR Doc. E8–24416 Filed 10–15–08; 8:45 am]

**BILLING CODE 6560–50–P**

# Notices

Federal Register

Vol. 73, No. 201

Thursday, October 16, 2008

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

**[Docket No. FSIS–2008–0020]**

### Codex Alimentarius Commission: Meeting of the Codex Committee on Food Hygiene

**AGENCY:** Office of the Under Secretary for Food Safety, USDA.

**ACTION:** Notice of public meeting and request for comments.

**SUMMARY:** The Office of the Under Secretary for Food Safety, U.S. Department of Agriculture (USDA), and the Food and Drug Administration (FDA), U.S. Department of Health and Human Services (HHS), are sponsoring a public meeting on October 30, 2008. The objective of the public meeting is to provide information and receive public comments on agenda items and draft United States positions that will be discussed at the 40th Session of the Codex Committee on Food Hygiene (CCFH) of the Codex Alimentarius Commission (Codex), which will be held in Guatemala City, Guatemala, from December 1–5, 2008. The Under Secretary for Food Safety and the FDA, Center for Food Safety and Applied Nutrition (CFSAN), recognize the importance of providing interested parties the opportunity to obtain background information on the 40th Session of the CCFH and to address items on the agenda.

**DATES:** The public meeting is scheduled for Thursday, October 30, 2008, 2 p.m.–4 p.m.

**ADDRESSES:** The public meeting will be held in Rm. 1A001, Harvey W. Wiley Building, FDA, CFSAN, 5100 Paint Branch Parkway, College Park, MD 20740. Documents related to the 40th Session of the CCFH will be accessible via the World Wide Web at the following address: *http://www.codexalimentarius.net/current.asp.*

The U.S. Co-Alternate Delegates to the 40th Session of the CCFH, Dr. Rebecca Buckner of FDA and Dr. Kerry Dearfield of USDA, invite U.S. interested parties to submit their comments electronically to the following e-mail address: *Rebecca.Buckner@fda.hhs.gov.*

**Registration**

If you are interested in attending the public meeting, please pre-register (name and affiliation) with Ms. Tiffany Paulsin at *Tiffany.Paulsin@fda.hhs.gov* or 301–436–2380. Visitor parking is available, but you must indicate you will be driving when you pre-register.

*For Further Information About the 40th Session of the CCFH Contact:* Rebecca Buckner, Co-Alternate to the U.S. Delegate to the CCFH, FDA, CFSAN, Harvey W. Wiley Federal Building, 5100 Paint Branch Parkway, College Park, MD 20740–3835, Phone: (301) 436–1486, Fax: (301) 436–2632. E-mail: *Rebecca.Buckner@fda.hhs.gov.*

*For Further Information About the Public Meeting Contact:* Syed Amjad Ali, International Issues Analyst, U.S. Codex Office, Food Safety and Inspection Service (FSIS), Room 4861, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250, Phone: (202) 205–7760, Fax: (202) 720–3157.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Codex Alimentarius (Codex) was established in 1963 by two United Nations organizations, the Food and Agriculture Organization (FAO) and the World Health Organization (WHO). Through adoption of food standards, codes of practice, and other guidelines developed by its committees, and by promoting their adoption and implementation by governments, Codex seeks to protect the health of consumers and ensure that fair practices are used in trade.

The Codex Committee on Food Hygiene was established to elaborate codes, standards, and related texts for food hygiene. The Committee is hosted by the United States.

*Issues To Be Discussed at the Public Meeting*

The following items on the agenda for the 40th Session of the CCFH will be discussed during the public meeting:

- Matters Referred to the Committee on Food Hygiene from the Other Codex Bodies.
- Progress Report on the Joint FAO/WHO Expert meetings on Microbiological Risk Assessment (JEMRA) and Related Matters.
- Information from the World Organization for Animal Health (OIE).
- Microbiological Criteria for Powdered Follow-up Formula and Formulas for Special Medical Purposes for Young Children (Annex to the Code of Hygienic Practice for Powdered Formulae for Infants and Young Children).
- Proposed Draft Microbiological Criteria for Control of *Listeria monocytogenes* in Ready-to-Eat Foods.
- Proposed Draft Guidelines for the Control of *Campylobacter* and *Salmonella* spp. in Chicken Products.
- Proposed Draft Annex on Leafy Green Vegetables, including Leafy Herbs, to the Code of Hygienic Practice for Fresh Fruits & Vegetables.
- Proposed Draft Code of Hygienic Practice for *Vibrio* spp. in Seafood.
- Discussion of the New Work Proposals submitted to the *Ad Hoc* Working Group for Establishment of CCFH Work Priorities.

Each issue listed will be fully described in documents distributed, or to be distributed, by the Secretariat prior to the meeting. Members of the public may access or request copies of these documents (see **ADDRESSES**).

*Public Meeting*

At the October 30th public meeting, draft U.S. positions on the agenda items will be described and discussed, and attendees will have the opportunity to pose questions and offer comments. Written comments may be offered at the meeting or sent to the Co-Alternate to the U.S. Delegate for the 40th Session of the CCFH, Dr. Rebecca Buckner (see **ADDRESSES**). Written comments should state that they relate to activities of the 40th Session of CCFH.

*Additional Public Notification*

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it online through the FSIS Web page located at *http://www.fsis.usda.gov/regulations/2008_Notices_Index/*. FSIS will also

make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an e-mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/news_and_events/email_subscription/*. Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and they have the option to password protect their accounts.

Done at Washington, DC on October 9, 2008.

**Paulo Almeida,**

*Associate Manager for Codex Alimentarius.*

[FR Doc. E8–24464 Filed 10–15–08; 8:45 am]

**BILLING CODE 3410–DM–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### 30-Day Pre-decisional Review and Opportunity To Object; Cimarron and Comanche National Grasslands Land Management Plan (Grasslands Plan)

**AGENCY:** The Pike and San Isabel National Forests and the Cimarron and Comanche National Grasslands, Forest Service, USDA.

**Authority:** 36 CFR 219.9(b)(2)(i) and 36 CFR 219.9(b)(3)(iii)

*Notice:* Availability of the Cimarron and Comanche National Grasslands Land Management Plan (Grasslands Plan), and 30–Day Pre-decisional Review and Objection Period.

**SUMMARY:** The Forest Supervisor for the Pike and San Isabel National Forests and the Cimarron and Comanche National Grasslands (PSICC) has made available the Cimarron and Comanche National Grasslands Land Management Plan (Grasslands Plan) for a 30 day pre-decisional review and objection period. The 30-day pre-decisional review and objection period commences the day following the publication of the legal notice in the Pueblo Chieftain, Pueblo, Colorado.

**DATES:** October 7, 2008.

**FOR FURTHER INFORMATION CONTACT:** Barb Masinton, 719–553–1400.

**SUPPLEMENTARY INFORMATION:** The Forest Supervisor for the PSICC has announced a 30-day pre-decisional review and objection period for the Grasslands Plan, as provided by 36 CFR 219.13(a). The 30-day pre-decisional review and objection period will commence the day following the publication date of the legal notice in the Pueblo Chieftain, Pueblo, Colorado. The publication date of the legal notice in this newspaper of record is the exclusive means for calculating the time to file an objection (see Forest Service Handbook 1909,12, Chapter 50, section 51.13b).

Objections may be filed only by non-federal agencies, organizations and individuals who participated in the planning process through the submission of written comments to the Forest Service pertaining to the Grasslands Plan or supporting documents. It is helpful to reference your earlier written comments to document your standing in this objection process. These objections must be: (a) In writing, (b) submitted to the Grasslands Plan Reviewing Officer (Regional Forester, Rocky Mountain Region), and (c) submitted during the 30-day pre-decisional review and objection period. Additionally, objections must contain the following:

1. The name, mailing address, and telephone number of the person or entity filing the objection. Where a single objection is filed by more than one person, the objection must indicate the lead objector to contact. The Reviewing Officer may appoint the first name listed as the lead objector to act on behalf of all parties to the single objection when the single objection does not specify a lead objector. The Reviewing Officer may communicate directly with the lead objector and is not required to notify the other listed objectors about the objection response or any other written correspondence related to the single objection;

2. A statement of the issues and the parts of the Grasslands Plan to which the objection applies, and how the objecting party would be adversely affected;

3. A concise statement explaining how the objector believes that the Grasslands Plan is inconsistent with law, regulation, or policy, or how the objector disagrees with the decision, and providing any recommendations for change, and

4. A signature or other verification of authorship is required (a scanned signature when filing electronically is acceptable).

The written notice of objection, including attachments, must be submitted to the Grasslands Plan Reviewing Officer for the Rocky Mountain Region by regular mail, e-mail, fax, hand-delivery, express delivery, or messenger service.

Objections that are delivered by hand, by express delivery, or messenger service must be delivered during business hours, Monday through Friday (excluding holidays) from 7:30 a.m. until 4:30 p.m., Mountain Time. Objections that are sent by regular mail, and those delivered by hand, by express delivery, or messenger service will only be accepted at:

USDA Forest Service, Rocky Mountain Region, ATTN: Rick Cables, Regional Forester and Grasslands Plan Reviewing Officer, 740 Simms Street, Golden, CO 80401.

E-mail: Electronically-filed objections will be accepted at: *objections-rocky-mountain-regional-office@fs.fed.us.*

E-mailed objections must be in Microsoft Word, Corel WordPerfect, or rich text format (.rtf) file formats. For electronically-mailed objections, the sender should typically receive an automated electronic acknowledgment from the agency as confirmation of receipt. If the sender does not receive an automated acknowledgment of the receipt of the objection, it is the sender's responsibility to ensure timely receipt by other means.

*Fax:* The number to use for faxing written objections is: (303) 275–5482.

Objections must he postmarked, e-mailed, faxed, or hand-delivered within 30 days following the date of publication of the legal notice in the Pueblo Chieftain, Pueblo, Colorado.

The pre-decisional Grasslands Plan and supporting documents can be accessed, viewed, and downloaded at the following Web site: *http://www.fs.fed.us/r2/psicc/projects/forest_revision/*. The Grasslands Plan is also available in paper copy or compact disc (CD) formats by request.

Note that all objections, including names and addresses, become part of the public record and are subject to Freedom of Information Act (FOIA) requests, except for proprietary documents and information.

Dated: October 7, 2008.

**Robert J. Leaverton,**

*Forest Supervisor.*

[FR Doc. E8–24262 Filed 10–15–08; 8:45 am]

**BILLING CODE 3410–ES–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Humboldt-Toiyabe National Forests; Santa Rosa Ranger District; Martin Basin Rangeland Management Project

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of Intent To Prepare an Environmental Impact Statement; Corrected.

**SUMMARY:** The Santa Rosa Ranger District of the Humboldt-Toiyabe National Forest will prepare an Environmental Impact Statement (EIS) on a proposal to authorize continued livestock grazing on National Forest System (NFS) lands within the boundaries administered by the Santa Rosa Ranger District. The Project Area is located in Humboldt County, Nevada.

The preparation of this EIS is needed because the Record of Decision issued on June 2, 2006, for the Martin Basin Rangeland Management Project was appealed, and following review, the decision was reversed. A new EIS is being prepared to completely replace the Draft EIS released in 2004 and the Final EIS released in 2005.

**DATES:** The new Draft EIS is expected to be released for public review and comment in December of 2008 and the new Final EIS is expected to be released in February of 2009.

**ADDRESSES:** Send written comments to: Jose Noriega, District Ranger, Santa Rosa Ranger District, 1200 East Winnemucca Blvd., Winnemucca, NV 89445.

**FOR FURTHER INFORMATION, CONTACT:** For further information, mail correspondence to or contact Jose Noriega, District Ranger, Santa Rosa Ranger District, 1200 East Winnemucca Blvd., Winnemucca, NV 89445. The telephone number is: 775–623-5025, extension 5. E-mail address is: *jnoriega@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:**

#### Background

Initiation of the Martin Basin Rangeland Project began in 2002 with the original Notice of Intent published in the **Federal Register** on December 30, 2002 (Vol. 67, Number 250). The Draft EIS was released in May of 2004 for a 135 day comment period. The Final EIS was released in June of 2005 and a 45 day comment period was also provided at that time. The Record of Decision for this project was issued on June 2, 2006, by then Forest Supervisor, Robert L. Vaught.

The Record of Decision for the Martin Basin Rangeland Project was appealed to the Intermountain Regional Forester. On September 6, 2006, the Regional Forester issued a decision on the appeal and remanded the decision back to the Humboldt-Toiyabe National Forest for additional analysis.

A Notice of Intent to prepare a Supplemental Environmental Impact Statement was published in the **Federal Register** on February 26, 2007 (Vol. 72, Number 37). That NOI estimated that the Draft Supplemental EIS would be released for review and comment on April 2007 and the Final Supplemental EIS would be completed by July 2007. This Corrected NOI provides notice that a new EIS is being prepared instead of a supplement to the 2005 Final EIS. This notice also updates the estimated dates for release of the new Draft and Final EISs, and provides additional information on the Proposed Action and Possible Alternatives.

#### Proposed Action

The Proposed Action, as outlined in the Final ETS released in 2005, will be refined and include additional details. Specifically, the Proposed Action would reduce the maximum utilization on forage to 45 percent for riparian areas and 50 percent for uplands. It would also apply a set of proper use criteria (for example, utilization, streambank disturbance) to each allotment based on its ecological condition (functioning, functioning-at-risk, or non-functioning). The ecological condition of the allotments would continue to be evaluated through a long-term monitoring process. If long-term monitoring indicates the ecological condition of the allotment has changed, then the set of proper use criteria associated with that ecological condition would be applied to the allotment.

#### Possible Alternatives

In addition to the Proposed Action, two additional alternatives have been identified from analysis in the EIS:

1. *Current Management Alternative:* Continue current grazing management.

2. *No Grazing Alternative:* Do not issue new grazing permits when existing permits expire.

#### Scoping Process

The scoping period for this EIS was formally initiated in December of 2002 when the original Notice of Intent for this project was published in the **Federal Register** (December 30, 2002; volume 67, Number 250).

While no additional scoping periods are planned prior to the release of the Draft Environmental Impact Statement, those wishing to submit comments may do so at the address listed above for District Ranger Jose Noriega.

#### Early Notice of Importance of Public Participation in Subsequent Environmental Review

A new Draft Environmental Impact Statement will be prepared for comment. The comment period on the new Draft EIS will be 45 days from the date that the Environmental Protection Agency (EPA) publishes the Notice of Availability (NOA) in the **Federal Register**.

It is important that reviewers provide their comments at such times and in such a way that they are useful to the Agency's preparation of the EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative review or judicial review.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in subsequent administrative review or judicial review.

(Authority: 40 CFR 1501.7 and 1508.22; Forest Service Handbook 1909.15, Section 22.3)

Dated: September 19, 2008.

**Edward C. Monnig,**

*Forest Supervisor.*

[FR Doc. E8–24366 Filed 10–15–08; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XL03**

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper and Grouper Off the Southern Atlantic States

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of receipt of an application for an exempted fishing permit; request for comments.

**SUMMARY:** NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Gulf Fishermen's Association. If granted, the EFP would authorize the applicants, with certain conditions, to collect limited numbers of undersized and out–of–season reef fish in Gulf of Mexico Federal waters. It would also allow a limited number of red snapper to be collected outside the Gulf of Mexico Individual Fishing Quota (IFQ) program. This study is intended to provide detailed information and disposition of reef fish discards by the eastern Gulf of Mexico commercial reef fish fishery.

**DATES:** Comments must be received no later than 5 p.m., eastern time, on November 17, 2008.

**ADDRESSES:** You may submit comments on the application by any of the following methods:

• E–mail: *Peter.Hood@noaa.gov*. Include in the subject line of the e–mail comment the following document identifier: ''GFA_EFP''.

• Mail: Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

• Fax: 727–824–5308.

The application and related documents are available for review upon written request to any of the above addresses.

**FOR FURTHER INFORMATION CONTACT:** Peter Hood, 727–824–5305; fax: 727–824–5308; e–mail: *Peter.Hood@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** The EFP is requested under the authority of the Magnuson–Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

The described research is part of a Cooperative Research Program Grant (Cooperative Agreement No. NA08NMF4540401). The Cooperative Research Program is a means of involving commercial and recreational fishermen in the collection of fundamental fisheries information. Resource collection efforts support the development and evaluation of fisheries management and regulatory options.

The proposed collection for scientific research involves activities otherwise prohibited by regulations implementing the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico. The applicants require authorization to harvest and possess undersized and out–of–season snapper and grouper for scientific research activities during a 1-year period beginning late in 2008. It would also allow the applicants to land red snapper outside of the current IFQ program over this same time period. Specimens would be collected from Federal waters off the west coast of Florida, in three geographical areas: NMFS' Gulf of Mexico statistical grids 2–4, 5–7, and 8–10. Sampling would occur during normal fishing operations of the commercial reef fish longline and vertical hook–and–line fishery. The applicant intends to use 10 longline and 10 vertical hook–and–line gear vessels to randomly collect up to 300 reef fish from each of the three geographical areas. The applicant also intends to retain 100 percent of the catch during two fishing trips within each of three geographical areas. Fish from these portions of the study will be provided to NMFS personnel for length and life history information to better characterize the discards in the commercial fishery. Finally, the applicants will use logbooks and video monitors to test methods for real–time catch reporting and at–sea observation. Data collections for this study would support improved information about the catch, bycatch, discards, and discard mortality for reef fish species.

Accurate estimates of bycatch and the level of discards is a persistent problem for assessing Gulf of Mexico reef fish stocks. Using fisheries dependant data accompanied by independent video monitoring would help establish reliability of current bycatch information and provide a higher level of confidence from various constituents interested in this fishery. Additionally, this information would assist fishery managers in developing more effective regulations to reduce bycatch and discard mortality.

NMFS finds this application warrants further consideration. Based on a preliminary review, NMFS intends to issue an EFP. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition of conducting research within marine protected areas, marine sanctuaries, or special management zones, without additional authorization. Additionally, NMFS may prohibit the possession of Nassau or goliath grouper, and require any sea turtles taken incidentally during the course of fishing or scientific research activities to be handled with due care to prevent injury to live specimens, observed for activity, and returned to the water. A final decision on issuance of the EFP will depend on a NMFS review of public comments received on the application, consultations with the affected states, the Gulf of Mexico Fishery Management Council, and the U.S. Coast Guard, and a determination that it is consistent with all applicable laws.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 9, 2008.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–24541 Filed 10–15–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XL19**

### Marine Mammals; File No. 13614

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Sea World, Inc., 9205 South Park Circle, Suite 400, Orlando, FL 32819, has applied in due form for a permit to import one pilot whale (*Globicephala melas*) for the purposes of public display.

**DATES:** Written or telefaxed comments must be received on or before November 17, 2008.

**ADDRESSES:** The application and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East–West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 427–2521; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East–West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy

submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e–mail. The mailbox address for providing e–mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e–mail comment the following document identifier: File No. 13614.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Skidmore or Kristy Beard, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests authorization to import one male pilot whale from the Lisbon Zoo (Jardim Zoológico de Lisboa), Estrada de Benfica, 158 - 160, 1549 - 004, Lisboa, Portugal to Sea World of California. The applicant requests this import for the purpose of public display. The receiving facility, Sea World of California, 1720 South Shores Road, San Diego, CA 92109–7995 is: (1) open to the public on regularly scheduled basis with access that is not limited or restricted other than by charging for an admission fee; (2) offers an educational program based on professionally accepted standards of the AZA and the Alliance for Marine Mammal Parks and Aquariums; and (3) holds an Exhibitor's License, number 93–C–0069, issued by the U.S. Department of Agriculture under the Animal Welfare Act (7 U.S.C. 2131 - 59).

In addition to determining whether the applicant meets the three public display criteria, NMFS must determine whether the applicant has demonstrated that the proposed activity is humane and does not represent any unnecessary risks to the health and welfare of marine mammals; that the proposed activity by itself, or in combination with other activities, will not likely have a significant adverse impact on the species or stock; and that the applicant's expertise, facilities and resources are adequate to accomplish successfully the objectives and activities stated in the application.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 10, 2008.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–24596 Filed 10–15–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XL21**

### Marine Mammals; File No. 633–1763

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

**ACTION:** Notice; receipt of application for amendment.

**SUMMARY:** Notice is hereby given that the Center for Coastal Studies (CCS) has requested an amendment to scientific research Permit No. 633–1763.

**DATES:** Written, telefaxed, or e–mail comments must be received on or before November 17, 2008.

**ADDRESSES:** The application and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/index.cfm*, and then selecting File No. 633–1763 from the list of available applications. These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East–West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521.

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978)281–9300; fax (978)281–9394; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, Florida 33701; phone (727)824–5312; fax (727)824–5309.

Written comments or requests for a public hearing on this request should be submitted to the Chief, Permits, Conservation and Education Division, F/PR1, Office of Protected Resources, NMFS, 1315 East–West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular amendment request would be appropriate.

Comments may also be submitted by facsimile at (301)427–2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e–mail. The mailbox address for providing e–mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e–mail comment the following document identifier: File No. 633–1763.

**FOR FURTHER INFORMATION CONTACT:** Kristy Beard or Kate Swails, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject amendment to Permit No. 633–1763, issued on April 21, 2005 (70 FR 22299) is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), and the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). Permit No. 633–1763 authorizes the permit holder to harass North Atlantic right whales (*Eubalaena glacialis*) during close approaches for aerial and vessel surveys with associated photo–identification and behavioral observations in the Gulf of Maine, Cape Cod Bay, Great South Channel, and Georgia Bight, and the collection and export of sloughed right whale skin. The original application submitted by CCS included a request to collect biopsy samples from North Atlantic right whales. At the time of permit issuance, takes for biopsy samples were not authorized. NMFS is now reviewing the biopsy sample portion of the request as an amendment to Permit No. 633–1763. CCS requests authorization to biopsy sample up to 30 North Atlantic right whales annually during close vessel approaches for photo-identification and behavioral observation; authorization is requested to biopsy up to 10 of these right whales two times to contribute to individual whale's health assessments. This work would continue long-term population monitoring to determine status and trends of this species in the North Atlantic. The amendment would be valid until the permit expires on May 1, 2010.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 9, 2008.

**P. Michael Payne,**

*Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. E8–24597 Filed 10–15–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XL24**

### Marine Fisheries Advisory Committee; Public Meetings

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

**ACTION:** Notice of open public meeting.

**SUMMARY:** Notice is hereby given of a meeting of the Marine Fisheries Advisory Committee (MAFAC). This will be the second meeting to be held in the calendar year 2008. Agenda topics are provided under the **SUPPLEMENTARY INFORMATION** section of this notice. All full Committee sessions will be open to the public.

**DATES:** The meeting will be held November 12–14, 2008, from 8:30 a.m. to 5 p.m.

**ADDRESSES:** The meeting will be held at the Hotel Chateau LeMoyne, 301 Rue Dauphine, New Orleans, LA 70112; (504) 581–1303

**FOR FURTHER INFORMATION CONTACT:** Mark Holliday, MAFAC Executive Director; (301) 713–2239 x120; e–mail: *Mark.Holliday@noaa.gov*.

**SUPPLEMENTARY INFORMATION:** As required by section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 2, notice is hereby given of a meeting of MAFAC. MAFAC was established by the Secretary of Commerce (Secretary) on February 17, 1971, to advise the Secretary on all living marine resource matters that are the responsibility of the Department of Commerce. This committee advises and reviews the adequacy of living marine resource policies and programs to meet the needs of commercial and recreational fisheries, and environmental, State, consumer, academic, tribal, governmental and other national interests. The complete charter and summaries of prior meetings are located online at *http://www.nmfs.noaa.gov/ocs/mafac/*.

**Matters To Be Considered**

The order in which these matters are considered is subject to change.

*November 12, 2008*

The meeting will begin with opening remarks and introductions to the full committee from Dr. Jim Balsiger, Acting Assistant Administrator for NOAA Fisheries. The remainder of the day will cover various MAFAC administration and organizational matters, including: new member orientation; review of travel, financial disclosure and ethics requirements; and subcommittee organization, chairmanship, current issues, and future issues.

*November 13, 2008*

Updates will be presented on: Magnuson–Stevens Act Reauthorization; seafood inspection; and ecolabeling and seafood certification. Other topics to be discussed are the NOAA Fisheries Southeast Regional Office and Gulf of Mexico Regional Fishery Management Council experiences with individual fishery quotas, and the pending aquaculture amendment.

*November 14, 2008*

The Committee will hear presentations and discuss policies influencing U.S. fisheries infrastructure, with specific reference to the federal/NOAA/state agency response to the effects of recent hurricane events on Gulf coast fisheries, including supporting infrastructure. This will be followed by a discussion of how to annually appraise progress on the MAFAC 2020 report recommendations, and a decision on the process for advancing/communicating the ideas contained in the MAFAC transition paper. The meeting will conclude with a review of action items and next steps, and a decision on the time and place of the spring 2009 meeting.

**Special Accommodations**

The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mark Holliday, MAFAC Executive Director; (301) 713–2239 x120 by 5 p.m. October 27, 2008.

Dated: October 9, 2008.

**James W. Balsiger,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

[FR Doc. E8–24594 Filed 10–15–08; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF DEFENSE

### Office of the Secretary

**[Transmittal Nos. 08–101]**

### 36(b)(1) Arms Sales Notification

**AGENCY:** Department of Defense, Defense Security Cooperation Agency.

**ACTION:** Notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104–164 dated 21 July 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. B. English, DSCA/DBO/CFM, (703) 601–3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08–101 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: October 7, 2008.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001–06–M**

DEFENSE SECURITY COOPERATION AGENCY
2800 DEFENSE PENTAGON
WASHINGTON, DC 20301-2800

SEP 26 2008

In reply refer to:
USP013319-08

The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-101, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Saudi Arabia for defense articles and services estimated to cost $31 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

Jeffrey A. Wieringa
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Same ltr to:

| House | Senate |
|---|---|
| Committee on Foreign Affairs | Committee on Foreign Relations |
| Committee on Armed Services | Committee on Armed Services |
| Committee on Appropriations | Committee on Appropriations |

**Transmittal No. 08-101**

**Notice of Proposed Issuance of Letter of Offer**
**Pursuant to Section 36(b)(1)**
**of the Arms Export Control Act, as amended**

(i) **Prospective Purchaser: Saudi Arabia**

(ii) **Total Estimated Value:**

| | |
|---|---|
| Major Defense Equipment* | $ 30 million |
| Other | $ 1 million |
| TOTAL | $ 31 million |

(iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase: 80 Link 16 Multifunctional Information Distribution System/Low Volume Terminals (MIDS/LVT-1) to be installed on United Kingdom Eurofighter Typhoon aircraft, data transfer devices, installation, testing, spare and repair parts, support equipment, personnel training, training equipment, contractor engineering and technical support, and other related elements of program support.**

(iv) **Military Department: Navy (LCH)**

(v) **Prior Related Cases, if any: FMS case QAB-$183M-6Feb06**

(vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: none**

(vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Annex attached**

(viii) **Date Report Delivered to Congress:** SEP 26 2008

* **as defined in Section 47(6) of the Arms Export Control Act.**

## POLICY JUSTIFICATION

**Saudi Arabia - Multifunctional Information Distribution System/Low Volume Terminals**

**The Government of Saudi Arabia has requested a possible sale of 80 Link 16 Multifunctional Information Distribution System/Low Volume Terminals (MIDS/LVT-1) to be installed on United Kingdom Eurofighter Typhoon aircraft, data transfer devices, installation, testing, spare and repair parts, support equipment, personnel training, training equipment, contractor engineering and technical support, and other related elements of program support. The estimated cost is $31 million.**

**This sale will contribute to the foreign policy and national security of the United States by helping to improve the security of a friendly country that has been and continues to be an important force for political stability and economic progress in the Middle East.**

**The MIDS terminals will increase pilot operational effectiveness by at-a-glance portrayal of targets, threats, and friendly forces on an easy-to-understand relative position display. This proposed system will increase combat effectiveness while reducing the threat of friendly fire. The system will foster interoperability with the U.S. Air Force and other countries. MIDS/LVT-1 will provide allied forces greater situational awareness in any coalition operation.**

**The proposed sale of this equipment and support will not alter the basic military balance in the region. Saudi Arabia is capable of absorbing and maintaining these additional MIDS/LVT-1 terminals in its inventory.**

**The prime contractor will be Data Link Solutions, LLC of Cedar Rapids, Iowa. There are no known offset agreements proposed in connection with this potential sale.**

**Implementation of this proposed sale will not require the assignment of any additional U.S. Government and contractor representatives to Saudi Arabia.**

**There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.**

**Transmittal No. 08-101**

**Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act**

**Annex**
**Item No. vii**

**(vii) Sensitivity of Technology:**

**1. The Multifunctional Information Distribution System/Low Volume Terminals (MIDS/LVT-1) Communications Security (COMSEC) device provides improved situational awareness and sensor cueing in support of air superiority and interdiction missions. The Link 16 tactical data link provides networking with other Link 16 capable aircraft, command, and control systems. The MIDS/LVT-1 are Controlled Cryptographic Items (CCI) to which access is restricted. Special shipping and handling procedures are in place for CCI hardware. The hardware and software are unclassified with embedded COMSEC chips.**

**2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures or equivalent systems which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.**

[FR Doc. E8–24458 Filed 10–15–08; 8:45 am]
BILLING CODE 5001–06–C

## DEFENSE NUCLEAR FACILITIES SAFETY BOARD

### Revision of Routine Uses of Privacy Act Systems of Records

**AGENCY:** Defense Nuclear Facilities Safety Board (Board).

**ACTION:** Notice of revision of routine uses of Privacy Act systems of records.

**SUMMARY:** Each Federal agency is required by the Privacy Act of 1974, 5 U.S.C. 552a, to publish a description of the systems of records containing personal information defined by the Act. In this notice, the Board updates the routine uses to all systems of records as required by the Office of Management and Budget Memorandum, M–07–16, dated May 22, 2007, entitled ''Safeguarding Against and Responding to the Breach of Personally Identifiable Information.'' This new routine use enables the Board to quickly and effectively respond to a breach of personally identifiable information through disclosure of information regarding the breach to those individuals affected by it, as well as to persons and entities in a position to cooperate, either by assisting in notification to the affected individuals or playing a role in preventing or minimizing harms from the breach.

**FOR FURTHER INFORMATION CONTACT:** Richard A. Azzaro, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004, (202) 694–7000, *mailbox@dnfsb.gov*.

**SUPPLEMENTARY INFORMATION:** The Board adds the following paragraph to each of its eight systems of records, under the section entitled, ''Routine Uses of Records Maintained in the System, Including Categories of Users and the Purpose of Such Uses:''The Board will disclose information to appropriate agencies, entities, and persons when the Board (1) Suspects or has confirmed that the security or confidentiality of informationin the system of records has been compromised; (2) determines that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Board or another agency or entity) that rely upon the compromised information; and (3) deems the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Board's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

Dated: October 7, 2008.

**A.J. Eggenberger,**

*Chairman.*

[FR Doc. E8–24577 Filed 10–15–08; 8:45 am]
BILLING CODE 3670–01–P

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before December 15, 2008.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: October 9, 2008.

**Angela C. Arrington,**

*IC Clearance Official, Regulatory Information Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension.

*Title:* 21st Century Community Learning Centers Annual Performance Report.

*Frequency:* Annually.

*Affected Public:* Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 1,400.

Burden Hours: 36,400.

*Abstract:* Originally authorized under Title X, Part I, of the Elementary and Secondary Education Act, the program was initially administered through the U.S. Department of Education, which provided grants directly to over 1,825 grantees. With the reauthorization of the program under the No Child Left Behind Act, direct administration of the program was transferred to state education agencies (SEA) to administer their own grant competitions. Preliminary data shows that states have awarded approximately 1,400 grants to support more than 4,700 centers in every state in the country. The purpose of the 21st Century Community Learning Centers (21st CCLC) program, as reauthorized under Title IV, Part B, of the No Child Left Behind Act of 2001, 4201 *et seq.* (20 U.S. Code 7171 *et seq.*), is to provide expanded academic enrichment opportunities for children attending low-performing schools. To reflect the changes in the authorization and administration of the 21st CCLC program and to comply with its reporting requirements, the Education Department (ED) is requesting authorization for the collection of data through Web-based, data-collection modules, the Annual Performance Report, the Grantee Profile, the Competition Overview, and the State Activities module, which collectively will be housed in an application called the 21st CCLC Profile and Performance Information Collection System (PPICS). The data will continue to be used to fulfill ED's requirement under the Government Performance and Results Act (GPRA) to report to Congress annually on the implementation and progress of 21st CCLC projects and the use of state administrative and technical assistance funds allocated to the states to support the program. The data collection will also provide SEA liaisons with needed descriptive data about their grantees and allow SEA liaisons to conduct performance monitoring and identify areas of needed technical assistance.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3860. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–24637 Filed 10–15–08; 8:45 am]

**BILLING CODE 4000–01–M**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before November 17, 2008.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires

that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 9, 2008.

**Angela C. Arrington,**

*IC Clearance Official, Regulatory Information Management Services, Office of Management.*

**Office of Special Education and Rehabilitative Services**

*Type of Review:* Revision.

*Title:* State Plan for Assistive Technology.

*Frequency:* Annually.

*Affected Public:* Not-for-profit institutions; Federal Government; State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 56.

Burden Hours: 4,200.

*Abstract:* Section 4 of the Assistive Technology Act of 1998, as amended, requires States to submit an application in order to receive funds under the State Grant for Assistive Technology Program. This information collection will be used by States to meet their application requirements. The Rehabilitation Services Administration calls this application a State Plan for Assistive Technology.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 3782. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–24638 Filed 10–15–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before November 17, 2008.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']''. Persons submitting comments electronically should not submit paper copies.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 9, 2008.

**Angela C. Arrington,**

*IC Clearance Official, Regulatory Information Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension.

*Title:* State Agency Use of Alternative Method to Distribute Title I Funds to LEAs with Fewer Than 20,000 Total Residents.

*Frequency:* As needed.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 25.

Burden Hours: 200.

*Abstract:* Sections 1124(a)(2)(B), 1124(a)(4)(A), and 1125(d) of Title I, Part A of the Elementary and Secondary Education Act, as amended by the No Child Left Behind Act, authorize State educational agencies (SEAs) to use alternative poverty data to redistribute Title I Basic, Concentration, and Targeted Grant allocations determined by the Department of Education (ED) to ''small'' local educational agencies (LEAs) with fewer than 20,000 residents. These statutory provisions have been part of the Title I, Part A statute since 1994. They were first implemented in 1999 when ED switched to allocating Title I funds directly to LEAs.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3783. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically

mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–24639 Filed 10–15–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before November 17, 2008.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']''. Persons submitting comments electronically should not submit paper copies.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 9, 2008.

**Angela C. Arrington,**

*IC Clearance Official, Regulatory Information Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Extension of a currently approved collection.

*Title:* SEA Procedures for Adjusting ED-Determined Title I Allocations to Local Education Agencies (LEAs).

*Frequency:* As needed.

*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 52.

Burden Hours: 2,080.

*Abstract:* Although the U.S. Department of Education (ED) determines Title I, Part A allocations for local educational agencies (LEAs), State educational agencies (SEAs) must adjust ED-determined Title I, Part A LEA allocations to account for newly created LEAs and LEA boundary changes, to redistribute Title I, Part A funds to small LEAs (under 20,000 total population) using alternative poverty data, and to reserve funds for school improvement, State administration, and the State academic achievement awards program.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3784. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–24640 Filed 10–15–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Privacy Act of 1974; System of Records—Office of Inspector General Data Analytics System

**AGENCY:** Office of the Inspector General, Department of Education.

**ACTION:** Notice of a new system of records.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended (Privacy Act), the Department of Education (Department) publishes this notice of a new system of records entitled ''The Office of Inspector General Data Analytics System (ODAS)'' (System Number 18–10–02). This system will store individually identifying information from a variety of individuals who have applied for or received grants, contracts, loans, or payments from the Department.

**DATES:** The Department seeks comment on the new system of records described in this notice, in accordance with the requirements of the Privacy Act. We must receive your comments about the new system of records on or before November 17, 2008.

The Department filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House of Representatives Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on October 9, 2008. TThis system of records will become effective at the later date of— (1) the expiration of the 40-day period for OMB review on November 19, 2008 unless OMB waives 10 days of the 40-day review period for compelling reasons shown by the Department, or (2) November 17, 2008, unless the system of records needs to be changed as a result of public comment or OMB review.

**ADDRESSES:** Address all comments about the new system of records to the Assistant Inspector General for Information Technology Audits and Computer Crime Investigations, Office of Inspector General, U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center Plaza (PCP), 8th Floor,

Washington, DC 20202–1510. If you prefer to send comments through the Internet, use the following address: *comments@ed.gov*

You must include the term ''ODAS'' in the subject line of your electronic message.

During and after the comment period, you may inspect all public comments about this notice at the U.S. Department of Education in the PCP, Room 8166, 500 12th Street, SW., Washington, DC 20024, between the hours of 8 a.m. and 4:30 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

**Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record**

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**FOR FURTHER INFORMATION CONTACT:** Shelley Shepherd, Assistant Counsel to the Inspector General, 400 Maryland Ave., SW., PCP, Washington, DC 20202. Telephone: (202) 245–7077.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**SUPPLEMENTARY INFORMATION:**

**Introduction**

The Privacy Act (5 U.S.C. 552a(e)(4)) requires the Department to publish in the **Federal Register** a notice of new system of records maintained by the Department. The Department's regulations implementing the Privacy Act are contained in the Code of Federal Regulations (CFR) in 34 CFR part 5b.

The Privacy Act applies to information about an individual that is maintained in a system of records from which individually identifying information is retrieved by a unique identifier associated with each individual, such as a name or social security number. The information about each individual is called a ''record,'' and the system, whether manual or computer-driven, is called a ''system of records.'' The Privacy Act requires each agency to publish a system of records notice in the **Federal Register** and to submit reports to the Administrator of the Office of Information and Regulatory Affairs, OMB, the Chair of the House of Representatives Committee on Oversight and Government Reform, and the Chair of the Senate Committee on Homeland Security and Governmental Affairs, whenever the agency publishes a new or altered system of records.

**Background of System of Records**

ODAS is a system of records that will store individually identifying information from a variety of individuals who have applied for or received grants, contracts, loans, or payments from the Department. These individuals include: Employees of the Department; consultants; contractors; grantees; advisory committee members or others who have received funds from the Department for performing services; students who have applied for Federal student financial assistance; Pell Grant recipients; borrowers of William D. Ford Federal Direct Loans, Federal Family Education loans, Federal Insured Student loans or Federal Perkins loans; owners, board members, officials, or authorized agents of postsecondary institutions; and individuals applying to the Department's Office of Federal Student Aid for a personal identification number.

Information in this system will be obtained from the following systems of records maintained by the Department: Education's Central Automated Processing System (EDCAPS)(System Number 18–03–02); Federal Student Aid Application File (System Number 18–11–01); Recipient Financial Management System (the Department expects to amend this system soon and re-name it as the Common Origination and Disbursement System (COD)) (System Number 18–11–02); Title IV Program Files (System Number 18–11–05); National Student Loan Data System (NSLDS)(System Number 18–11–06); Student Financial Assistance Collection Files (System Number 18–11–07); Postsecondary Education Participants System (PEPS)(System Number 18–11–09); the Department of Education (ED) PIN (Personal Identification Number) (System Number 18–11–12); and the Student Authentication Network Audit File (System Number 18–11–13).

This new system of records notice is being established because it will involve the new use of records covered by existing Department systems of records. This new system of records will be used to identify internal control weaknesses and to identify system issues to improve methods of data modeling and annual audit planning. This system will provide the Department's Office of Inspector General (OIG) with access to a single repository of data that currently resides in many, different Department systems of records. OIG will conduct data modeling on this data, using statistical and mathematical techniques, in order to predict anomalies indicating fraudulent activity.

Under the Inspector General Act of 1978, as amended, 5 U.S.C. Appendix, Inspectors General, including the Department's Inspector General, are responsible for conducting, supervising, and coordinating audits and investigations, relating to programs and operations of the Federal agency for which their office is established. This system of records facilitates OIG's performance of this statutory duty.

Pursuant to 5 U.S.C. 552a(k)(2), through rulemaking, may exempt from a limited number of Privacy Act requirements a system of records that contains investigatory materials compiled for law enforcement purposes. The materials in this system of records fall within the scope of section 552a(k)(2).

Pursuant to 5 U.S.C. 552a(k)(2), the Secretary has issued final regulations published elsewhere in this issue of the **Federal Register** exempting the ODAS from the following Privacy Act requirements:

5 U.S.C. 552a(c)(3)—access to accounting of disclosure.

5 U.S.C. 552a(c)(4)—notification to outside parties and agencies of correction or notation of dispute made in accordance with 5 U.S.C. 552a(d).

5 U.S.C. 552a(d)(1) through (4) and (f)—procedures for notification or access to, and correction or amendment of, records.

5 U.S.C. 552a(e)(1)—maintenance of only relevant and necessary information.

5 U.S.C. 552a(e)(4)(G) and (H)—inclusion of information in the system of records notice regarding Department procedures on notification of, access to, correction of, and amendment of records.

**Electronic Access to This Document**

You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister*.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government

Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

**Note:** The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html*.

Dated: October 10, 2008.

**Mary Mitchelson,**

*Acting Inspector General.*

For the reasons discussed in the preamble, the Inspector General of the U.S. Department of Education (Department) publishes a notice of a new system of records to read as follows:

**18–10–02**

**SYSTEM NAME:**

The Office of Inspector General Data Analytics System (ODAS).

**SECURITY CLASSIFICATION:**

None.

**SYSTEM LOCATION:**

The Office of Inspector General, Information Technology Audits and Computer Crimes Investigations (ITACCI), U.S. Department of Education, 550 12th Street, SW., room 8089, Washington, DC 20024–6122.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

This system will include records on individuals that are obtained from the following other systems of records maintained by the Department:

*Education Central Automated Processing System (18–03–02)*

The categories of individuals included from this system are employees of the Department, consultants, contractors, grantees, advisory committee members, and other individuals receiving funds from the Department for performing services for the Department.

*Federal Student Aid Application File (18–11–01)*

The categories of individuals included from this system are students applying for Federal student financial assistance under Title IV of the Higher Education Act of 1965, as amended (HEA).

*Recipient Financial Management System (the Department soon expects to amend this system and re-name it as the Common Origination and Disbursement System (COD)) (18–11–02)*

The categories of individuals included from this system are records of individuals who apply for or receive a grant or loan which is made under (1) the Federal Pell Grant Program; (2) the Academic Competitiveness Grant (ACG) Program; (3) the National Science and Mathematics Access to Retain Talent Grant (National SMART Grant) Program; and (4) the William D. Ford Federal Direct Loan (Direct Loan) Program, Federal Direct Unsubsidized and Subsidized Stafford/Ford Loans, and Federal Direct PLUS Loans.

*Title IV Program Files (18–11–05)*

The categories of individuals included from this system are: individuals who apply for Federal financial student aid; recipients of Federal Pell Grants; recipients of Federal Direct Student Loans; and borrowers whose loan defaulted or borrower died, became disabled or had a loan discharged in bankruptcy under the Federal Direct Student Loan program.

*National Student Loan Data System (NSLDS) (18–11–06)*

The categories of individuals included from this system are:

(1) Borrowers who have applied for and received loans under the William D. Ford Federal Direct Loan Program, the Federal Family Education Loan (FFEL) Program, the Federal Insured Student Loan (FISL) Program, and the Federal Perkins Loan Program (including National Defense Student Loans, National Direct Student Loans, Perkins Expanded Lending and Income Contingent Loans); and

(2) Recipients of Federal Pell Grants and persons who owe an overpayment on a Federal Pell Grant, Federal Supplemental Educational Opportunity Grant or Federal Perkins Loans.

*Student Financial Assistance Collection Files (18–11–07)*

The categories of individuals included from this system are individuals who have student loans made under the FFEL Program: Stafford Loans (formerly the Guaranteed Student Loan Program (GSL), including Federally Insured Student Loans), Supplemental Loans for Students (SLS), PLUS Loans (formerly Parental Loans for Undergraduate Students), and Consolidation Loans; the William D. Ford Federal Direct Student Loan (Direct Loan) Program (formerly known as the Stafford/Ford Loan Program (SFLP), Federal Direct Unsubsidized Stafford/Ford Loan Program, Federal Direct Consolidation Loan, and Federal Direct Plus Loans; and Federal Perkins Loans (formerly known as National Direct/Defense Student Loans (NDSL)) and those who are awarded grants under the Federal Pell Grant Program and the Supplemental Education Opportunity Grant Program (SEOG).

*Postsecondary Education Participants System (PEPS) (18–11–09)*

The categories of individuals included from this system are owners (individuals, either solely or as partners, and corporate entities), officials, and authorized agents of postsecondary institutions; members of boards of directors or trustees of such institutions; employees of foreign entities that evaluate the quality of education; third-party servicers, including contact persons.

*Department of Education (ED) PIN (Personal Identification Number) (18–11–12)*

The categories of individuals included from this system are former, current and prospective students and parents who apply for an ED PIN number. The ED PIN number is used for identification purposes when PIN holders access other Department systems, including the Free Application for Federal Student Aid (FAFSA), Access America and the Direct Loan Program.

*Student Authentication Network Audit File (18–11–13)*

The categories of individuals included from this system are individuals who have had, or attempted to have, their identity verified for the purpose of electronically completing and signing promissory notes and other documents in connection with applying for or obtaining aid, or carrying out other activities under the Student Financial Assistance Programs authorized by Title IV of the Higher Education Act of 1965, as amended.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

This system will include records that are obtained from the following other systems of records maintained by the Department:

*Education's Central Automated Processing System (18–03–02)*

The categories of records included from this system are individual's name, address, social security number, eligibility codes, detailed and summary obligation data, reports of expenditures, and grant management data, including application and close out information.

*Federal Student Aid Application File (18–11–01)*

The categories of records included from this system are the name, address, birth date, social security number, parents' and students' personal identification numbers assigned by the Department, and financial data necessary to identify applicants, verify applicant data, and calculate their expected family contributions for Federal student financial assistance. Also included from this system will be

information on the student's prior Federal Pell Grant awards and student loan status from the NSLDS database is maintained in the system. Finally, included from this system will be information from an individual's processed FAFSA form, such as Estimated Family Contribution, dependency status and post-secondary school identifier.

*Recipient Financial Management System (the Department expects to amend this system soon and re-name it as the Common Origination and Disbursement System (COD)) (18–11–02)*

The categories of records included from this system are records that are sent by institutions of higher education to the Department, and that include, but are not limited to, information such as an individual's social security number, birth date, name, address, e-mail address, driver's license number, telephone number, citizenship status, cost of attendance, enrollment information, type of financial aid award, and the amount and disbursement date of Federal financial aid awarded. In addition, this system contains collection referral amounts, loan repayment information, and promissory notes for loans made under the Federal Direct Loan program.

*Title IV Program Files (18–11–05)*

The categories of records included from this system are records regarding the amount of Pell Grant received; an applicant's demographic background; loan and education status; family income; social security number; address and telephone number; and employment information on borrowers and co-signers; default claim number; amount of claim; information pertaining to locating a borrower; collection and repayment history; information pertaining to the amount of the loan and repayment obligation; forbearance; cancellation; disability; and deferment information; and personal identification numbers assigned by the Department.

*National Student Loan Data System (NSLDS) (18–11–06)*

The categories of records included from this system are records regarding: (1) Student/borrower identifier information including social security number, date of birth and name; (2) the information on borrowers' loans covering the entire life cycle of a loan from origination through final payment, cancellation, discharge or other final disposition including details regarding each loan received by a student such as information on loan amounts, educational status, disbursements, balances, loan status, collections, claims, deferments, refunds and cancellations; (3) enrollment information including school(s) attended, anticipated completion date, enrollment status and effective dates; (4) student demographic information such as course of study, dependency, citizenship, gender, data on family income, expected family contribution, and address; (5) Federal Pell Grant amounts and dates; and (6) Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, and Federal Perkins Loan Program overpayments.

*Student Financial Assistance Collection Files (18–11–07)*

The categories of records included from this system are records regarding an applicant's demographic background; loan, repayment history, and educational status; family income; social security number; address and telephone numbers; employment information on borrowers and co-signers; collection activity on accounts; default claim number; amount of claim; information pertaining to locating a borrower; collection and repayment obligation; forbearance; cancellation; disability; deferment; administrative wage garnishment; bankruptcy, death; closed school discharge; hearings; photocopy of all promissory notes; account collection records; administrative resolutions and litigations; and parents' and students' personal identification numbers assigned by the Department.

*Postsecondary Education Participants System (PEPS) (18–11–09)*

The categories of records included from this system are records regarding the eligibility, administrative capability, and financial responsibility of postsecondary institutions that participate in the student financial aid programs, including the names, taxpayer identification numbers (social security numbers), business addresses, and phone numbers of the individuals with substantial ownership interests in, or control over, those institutions, and personal identification numbers assigned by the Department.

*The Department of Education (ED) PIN (Personal Identification Number) Registration System (PIN) (18–11–12)*

The categories of records included from this system are name, social security number, date of birth and address of prospective students and parents who apply for an ED PIN number.

*Student Authentication Network Audit File (18–11–13)*

The categories of records included from this system are related to individuals seeking to have their identity verified for the purpose of electronically completing and signing promissory notes and other documents in connection with applying for or obtaining aid. Records include the individual's social security number; date of birth; first and last name; user code (i.e., the Department, lenders, schools, guarantee agencies and holders of Federal student loans) identifying the entity seeking to verify the individual's identity; data provided by the user that may subsequently be used for auditing or other internal purposes of the user); an action code documenting the ''affirmed'' or ''denied'' verification response the system receives from the Department's PIN database; a unique identifier comprising a system-generated sequence number; and, the date and time the individual's identity is authenticated against the Department's PIN database.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

The Inspector General Act of 1978, as amended, (5 U.S.C. Appendix.

**PURPOSE(S):**

This system of records is maintained for the general purpose of enabling OIG to fulfill the requirements of section (4)(a)(1) and (3) of the Inspector General Act of 1978, as amended, which requires OIG to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of the Department and to conduct, supervise and coordinate activities for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, the programs and operations of the Department. This system is maintained for the purpose of improving the efficiency, quality, and accuracy of existing data collected by the Department. Records in this system will be used to conduct data modeling for indications of fraud, abuse and internal control weaknesses concerning Department programs and operations. The result of that data modeling may be used in the conduct of audits, investigations, inspections or other activities as necessary to prevent and detect waste, fraud and abuse in Department programs and operations.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES FOR SUCH USES:**

The Department may disclose information contained in a record in this system of records without the consent of the individual if the disclosure is compatible with the purpose for which the record was collected, under the following routine uses. OIG may make these disclosures

on a case-by-case basis or, if OIG has met the requirements of the Computer Matching and Privacy Protection Act of 1988, as amended, under a computer matching agreement.

(1) *Disclosure for Use by Other Law Enforcement Agencies.* The Department may disclose information from this system of records as a routine use to any Federal, State, local, or foreign agency or other public authority responsible for enforcing, investigating, or prosecuting violations of administrative, civil, or criminal law or regulations if that information is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility of the receiving entity.

(2) *Disclosure to Public and Private Entities to Obtain Information Relevant to Department of Education Functions and Duties.* The Department may disclose information from this system of records as a routine use to public or private sources to the extent necessary to obtain information from those sources relevant to an OIG investigation, audit, inspection, or other inquiry.

(3) *Disclosure for Use in Employment, Employee Benefit, Security Clearance, and Contracting Decisions.*

(a) *For Decisions by the Department.* The Department may disclose information from this system of records as a routine use to a Federal, State, local, or foreign agency maintaining civil, criminal, or other relevant enforcement or other pertinent records, or to another public authority or professional organization, if necessary to obtain information relevant to a Department decision concerning the hiring or retention of an employee or other personnel action, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit.

(b) *For Decisions by Other Public Agencies and Professional Organizations.* The Department may disclose information from this system of records as a routine use to a Federal, State, local, or foreign agency, other public authority, or professional organization in connection with the hiring or retention of an employee or other personnel action, the issuance or retention of a security clearance, the letting of a contract, or the issuance or retention of a license, grant, or other benefit.

(4) *Disclosure to Public and Private Sources in Connection with the Higher Education Act of 1965, as Amended (HEA).* The Department may disclose information from this system of records as a routine use to facilitate compliance with program requirements to any accrediting agency that is or was recognized by the Secretary of Education pursuant to the HEA; to any educational institution or school that is or was a party to an agreement with the Secretary of Education pursuant to the HEA; to any guaranty agency that is or was a party to an agreement with the Secretary of Education pursuant to the HEA; or to any agency that is or was charged with licensing or legally authorizing the operation of any educational institution or school that was eligible, is currently eligible, or may become eligible to participate in any program of Federal student assistance authorized by the HEA.

(5) *Litigation and Alternative Dispute Resolution (ADR) Disclosures.*

(a) *Disclosure to the Department of Justice.* If the disclosure of certain records to the Department of Justice (DOJ) is relevant and necessary to litigation or ADR and is compatible with the purpose for which the records were collected, the Department may disclose those records as a routine use to the DOJ. The Department may make such a disclosure in the event that one of the following parties is involved in the litigation or ADR or has an interest in the litigation or ADR:

(i) The Department or any component of the Department;

(ii) Any employee of the Department in his or her official capacity;

(iii) Any Department employee in his or her individual capacity if the DOJ has been asked or has agreed to provide or arrange for representation for the employee;

(iv) Any employee of the Department in his or her individual capacity if the Department has agreed to represent the employee or in connection with a request for that representation; or

(v) The United States, if the Department determines that the litigation or ADR proceeding is likely to affect the Department or any of its components.

(b) *Other Litigation or ADR Disclosure.* If disclosure of certain records to a court, adjudicative body before which the Department is authorized to appear, individual or entity designated by the Department or otherwise empowered to resolve disputes, counsel, or other representative, party, or potential witness is relevant and necessary to litigation or ADR and is compatible with the purpose for which the records were collected, the Department may disclose those records as a routine use to the court, adjudicative body, individual or entity, counsel or other representative, party, or potential witness. The Department may make such a disclosure in the event that one of the following parties is involved in the litigation or ADR or has an interest in the litigation or ADR:

(i) The Department or any component of the Department;

(ii) Any employee of the Department in his or her official capacity;

(iii) Any Department employee in his or her individual capacity if the DOJ has been asked or has agreed to provide or arrange for representation for the employee;

(iv) Any employee of the Department in his or her individual capacity if the Department has agreed to represent the employee; or

(v) The United States, if the Department determines that the litigation or ADR is likely to affect the Department or any of its components.

(6) *Disclosure to Contractors and Consultants.* The Department may disclose information from this system of records as a routine use to the employees of any entity or individual with whom or with which the Department contracts for the purpose of performing any functions or analyses that facilitate or are relevant to an OIG investigation, audit, inspection, or other inquiry. Before entering into such a contract, the Department must require the contractor to maintain Privacy Act safeguards, as required under 5 U.S.C. 552a(m) with respect to the records in the system.

(7) *Debarment and Suspension Disclosure.* The Department may disclose information from this system of records as a routine use to another Federal agency considering suspension or debarment action if the information is relevant to the suspension or debarment action. The Department also may disclose information to any Federal, State, or local agency to gain information in support of the Department's own debarment and suspension actions.

(8) *Disclosure to the Department of Justice.* The Department may disclose information from this system of records as a routine use to the DOJ to the extent necessary for obtaining the DOJ's advice on any matter relevant to Department of Education programs or operations.

(9) *Congressional Member Disclosure.* The Department may disclose information from this system of records to a Member of Congress or to a congressional staff member in response to an inquiry from the congressional office made at the written request of the constituent about whom the record is maintained. The member's right to the information is no greater than the right of the individual who requested the inquiry.

(10) *Benefit Program Disclosure.* The Department may disclose records as a routine use to any Federal, State, local, or foreign agency, or other public authority, if relevant to the prevention or detection of fraud and abuse in benefit programs administered by any agency or public authority.

(11) *Collection of Debts and Overpayment Disclosure.* The Department may disclose records as a routine use to any Federal, State, local, or foreign agency, or other public authority, if relevant to the collection of debts or to overpayments owed to any agency or public authority.

(12) *Disclosure to the President's Council on Integrity and Efficiency (PCIE).* The Department may disclose records as a routine use to members and employees of the PCIE for the preparation of reports to the President and Congress on the activities of the Inspectors General.

(13) *Disclosure for Qualitative Assessment Reviews.* The Department may disclose records as a routine use to members of the PCIE, the DOJ, the U.S. Marshals Service, or any Federal agency for the purpose of conducting qualitative assessment reviews of the investigative or audit operations of the Department's OIG to ensure that adequate internal safeguards and management procedures are maintained.

(14) *Disclosure in the Course of Responding to Breach of Data.* The Department may disclose records to appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in this system has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Department or by another agency or entity) that rely upon the compromised information; and, (c) the disclosure is made to such agencies, entities, and persons who are reasonably necessary to assist the Department in responding to the suspected or confirmed compromise and in helping the Department prevent, minimize, or remedy such harm.

**DISCLOSURE TO CONSUMER REPORTING AGENCIES:**

Not applicable to this system of records.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISCLOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

The records are maintained on encrypted magnetic disks and encrypted tape cartridges in a locked computer facility within the U.S. Department of Education's OIG.

**RETRIEVABILITY:**

Records in this system of records are retrieved by name or other identifying information of an individual or institution.

**SAFEGUARDS:**

Access to data in ODAS is restricted to authorized OIG staff members and is recorded in an access log. All physical access to the Department's site where this system of records is maintained is controlled and monitored by security personnel who check each individual entering the buildings for his or her employee or visitor badge. All data contained in the system of records are kept on a secured and restricted private network and stored in a combination-locked computer laboratory. ODAS is housed within a secure and controlled computer lab. Access to the lab is by authorized OIG personnel only. The general public does not have access to ODAS.

All information stored in this system is secured by using database encryption technology and is resistant to tampering and circumvention by unauthorized users. Access to data by all users will be monitored using both automated and manual controls. The information is accessed by OIG staff on a ''need-to-know'' and intended systems usage basis.

OIG maintains ODAS in a secure and controlled facility. Access to the computer lab is by authorized OIG personnel only. The general public does not have access to ODAS. The information maintained in ODAS is secured in accordance with OMB M–03–22, *OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002,* September 26, 2003, the E-Government Act, Section 208, Attachment A, and NIST 800–53, Revision 1, *Recommended Security Controls for Federal Information Systems,* December 2006.

Contractors will not maintain this system, but under certain limited circumstances they may have access to the system. In accordance with the Department's Administrative Communications System Directive OM: 5–101 entitled ''Contractor Employee Personnel Security Screenings,'' all Department personnel who have facility access and system access must undergo a security clearance investigation. Individuals requiring access to Privacy Act data are required to hold, at a minimum, a moderate-risk security clearance level. These individuals are required to undergo periodic screening at five-year intervals.

In addition to conducting security clearances, individuals with access to this system are required to complete security awareness training on an annual basis. Annual security awareness training is required to ensure that users are appropriately trained in safeguarding Privacy Act data in accordance with OMB Circular No. A–130, Appendix III.

The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. All users of this system of records are given a unique user identification, and users are required to change their password at least every 90 days in accordance with the Department's information technology standards.

**RETENTION AND DISPOSAL:**

Records are maintained and disposed of in accordance with the Department's Records Disposition Schedules applicable to the aforementioned records. A new records retention and disposition schedule is under development for this system of records. Until NARA approves a retention and disposition schedule for these records, The Department will not destroy any records.

**SYSTEM MANAGER AND ADDRESS:**

Roland Wong, Director, Computer Assisted Assessment Techniques, Information Technology Audits and Computer Crimes Investigations, Department of Education, Office of Inspector General, 400 Maryland Avenue, SW., PCP, Washington, DC 20202–1510.

**NOTIFICATION PROCEDURE:**

This system is exempt from the notification procedures in 5 U.S.C. 552a(e)(4)(G) pursuant to 5 U.S.C. 552a(k)(2) and 34 CFR 5b.11(c)(1).

**RECORD ACCESS PROCEDURE:**

This system is exempt from the record access procedures in 5 U.S.C. 552a(e)(4)(H) pursuant to 5 U.S.C. 552a(k)(2) and 34 CFR 5b.11(c)(1).

**CONTESTING RECORD PROCEDURE:**

This system is exempt from the contesting record procedures in 5 U.S.C. 552a(e)(4)(H) pursuant to 5 U.S.C. 552a(k)(2) and 34 CFR 5b.11(c)(1).

**RECORD SOURCE CATEGORIES:**

This system contains records taken from the following Department systems: Education's Central Automated Processing System (EDCAPS) (System Number 18–03–02); Federal Student Aid Application File (System Number 18–11–01); Recipient Financial Management System (the Department expects to amend this system soon and re-name it as the Common Origination and Disbursement System (COD)) (System Number 18–11–02); Title IV Program Files (System Number 18–11–05); National Student Loan Data System (NSLDS) (System Number 18–11–06); Student Financial Assistance Collection Files (System Number 18–11–07); Postsecondary Education Participants System (PEPS) (System Number 18–11–09); The Department of Education (ED) PIN (Personal Identification Number) Registration System (System Number 18–11–12); and the Student Authentication Network Audit File (System Number 18–11–13).

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

Pursuant to 5 U.S.C. 552a(k)(2), the Secretary, through rulemaking, may exempt from a limited number of Privacy Act requirements a system of records that contains investigatory materials compiled for law enforcement purposes. The materials in this system fall within the scope of section 552a(k)(2) because they are investigatory materials compiled for purposes of enforcing Federal legal requirements. Therefore, the Secretary has issued final regulations published elsewhere in this issue of the **Federal Register** exempting the ODAS from the following Privacy Act requirements:

5 U.S.C. 552a(c)(3)—access to accounting of disclosure.

5 U.S.C. 552a(c)(4)—notification to outside parties and agencies of correction or notation of dispute made in accordance with 5 U.S.C. 552a(d).

5 U.S.C. 552a(d)(1) through (4) and (f)—procedures for notification or access to, and correction or amendment of, records.

5 U.S.C. 552a(e)(1)—maintenance of only relevant and necessary information.

5 U.S.C. 552a(e)(4)(G) and (H)—inclusion of information in the system of records notice regarding Department procedures on notification of, access to, correction of, or amendment of records.

[FR Doc. E8–24610 Filed 10–15–08; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### DOE/Advanced Scientific Computing Advisory Committee

**AGENCY:** Department of Energy, Office of Science.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Tuesday, October 28, 2008, 9 a.m. to 5:15 p.m.; Wednesday, October 29, 2008, 9 a.m. to 12 p.m.

**ADDRESSES:** Hilton Washington DC North, 620 Perry Parkway, Gaithersburg, MD 20877.

**FOR FURTHER INFORMATION CONTACT:** Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290; Telephone (301) 903–7486, (E-mail: *Melea.Baker@science.doe.gov*).

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* The purpose of this meeting is to provide advice and guidance with respect to the advanced scientific computing research program.

*Tentative Agenda:* Agenda will include discussions of the following:

**Tuesday, October 28, 2008**

View from Washington and Germantown.

Report Discussion on Charge—Balance.

Petascale Data Storage Institute.

SciDAC Update (Mid-Term Review Plans).

ASCR Response to INCITE COV and New Charge—Computer Science COV.

Simulating Nuclear Power Plants.

Update on Applied Math Program.

Large-Scale PDE-Constrained Optimization.

Public Comment.

**Wednesday, October 29, 2008**

Exascale Workshops.

Graph-Based Approaches to Multi-Threading.

Facilities Update.

Public Comment.

*Public Participation:* The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Melea Baker via FAX at 301–903–4846 or via e-mail (*Melea.Baker@science.doe.gov*). You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule. This notice is being published less than 15 days before the date of the meeting due to programmatic issues.

*Minutes:* The minutes of this meeting will be available for public review at *http://www.sc.doe.gov/ascr/ASCAC/PastMeetings.html*.

Issued in Washington, DC, on October 9, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–24643 Filed 10–15–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Hydrogen and Fuel Cell Technical Advisory Committee (HTAC)

**AGENCY:** Department of Energy, Office of Energy Efficiency and Renewable Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** The Hydrogen and Fuel Cell Technical Advisory Committee (HTAC) was established under section 807 of the Energy Policy Act of 2005 (EPACT), Pub. L. No. 109–58; 119 Stat. 849. The Federal Advisory Committee Act, Pub. L. No. 92–463, 86 Stat. 770, requires that agencies publish notice of an advisory committee meeting in the **Federal Register**. To attend the meeting and/or to make oral statements during the public comment period, please e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting both days or a specific day, if you want to make an oral statement on November 7, 2008, and what organization you represent (if appropriate).

**DATES:** Thursday, November 6, 2008, from 9 a.m.–6 p.m. and Friday, November 7, 2008, from 8:30 a.m.–3 p.m.

**ADDRESSES:** Washington Marriott, 1221 22nd St., NW., Washington, DC 20037.

**FOR FURTHER INFORMATION CONTACT:** *HTAC@nrel.gov*.

**SUPPLEMENTARY INFORMATION:**

*Purpose of the Meeting:* To provide advice, information, and recommendations to the Secretary on

the program authorized by title VIII of EPACT.

*Tentative Agenda:* (Subject to change; updates will be posted on *http://hydrogen.energy.gov* and copies of the final agenda will be available the date of the meeting). The following items will be covered on the agenda:

- Introduction of new Chair and Vice Chair
- New Member Orientation/Expiring Member Recognition Processes
- Review of Talking Points for a New Administration
- Update on HTAC Annual Report
- DOE Loan Guarantee Program
- Update on DOE H-Prize
- Presentation on the Comparison of the H2A Modeling Efforts and the European HYWAY's Analysis
- Briefing on the Hydrogen Road Tour
- Review of US–EU Technology Collaboration and IPHE Meetings
- Briefing on Solid Oxide Fuel Cells
- Discussion Regarding the Absence of Hydrogen in the Presidential Candidates' Platforms
- UC Davis Hydrogen Policy Recommendations
- Public Comment Period

*Public Participation:* In keeping with procedures, members of the public are welcome to observe the business of the meeting of HTAC and to make oral statements during the specified period for public comment. The public comment period is tentatively scheduled from 9 a.m. to 9:30 a.m. on November 7, 2008. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, e-mail *HTAC@nrel.gov* at least 5 business days before the meeting. Please indicate if you will be attending the meeting on both days or a particular day, if you want to make an oral statement, and what organization you represent (if appropriate). Members of the public will be heard in the order in which they sign up for the public comment period. Oral comments should be limited to two minutes in length. Reasonable provision will be made to include the scheduled oral statements on the agenda. The chair of the committee will make every effort to hear the views of all interested parties and to facilitate the orderly conduct of business. If you would like to file a written statement with the committee, you may do so either by submitting a hard copy at the meeting or by submitting an electronic copy to *HTAC@nrel.gov*.

*Minutes:* The minutes of the meeting will be available for public review at *http://www.hydrogen.energy.gov/advisory_htac.html*.

Issued at Washington, DC, on October 9, 2008.

**Rachel Samuel,**

*Deputy Committee Management Officer.*

[FR Doc. E8–24641 Filed 10–15–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Office of International Regimes and Agreements; Proposed Subsequent Arrangement

**AGENCY:** Department of Energy.

**ACTION:** Notice of Proposed Subsequent Arrangement.

**SUMMARY:** This notice is being issued under the authority of Section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160). The Department is providing notice of a proposed ''subsequent arrangement'' under the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and the European Atomic Energy Community (Euratom) and the Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and Canada.

This subsequent arrangement concerns the retransfer of 1.14 kg of Uranium, containing .225 kg of U–235, in the form of one standard fuel assembly. The material will be sent from McMaster University, Canada to CERCA, France for repair and will be returned to Canada. CERCA is authorized to receive nuclear material pursuant to the U.S.-Euratom Agreement for Cooperation.

In accordance with Section 131 of the Atomic Energy Act of 1954, as amended, we have determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

**Richard Goorevich,**

*Director, Office of International Regimes and Agreements.*

[FR Doc. E8–24642 Filed 10–15–08; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 10198–029]**

### Pelican Utility District; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

October 8, 2008.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-Capacity Amendment of License.

b. *Project No.:* 10198–029.

c. *Date Filed:* July 14, 2008.

d. *Applicant:* Pelican Utility District.

e. *Name of Project:* Pelican Project.

f. *Location:* The project is located on the Pelican Creek in the Borough of Sitka, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Paul Mclarnon, HDR Alaska, Inc., 2525 C Street, Suite 300, Anchorage, AK 99503, (907) 644–2022.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Steven Sachs at (202) 502–8666.

j. *Deadline for filing comments and or motions:* November 10, 2008.

Please include the project number (P–10198) on any comments or motions filed. All documents (an original and eight copies) must be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Motions to intervene, protests, comments and recommendations may be filed electronically via the Internet in lieu of paper filings, 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. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* Pelican Utility District (PUD) proposes to replace the dam's north wing wall, construct a new steel and concrete intake, and install a new high density polyethylene upper and lower penstock bedded, at-grade on land fill. Additionally PUD proposes to install a new low level outlet pipe in the north wing wall and upgrade equipment in the powerhouse.

l. *Location of the Application:* A copy of the licensee's filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docsfiling/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call toll-free at 1–866–208–3372 or e-mail *ferconlinesupport@ferc.gov,* or for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address listed in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions To Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application (see item (j) above).

o. Any filing must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', ''MOTION TO INTERVENE'', or ''RECOMMENDATIONS'', as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–24494 Filed 10–15–08; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IC09–65–000; FERC–65]**

### Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

October 8 , 2008.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

**DATES:** Comments on the collection of information are due November 14, 2008.

**ADDRESSES:** Copies of sample filings of the proposed information collection can be obtained from the Commission's Web site (*http://www.ferc.gov/docs-filings/elibrary.asp*) or from the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Executive Director, ED–34, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing. For paper filing, the original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and refer to Docket No. IC09–65–000.

Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help.*

To file the document, access the Commission's Web site at *http://www.ferc.gov,* choose the Documents & Filings tab, click on eFiling, then follow the instructions given. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgment to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through the Commission's homepage using the eLibrary link. For user assistance, contact *FERConlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

**FOR FURTHER INFORMATION CONTACT:** Michael Miller, 888 First St., NE., Washington, DC 20426. He may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

**SUPPLEMENTARY INFORMATION:** The information collected under the requirements of FERC–65 ''Notification of Holding Company Status'' (OMB No. 1902–0218) is used by the Commission to implement the statutory provisions of the Public Utility Holding Company Act of 2005 (PUHCA 2005). Among other things, PUHCA 2005 was intended to give the Commission access to books and records relevant to costs incurred by a public utility or natural gas company which are necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. For the Commission to carry out its rate regulation responsibilities, it must know who the entities are that are holding companies of jurisdictional public utilities and natural gas companies. The Commission obtains this information through the FERC–65 filings.

The FERC–65 is a one-time informational filing set out in the Commission's regulations 18 CFR 366.4 that must be submitted within 30 days of becoming a holding company. The information is required in no specific format and consists of the identity of the holding company and of the public utilities and natural gas companies in the holding company system and the identity of service companies, including special-purpose subsidiaries providing non-power goods and services and the identity of all affiliates and subsidiaries and their corporate relationship to each other. Filings may be submitted in hardcopy or electronically through the Commission's eFiling system.

*Action:* The Commission is requesting a three-year extension of the current expiration date.

*Burden Statement:* Public reporting burden for this collection is estimated as:

| Number of respondents annually | Number of responses per respondent | Average burden hours per response | Total annual burden hours |
|---|---|---|---|
| (1) | (2) | (3) | (1) × (2) × (3) |
| 30 | 1 | 3 | 90 |

The estimated total cost to respondents is $5,468. [90 hours divided by 2080 hours [1] per year, times $126,384 [2] equals $5,468.54]. The average cost per respondent is $182.28.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, using technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable filing instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The cost estimate for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

*Comments are invited on:* (1) Whether the information collection is necessary for the proper performance of the functions of the Commission; (2) the accuracy of the Commission's burden estimate of the proposed information collection, including the validity of the methodology and assumptions used to calculate the reporting burden; and (3) ways to enhance the quality, utility and clarity of the information to be collected.

**Kimberly Bose,**

*Secretary.*

[FR Doc. E8–24491 Filed 10–15–08; 8:45 am]

**BILLING CODE 6717–01–P**

[1] Number of hours an employee works each year.

[2] Average annual salary per employee.

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IC09–65B–000; FERC–65B]**

### Commission Information Collection Activities, Proposed Collection; Comment Request; Extension

October 8, 2008.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirements of section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), the Federal Energy Regulatory Commission (Commission) is soliciting public comment on the specific aspects of the information collection described below.

**DATES:** Comments on the collection of information are due November 14, 2008.

**ADDRESSES:** Copies of sample filings of the proposed information collection can be obtained from the Commission's Web site (*http://www.ferc.gov/docs-filings/elibrary.asp*) or from the Federal Energy Regulatory Commission, Attn: Michael Miller, Office of the Executive Director, ED–34, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those parties filing electronically do not need to make a paper filing. For paper filing, the original and 14 copies of such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and refer to Docket No. IC09–65B–000.

Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Commission's submission guidelines. Complete filing instructions and acceptable filing formats are available at *http://www.ferc.gov/help.* To file the document, access the Commission's Web site at *http://www.ferc.gov,* choose the Documents & Filings tab, click on eFiling, then follow the instructions given. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet through FERC's homepage using the eLibrary link. For user assistance, contact *FERConlinesupport@ferc.gov* or toll-free at (866) 208–3676 or for TTY, contact (202) 502–8659.

**FOR FURTHER INFORMATION CONTACT:** Michael Miller, 888 First St., NE., Washington, DC 20426. He may be reached by telephone at (202) 502–8415, by fax at (202) 273–0873, and by e-mail at *michael.miller@ferc.gov.*

**SUPPLEMENTARY INFORMATION:** The information collected under the requirements of FERC–65B ''Waiver Notification'' (OMB No. 1902–0217) is used by the Commission to implement the statutory provisions of the Public Utility Holding Company Act of 2005. Among other things, PUHCA 2005 was intended to give the Commission access to books and records relevant to costs incurred by a public utility or natural gas company which are necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. This intention was made clear in section 1264 of the Energy Policy Act of 2005, 42 U.S.C. 16452. However, in 18 CFR 366.3(c) the Commission has allowed for waivers from related requirements for any holding company with respect to one or more of the following: (1) Single-state holding company systems; (2) holding companies that own generating facilities that total 100 MW or less in size and are used fundamentally for their own load or for sales to affiliated end-users; or (3) investors in independent transmission-only companies.

Entities meeting these criteria may file a FERC–65B pursuant to the notification procedures contained in 18 CFR 366.4 to obtain a waiver. Filings may be made in hardcopy or electronically through the Commission's Web site.

*Action:* The Commission is requesting a three-year extension of the current expiration date.

*Burden Statement:* Public reporting burden for this collection is estimated as:

| Number of respondents annually | Number of responses per respondent | Average burden hours per response | Total annual burden hours |
|---|---|---|---|
| (1) | (2) | (3) | (1) × (2) × (3) |
| 10 | 1 | 1 | 10 |

The estimated total cost to respondents is $607.62. [10 hours divided by 2080 hours [1] per year, times $126,384 [2] equals $607.62]. The average cost per respondent is $60.76.

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, using technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable filing instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The cost estimate for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than any one particular function or activity.

*Comments are invited on:* (1) The accuracy of the agency's burden estimate of the proposed information collection, including the validity of the methodology and assumptions used to calculate the reporting burden; (2) ways to enhance the quality, utility and clarity of the information to be collected.

**Kimberly Bose,**

*Secretary.*

[FR Doc. E8–24493 Filed 10–15–08; 8:45 am]

**BILLING CODE 6717–01–P**

[1] Number of hours an employee works each year.

[2] Average annual salary per employee.

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Project No. 2390–056]**

## Northern States Power Company of Wisconsin, d/b/a Excel Energy Inc.; Notice of Availability of Environmental Assessment

October 8, 2008.

In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Energy Regulatory Commission's (Commission) regulations (18 CFR Part 380), the Office of Energy Projects has reviewed an application for amendment of license and has prepared an environmental assessment (EA) regarding the licensee's request to amend the project license to include the jurisdictional Turtle-Flambeau Storage Reservoir as a project feature of the Big Falls Project. The Big Falls Project is located on the Flambeau River in Rusk County, Wisconsin. This EA concludes that the proposed action, with recommended measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

Copies of the EA are available in the Public Reference Room of the Commission's offices at 888 First Street, NE., Room 1–A, Washington, DC 204265. The EA also may be viewed on the Commission's Internet Web site *(http://www.ferc.gov)* using the ''eLibrary'' link. Enter the docket number ''P–2390'' in the docket number field to access the document. For assistance with eLibrary, contact *FERCOnlineSupport@ferc.gov* or call toll-free at (866) 208–3372, or for TTY contact (202) 502–8659.

For further information regarding this notice, please contact CarLisa Linton at (202) 502–8416.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8–24490 Filed 10–15–08; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8730–2; Docket ID No. EPA–HQ–ORD–2008–00461]**

## Draft Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of the Summary Information in the Integrated Risk Information System (IRIS)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of peer-review meeting.

**SUMMARY:** EPA is announcing that the National Academy of Sciences (NAS) will convene an independent panel of experts and organize and conduct a review of the draft document titled, ''Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' (EPA/635/R–08/011A). The NAS is organizing, convening, and conducting this independent peer-review meeting. A public meeting of the NAS peer review panel will be held on November 13, 2008.

The draft document was prepared by the National Center for Environmental Assessment (NCEA) within EPA's Office of Research and Development and was released on June 26, 2008, (73 FR 36321) solely for the purpose of pre-dissemination peer review under applicable information quality guidelines. This document has not been formally disseminated by EPA. It does not represent and should not be construed to represent any Agency policy or determination.

The draft ''Toxicological Review of Tetrachloroethylene (Perchloroethylene): In Support of Summary Information on the Integrated Risk Information System (IRIS)'' is available on the Internet on NCEA's home page under a June 26, 2008, Recent Additions entry and the Data and Publications menus at *http://www.epa.gov/ncea.* Copies are not available from NAS.

In previous **Federal Register** notices concerning this draft document, EPA announced a 90-day public comment period that ended September 24, 2008, (73 FR 36321), as well as a public

listening session that was held on August 18 (73 FR 43932). Submitted public comments may be accessed at *http://www.regulations.gov* under Docket ID No. EPA–HQ–ORD–2008–0461. EPA intends to forward public comments submitted in accordance with the June 26, 2008, **Federal Register** notice to the NAS for consideration by the external peer review panel prior to the November 13, 2008, meeting. In finalizing the draft document, EPA will consider public comments and recommendations from the expert panel.

NAS invites the public to register to attend this peer review panel meeting as observers. In addition, NAS invites the public to give oral and/or provide written comments at the meeting regarding the draft document under review. Space is limited, and reservations will be accepted on a first-come, first-served basis. A time limit for presentations will be specified by the NAS based on the number of registrants.

**DATES:** The peer-review panel meeting will be held on November 13, 2008, beginning at 1 p.m. and ending at 4 p.m.

**ADDRESSES:** The peer-review panel meeting will be held at the NAS's Keck Center, 500 Fifth St., NW., Washington, DC 20001, in Room 201. For details about registering for and attending the meeting, please see the NAS's Web site at *http://www8.nationalacademies.org/cp/projectview.aspx?key=48697.*

**FOR FURTHER INFORMATION CONTACT:** Questions regarding information, registration, access or services for individuals with disabilities, or logistics for the external peer-review panel meeting should be directed to NAS. For further information, please see the NAS's Web site *http://www8.nationalacademies.org/cp/projectview.aspx?key=48697.* For technical information about the document, please contact the Information Management Team, NCEA; telephone: 703–347–8561; facsimile: 703–347–8691; e-mail *nceadc.comment@epa.gov.*

Dated: October 8, 2008.

**Peter Preuss,**

*Director, National Center for Environmental Assessment.*

[FR Doc. E8–24595 Filed 10–15–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–8729–8]**

## State Innovation Grant Program, Notice of Availability of Solicitation for Proposals for 2009 Awards

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The U.S. Environmental Protection Agency, National Center for Environmental Innovation (NCEI) is giving notice of the availability of its solicitation for proposals for the 2009 grant program to support innovation by state environmental regulatory agencies—the ''State Innovation Grant Program.''

The solicitation is available at the Agency's State Innovation Grant website: *http://www.epa.gov/innovation/stategrants/solicitation2009.pdf*, or may be requested from the Agency by e-mail to: *innovation_state_grants@epa.gov* , telephone, or by mail. State principal environmental agencies, as well as regional, county, or municipal agencies with delegated or re-delegated authority for federal environmental permitting programs are eligible to receive these grants. In each state, each agency with one or more primary delegations for federal environmental permitting programs from EPA, or a re-delegated authority from a state agency with one or more primary delegations from EPA may submit one pre-proposal under this solicitation, but may appear on multiple team pre-proposals.

Any agency with a re-delegated authority for a federal environmental permitting program from a state environmental agency must have that principal state environmental regulatory agency as an active member of the project team.

**DATES:** Eligible applicants will have until December 10, 2008 to respond with a pre-proposal, budget, and project summary. The environmental regulatory agencies from the fifty (50) States; Washington, DC, and four (4) territories were notified of the solicitation's availability by fax and email transmittals on October 9, 2008.

**ADDRESSES:** Copies of the solicitation can be downloaded from the Agency's Web site at: *http://www.epa.gov/innovation/stategrants* or may be requested by telephone (202–566–2186), or by e-mail (*innovation_state_grants@epa.gov*). You can request a solicitation application package be sent to you by fax or by mail by contacting NCEI as indicated below.

Applicants are requested to apply online using the grants.gov website with an electronic signature. Applicants are encouraged to submit their pre-proposals early. For those applicants who lack the technical capability to apply electronically via *http://www.grants.gov*, please contact Sherri Walker by phone at: (202) 566–2186 and / or by e-mail to: *innovation_state_grants@epa.gov* for alternative submission procedures. Proposals submitted in response to this solicitation, or questions concerning the solicitation should be sent to:

State Innovation Grant Program, National Center for Environmental Innovation, Office of the Administrator, U.S. Environmental Protection Agency (MC 1807T), 1200 Pennsylvania Ave., NW., Washington, DC 20460, (202) 566–2186, (202) 566–2220 FAX, *innovation_state_grants@epa.gov* .

*For courier delivery only:*

Sherri Walker, State Innovation Grant Program, U.S. EPA, EPA West Building, Room 4214D, 1301 Constitution Ave., NW., Washington, DC 20005.

Proposal responses or questions may also be sent by fax to (202–566–2220), addressed to the ''State Innovation Grant Program,'' or by e-mail to: *innovation_state_grants@epa.gov* . We encourage e-mail responses. If you have questions about responding to this notice, please contact EPA at this e-mail address or fax number, or you may call Sherri Walker at 202–566–2186. EPA will acknowledge all responses it receives to this notice.

**SUPPLEMENTARY INFORMATION:** The U.S. Environmental Protection Agency (EPA) is soliciting pre-proposals for an assistance agreement program (the ''State Innovation Grant Program'') in an effort to support innovation by State environmental regulatory agencies. In April 2002, EPA issued its plan for future innovation efforts, published as *Innovating for Better Environmental Result: A Strategy to Guide the Next Generation of Innovation at EPA (EPA 100–R–02–002; http://www.epa.gov/innovation/pdf/strategy.pdf*). This assistance agreement program strengthens EPA's partnership with the States by supporting state innovation compatible with EPA's *Innovation Strategy.* EPA wants to encourage states to build on previous experience (theirs and others) to undertake strategic innovation projects that promote larger-scale models for ''next generation'' environmental protection and promise better environmental outcomes and other beneficial results. EPA is interested in funding projects that: (i) Go beyond a single facility experiment

and provide change that is ''systems-oriented;'' (ii) provide better results from a program, process, or sector-wide innovation; and (iii) promote integrated (multi-media) environmental management with a high potential for transfer to other states, U.S. territories, and tribes.

''Innovation in permitting'' is the theme for the 2009 solicitation. Under this theme, EPA is interested in pre-proposals that:

- Support the development and implementation of state Environmental Results Programs (ERPs);
- Test various forms of permitting integration;
- Test ways to help facilities practicing lean manufacturing better address environmental permit requirements and other environmental and energy considerations; or
- Advance implementation of performance-based environmental leadership programs similar to the National Environmental Performance Track (PT) program, particularly including the development and implementation of incentives.

EPA continues to interpret ''innovation in permitting'' broadly to include permitting programs, pesticide licensing programs, and other alternatives or supplements to permitting programs. EPA is interested in creative approaches for both: (1) Achieving mandatory federal and state standards; and (2) encouraging performance and addressing environmental issues above and beyond minimum requirements. EPA's focus on a small number of topics within this general subject area effectively concentrates the limited resources available for greater strategic impact. EPA may contemplate a very limited number of projects not linked to these focus areas, but otherwise related to the general theme of innovation in permitting, in particular as they address EPA regional and state environmental permitting priorities.

This solicitation begins the seventh State Innovation Grant competition. To date, the program has supported projects primarily in three strategic focus areas: application of the Environmental Results Programs (ERP) model, the National Environmental Performance Track (PT) Program and similar state performance-based environmental leadership programs, and demonstrations of various types of permitting integration, including the integration of Environmental Management Systems (EMS) into permit requirements. Thirty-eight awards to States have been made from the six prior competitions (2002, 2004, 2005, 2006, 2007, 2008). These projects awarded nearly 7.5 million dollars in assistance to States. Some of the projects funded previously fit into more than one category (e.g., combination projects of ERP with EMS, or ERP with PT). Among the grant projects: eighteen (18) were provided for development of Environmental Results Programs, eight (8) were to enhance performance-based Environmental Leadership Programs, nine (9) were related to the application of environmental management systems in permitting or for ''beyond-compliance'' improvement, seven (7) were awarded for demonstrations of other permit integration or streamlining approaches including two (2) for watershed-based permitting, one (1) to support development of an integrated regional air quality management plan, one (1) to test permit integration across various governmental levels, and one (1) was for an information technology innovation for the application of geographic information systems (GIS) and a web-based portal to a permitting process. For information on prior State Innovation Grant Program solicitations and awards, please see the EPA State Innovation Grants Web site at *http://www.epa.gov/innovation/stategrants*.

Dated: October 8, 2008.

**Elizabeth Shaw,**

*Director, Office of Environmental Policy Innovation.*

[FR Doc. E8–24589 Filed 10–15–08; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

October 7, 2008.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 15, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission, or an e-mail to *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review'', (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

**FOR FURTHER INFORMATION CONTACT:** For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0329.

*Title:* Section 2.955, Equipment Authorization—Verification (Retention of Records).

*Form No.:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit; not-for-profit institutions, and state, local or tribal government.

*Number of Respondents:* 5,655 respondents; 5,655 responses.

*Estimated Time Per Response:* 18 hours.

*Frequency of Response:* On occasion and one-time reporting requirements, recordkeeping requirement and third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits.

*Total Annual Burden:* 101,790 hours.

*Total Annual Cost:* $1,131,000.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* Commission rules require equipment testing to determine performance and compliance with FCC rules and standards. This testing is typically done by independent testing laboratories whose measurement facility has been reviewed by the Commission, or by an accrediting organization recognized by the Commission. The Commission believes that the independent testing laboratories and accrediting organizations endeavor to protect any propriety, patents and/or trade secrets, related to RF equipment devices they test. The Commission, itself, may also provide a guarantee of confidentiality for information collected, if the request for confidentiality meets the requirements of 47 CFR 0.457(d) and a request for confidential treatment is submitted in accordance with 47 CFR 0.457.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in reporting, recordkeeping and/or third party disclosure requirements) and there is no change in the estimated annual hourly burden or the annual cost burden.

The Commission rules in 47 CFR parts 15 and 18 require manufacturers of radio frequency (RF) equipment devices to gather and retain technical data on their equipment to verify compliance with established technical standards for each device operated under the applicable rule part. Testing and verification aid in controlling potential harmful interference to radio communications. The information may be used to determine that the equipment marketed complies with the applicable Commission rules and that the operation of the equipment is consistent with the initially documented test results. The information collected and used is essential to controlling potential interference to radio communications.

*OMB Control Number:* 3060–1042.

*Title:* Request for Technical Support—Help Request Form.

*Form No.:* N/A—Electronic only.

*Type of Review:* Revision of a currently approved collection.

*Respondents:* Individuals or households, business or other for-profit; not-for-profit institutions, and state, local or tribal government.

*Number of Respondents:* 42,300 respondents; 42,300 responses.

*Estimated Time Per Response:* 8–10 minutes (.133 hours.)

*Frequency of Response:* On occasion reporting requirement and recordkeeping requirement.

*Obligation to Respond:* Voluntary. There is no statutory authority for this information collection. The Commission developed this information collection (IC) on its own motion to assist users of the Universal Licensing System (US) or other electronic FCC systems.

*Total Annual Burden:* 5,640 hours.

*Total Annual Cost:* $569,640.

*Privacy Act Impact Assessment:* Yes. The FCC has a system of records notice, FCC/WTB–7, ''Remedy Action Request System (RARS)'' to cover personally identifiable information effected by these information collection requirements. At this time, the FCC is required to complete a Privacy Act Impact Assessment.

*Nature and Extent of Confidentiality:* Submission of the electronic form is voluntary. In general there is no need for confidentiality. On a case-by-case basis, the Commission may be required to withhold from disclosure certain information about the location, character, or ownership of a historic property, including traditional religious sites.

*Needs and Uses:* The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting a revision; with an increase in the number of respondents/responses; burden hours and annual costs.

We are streamlining this collection to improve the quality of information provided by the respondents. The revised form uses a wizard design in which applicants select the type of inquiry they are submitting and then provide data relevant to that on-line system. The form is also being expanded to facilitate the collection of information regarding problems customers are having with the FCC Web site. This results in incomplete submissions and an additional burden is being placed on both the public customer and the FCC staff.

The FCC's Wireless Telecommunications Bureau (WTB) maintains Internet software used by the public to apply for licenses, participate in auctions for spectrum, and maintain license information. In this mission, FCC has created a ''help desk'' that answers questions/inquiries to these systems as well as resetting and/or issuing the Web site *https://esupport.fcc.gov/request.htm/* under this OMB control number (displayed above). This form will continue to substantially decrease public and FCC staff burden since all the information needed to a support request will be submitted in a standardized format but be available to a wider audience. This eliminates or at least minimizes the need to follow-up with public customers to obtain all the information necessary to respond to their request. This form also presorts requests into previously defined categories to appropriate FCC staff to respond in a timelier manner.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–24605 Filed 10–15–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

### Federal Advisory Committee Act; Advisory Committee on Diversity for Communications in the Digital Age

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the Federal Communications Commission's (FCC) Advisory Committee on Diversity for Communications in the Digital Age (''Diversity Committee'') will hold a meeting on October 28th, 2008, at 10:00 a.m. in the Commission Meeting Room of the Federal Communications Commission, Room TW–C305, 445 12th Street, SW., Washington, DC 20554. Reports from the subcommittees will be presented. Barbara Kreisman is the Diversity Committee's Designated Federal Officer.

**DATES:** October 28th, 2008.

**ADDRESSES:** Federal Communications Commission, Room TW–C305 (Commission Meeting Room), 445 12th Street, SW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Barbara Kreisman, Designated Federal Officer of the FCC's Diversity Committee (202) 418–1600 or e-mail: *Barbara.kreisman@fcc.gov*

**SUPPLEMENTARY INFORMATION:** At this meeting, the Diversity Committee will discuss and consider possible areas in which to develop recommendations that will further enhance the ability of minorities and women to participate in the telecommunications and related industries.

Members of the general public may attend the meeting. The FCC will attempt to accommodate as many people as possible. However, admittance will be limited to seating availability. The public may submit written comments before the meeting to: Barbara Kreisman, the FCC's Designated Federal Officer for the Diversity Committee by e-mail: *Barbara.Kreisman@fcc.gov* or U.S. Postal Service Mail (Barbara Kreisman, Federal Communications Commission, Room 2–A665, 445 12th Street, SW., Washington, DC 20554).

Open captioning will be provided for this event. Other reasonable accommodations for people with disabilities are available upon request. Requests for such accommodations should be submitted via e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty). Such requests should include a detailed description of the accommodation needed. In addition, please include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Additional information regarding the Diversity Committee can be found at *http://www.fcc.gov/DiversityFAC.*

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. E8–24483 Filed 10–15–08; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL MARITIME COMMISSION

### Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

*Agreement No.:* 011426–042.

*Title:* West Coast of South America Discussion Agreement.

*Parties:* APL Co. Pte Ltd.; Compania Chilena de Navigacion Interoceanica, S.A.; Compania Sud Americana de Vapores, S.A.; Frontier Liner Services, Inc.; Hamburg-Süd; King Ocean Services Limited, Inc.; Maruba S.C.A.; Seaboard Marine Ltd.; South Pacific Shipping Company, Ltd.; and Trinity Shipping Line.

*Filing Party:* Wayne R. Rohde, Esq., Sher & Blackwell LLP, 1850 M Street, NW., Suite 900, Washington, DC 20036.

*Synopsis:* The amendment removes Mediterranean Shipping Company SA as a party to the agreement.

Dated: October 10, 2008.

By Order of the Federal Maritime Commission.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. E8–24622 Filed 10–15–08; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR part 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicant:

American NAV International Inc., dba Amerussia Shipping Company, 51 Chestnut Street, Rutherford, NJ 07070, Officers: William J. Spanton, Vice President (Qualifying Individual), Richard Shannon, President.

Dated: October 10, 2008.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. E8–24621 Filed 10–15–08; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

### Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515.

| License No. | Name/address | Date reissued |
|---|---|---|
| 019460NF | USCA Forwarding—Seabell Express Inc., 50 Harrison Street, Ste. 309, Hoboken, NJ 07030. | July 10, 2008. |

**Sandra L. Kusumoto,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. E8–24620 Filed 10–15–08; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices

of the Board of Governors. Comments must be received not later than October 29, 2008.

**A. Federal Reserve Bank of San Francisco** (Kenneth Binning, Vice President, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

*1. Fife Commerical Bank 401K ESOP*, to acquire voting shares of Puget Sound Financial Services, Inc., and thereby indirectly acquire voting shares of Fife Commercial Bank, all of Fife, Washington.

Board of Governors of the Federal Reserve System, October 9, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–24528 Filed 10–15–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of September 16, 2008

In accordance with § 271.25 of its rules regarding availability of information (12 CFR part 271), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on September 16, 2008.[1]

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability and promote sustainable growth in output. To further its long–run objectives, the Committee in the immediate future seeks conditions in reserve markets consistent with maintaining the federal funds rate at an average of around 2 percent.

By order of the Federal Open Market Committee, October 7, 2008.

**Brian F. Madigan,**

*Secretary, Federal Open Market Committee.*

[FR Doc. E8–24603 Filed 10–15–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 10, 2008.

**A. Federal Reserve Bank of Kansas City** (Todd Offenbacker, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

*1. Foundation First Corporation*, Omaha, Nebraska, to become a bank holding company by acquiring 100 percent of the voting shares of Western State Bancshares, Inc., and thereby indirectly acquire voting shares of Western State Bank, both of Waterloo, Nebraska.

Board of Governors of the Federal Reserve System, October 9, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–24527 Filed 10–15–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 10, 2008.

**A. Federal Reserve Bank of Chicago** (Burl Thornton, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

*1. Hoosier Heartland State Bancorp*, Crawfordsville, Indiana, to become a bank holding company by acquiring 100 percent of the voting shares of Linden State Bancorp, and thereby indirectly acquire voting shares of Linden State Bank, both of Linden, Indiana, and New Ross Bancorp, and thereby indirectly acquire voting shares of Farmers State Bank, both of New Ross, Indiana.

Board of Governors of the Federal Reserve System, October 10, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–24575 Filed 10–15–08; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Government in the Sunshine Meeting Notice

**AGENCY HOLDING THE MEETING:** Board of Governors of the Federal Reserve System.

[1] Copies of the Minutes of the Federal Open Market Committee meeting on September 16, 2008, which includes the domestic policy directive issued at the meeting, are available upon request to the Board of Governors of the Federal Reserve System, Washington, D.C. 20551. The minutes are published in the Federal Reserve Bulletin and in the Board's annual report.

**FEDERAL REGISTER** Citation of Previous Announcement: FR 73, 58592 dated October 7, 2008.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** 11:30 a.m., Tuesday, October 14, 2008.

**CHANGES IN THE MEETING:** Meeting has been canceled.

**FOR MORE INFORMATION PLEASE CONTACT:** Michelle Smith, Director, or Dave Skidmore, Assistant to the Board, Office of Board Members at 202–452–2955.

**SUPPLEMENTARY INFORMATION:** You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: October 14, 2008.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. E8–24681 Filed 10–14–08; 4:15 pm]

**BILLING CODE 6210–01–P**

## FEDERAL TRADE COMMISSION

### Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title H of the Hart-Scott Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

| Trans No. | Acquiring | Acquired | Entities |
|---|---|---|---|
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/22/2008** | | | |
| 20081727 | Audax Private Equity Fund I11, LP | Andrews Holding, LLC | Andrews Holding, LLC. |
| 20081730 | Dufry AG | Newco | Hudson Group Holdings, Inc. |
| 20081731 | Newco | Dufry AG | Dufry AG. |
| 20081741 | Sterling Investment Partners II, L.P | Charles M. Simon | FCX USA, Inc. |
| 20081744 | The Gap, Inc | Blue Highways Holdings LLC | Athleta, Inc. |
| 20081745 | Audax Private Equity Fund III, L.P | Mobilex Acquisition Group, LLC | MX USA, Inc. |
| 20081751 | Clayton, Dubilier & Rice Fund VII, L.P | Bodycote Plc | Bodycote Materials Testing Inc. |
| 20081752 | Sumner M. Redstone | NextMedia Investors LLC | NextMedia Outdoor, Inc. |
| 20081753 | Infosys Technologies Limited | Axon Group plc | Axon Group plc. |
| 20081758 | American Industrial Partners Capital Fund IV, LP. | Morgenthaler Partners VIII, L.P | MAI Holdings, Inc. |
| 20081760 | Anixter International Inc. | James M. Lindenberg | World Class Wire and Cable, Inc. |
| 20081764 | MOD Holding Company, L.L.P | Miller Distributing of Fort Worth, Inc | Miller Distributing of Fort Worth, Inc. |
| 20081766 | J.H. Whitney VI, L.P | George and Julianne Arguros | I Products Corporation. |
| 20081768 | Vladimir Lisin | Theodore P. Angelopoulos | Beta Steel Corp. |
| 20081772 | Actuant Corporation | Cortec Group Fund III, L.P | The Cortland Companies, Inc. |
| 20081774 | DCP Midstream Partners, LP | Ganesh Energy, LLC | Michigan Pipeline & Processing, LLC. |
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/23/2008** | | | |
| 20081723 | The Odom Corporation | Francine Loeb | Alaska Distributors Co. |
| 20081726 | 3M Company | TSG4 L.P | Meguiar's, Inc.<br>Meguiar's International, Inc. |
| 20081769 | Prudential Financial Inc | Nationwide Mutual Insurance Company | Mullin TBG Insurance Agency Services, LLC.<br>TBG Insurance Services Corp. |
| 20081770 | Prudential Financial Inc | MC Insurance Agency Services Holdings, LLC. | MC Insurance Agency Services, LLC.<br>Mullin TBG Insurance Agency Services, LLC. |
| 20081775 | OCM Principal Opportunities Fund IV, L.P. | Nevada Chemicals, Inc. | Nevada Chemicals, Inc. |
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/24/2008** | | | |
| 20081771 | Magnesita Refratararios S.A | Rhone Partners III LP | Rearden G Holdings Eins GmbH. |
| 20081773 | TransDigm Group Incorporated | General Electric Company | Unison Industries, LLC. |
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/26/2008** | | | |
| 20081701 | Warburg Pincus Private Equity X, L.P | Green Dot Corporation | Green Dot Corporation. |
| 20081716 | NEC Corporation | NetCracker Technology Corporation | NetCracker Technology Corporation. |
| 20081725 | Tower Group, Inc | Partners Limited | HIG, Inc. |
| 20081755 | Precision Drilling Trust | Grey Wolf, Inc | Grey Wolf, Inc. |
| 20081767 | Harbinger Capital Partners Offshore Fund I, Ltd. | Dr. Rajendra Singh | TVCC One Six Holdings, LLC. |
| 20081777 | Superior Well Services, Inc | Wexford Partners 9, L.P | Diamondback—Completions LLC. |

| Trans No. | Acquiring | Acquired | Entities |
|---|---|---|---|
| | | | Diamondback—Disposal LLC.<br>Diamondback—Disposal Texas LLC.<br>Diamondback Holdings, LLC.<br>Diamondback—Pioneer LLC.<br>Diamondback—PST LLC.<br>Diamondback Pumping GP LLC.<br>Diamondback Pumping Service LLC.<br>Diamondback—TD West LLC.<br>Diamondback—Total Oklahoma LLC.<br>Diamondback—Total Pumping GP LLC.<br>Diamondback—Total Services LLC.<br>Diamondback—Total Texas LLC.<br>Packers & Service Tools, Inc.<br>Sooner Trucking & Oilfield Services, Inc.<br>TD West LLC.<br>Wexford Partners 9, L.P. |
| 20081778 ..... | Tower Group, Inc ..... | CastlePoint Holdings, Ltd ..... | CastlePoint Holdings, Ltd. |
| 20081779 ..... | Onex Partners II LP ..... | Ronald M. Simon ..... | RSI Home Products, Inc. |
| 20081784 ..... | Unitrin, Inc ..... | Direct Response Corporation ..... | Direct Response Corporation. |
| 20081785 ..... | Voting Share Irrevocable Trust Dated May 31, 1989. | David W. Tice ..... | David W. Tice & Asssociates, LLC. |
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/29/2008** | | | |
| 20081724 ..... | Halliburton Company ..... | Carbo Ceramics Inc ..... | Pinnacle Technologies. |
| **TRANSACTIONS GRANTED EARLY TERMINATION—09/30/2008** | | | |
| 20081801 ..... | Best Buy Co., Inc ..... | Napster, Inc ..... | Napster, Inc. |

*For Further Information Contact:* Sandra M. Peay, Contact Representative or Renee Hallman, Contact Representative. Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. E8–24222 Filed 10–15–08; 8:45 am]

**BILLING CODE 6750–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60-Day–08–09AA]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS-D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

BioSense Recruitment Survey for Data Collection—New—National Center for Public Health Informatics (NCPHI), *Coordinating Center for Health Information and Service (CCHIS),* Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Congress passed the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, which requires specific activities related to bioterrorism preparedness and response. This congressional mandate outlines the need for improving the overall public's health through electronic surveillance. The Department of Health and Human Services outlined strategies aimed at achieving this goal via the Public Health IT Initiative thereby creating the BioSense program.

BioSense is the national, human health surveillance system designed to improve the nation's capabilities for disease detection, monitoring, and real-time health situational awareness. This work is enhanced by providing public health real-time access to existing data from healthcare organizations, state syndromic surveillance systems, national laboratories, and others for just in time public health decision-making. BioSense data are analyzed and made accessible through the BioSense application. The application provides data, charts, graphs, and maps through a secure Web-based interface which can be accessed by CDC and authorized state and local public health and hospital users.

In order to meet the congressional mandate, the BioSense program must recruit prospective data sources and collect certain information from each. This includes information on the types of data available, the types of computer systems used, and the approximate record volume. This information is used by BioSense personnel and contractors to design hardware and software to

connect the potential data source. To collect this information, a series of questionnaires in an Excel spreadsheet have been designed. Data collection will take place during and after on-site visits by BioSense personnel and contractors. We estimate that such data will be collected from 20 new entities (each representing many facilities or clinics) each year.

A second requirement is that electronic data records be transmitted to the BioSense system. Currently, data are transmitted from 35 entities, including 8 state or local health departments and 22 hospitals/hospital groups (which collectively transmit data from 460 hospitals); the Department of Veterans Affairs (which transmits data from 820 facilities), the Department of Defense (which transmits data from 320 facilities), 2 national laboratories, and one pharmacy claims system (which transmits data from >30,000 pharmacies). The data may include foundational data (e.g., demographics, chief complaint, diagnosis), laboratory data, pharmacy data, radiology data, or detailed emergency department data (e.g., vital signs, triage notes, medications). All are submitted via electronic record transmission, generally using a software program called PHIN-MS. A large number of electronic records are transmitted from each entity each year; however, once the automated interfaces are set up for transmission, there is no human burden for record transmission.

There are no costs to prospective data sources other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Instrument type | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| Recruitment of perspective data source entities | 20 | 1 | 4/60 | 1.5 |
| Total | | | | 1.5 |

Dated: October 7, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–24558 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–09–08BS]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Testing and Development of Materials Promoting Prevention and Control of Traumatic Brain Injury in Schools—New—, Division of Injury Response (DIR), National Center for Injury Prevention and Control (NCIPC), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Each year, an estimated 1.4 million Americans sustain a traumatic brain injury (TBI). A TBI is caused by a bump, blow, or jolt to the head or a penetrating head injury that disrupts the normal function of the brain.

Children ages 0 to 4 years and adolescents ages 15–19 are at the greatest risk of sustaining a TBI, as they often sustain TBIs from a host of mechanisms including falls (down stairs or from heights such as counter tops or beds), direct impacts (e.g. getting hit in the head with a ball), and motor vehicle crashes.

In order to address this important public health problem among young children and adolescents, CDC plans to conduct a national TBI educational initiative aimed at school nurses, school counselors, school psychologists, and school administrators. As part of the initiative, CDC will develop educational materials and messages for these audiences, as well as tools for partners, to help improve the prevention, recognition, and management of TBI among school-aged children and adolescents.

School nurses, school counselors, school psychologists, and school administrators are important audiences for this initiative, as they are well positioned to address short- and long-term issues related to TBI. These audiences play an important role in addressing the needs of students and working collaboratively with educators and parents. School nurses need current, reliable, and easy to use materials about TBI, to keep them up-to-date on the issue and assist them in educating and caring for students who come to them with a suspected TBI. Nurses, counselors and administrators can promote prevention of TBI in the school setting and inform educators and parents about TBI prevention and recognition in the classroom, on the playground and on the field. They can also work with schools to institute TBI specific back-to-school and return-to-play plans.

As part of this research, school nurses, counselors, psychologists, and administrators will participate in professionally moderated individual in-depth interviews. Information will be collected concerning respondents' knowledge, attitudes, and beliefs about traumatic brain injury and where and how they get health information.

The goal of these interviews with school professionals is to understand needs of school professionals (including school nurses, school counselors, school psychologists, and school administrators) for materials or tools related to TBI. The materials will provide guidance on how to prevent and recognize TBI in students. The content discussed in these interviews will be used to refine materials and develop future materials. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondents | Form name | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden (in hours) |
|---|---|---|---|---|---|
| School nurses, counselors, psychologists, and administrators. | Screening and Recruitment ..... | 96 | 1 | 10/60 | 16 |
| | Interview Guide: Model Programs. | 45 | 1 | 1 | 45 |
| Total ..... | ..... | ..... | ..... | ..... | 61 |

Dated: October 1, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–24559 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–09–0314]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed project or to obtain a copy of data collection plans and instruments, call the CDC Reports Clearance Officer on 404–639–5960 or send comments to CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

The National Survey of Family Growth (NSFG)–(0920–0314)—Revision—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

*Background and Brief Description*

Section 306 of the Public Health Service (PHS) Act (42 U.S.C. 242k), as amended, authorizes that the Secretary of Health and Human Services (DHHS), acting through NCHS, shall collect statistics on ''family formation, growth, and dissolution,'' as well as ''determinants of health'' and ''utilization of health care'' in the United States. This three-year clearance request includes the data collection in 2010–2012 for the continuous NSFG.

The National Survey of Family Growth (NSFG) was conducted periodically between 1973 and 2002, and continuously since 2006, by the National Center for Health Statistics, CDC. Each year, about 14,000 households are screened, with about 5,000 participants interviewed annually. Participation in the NSFG is completely voluntary and confidential. Interviews average 60 minutes for males and 80 minutes for females. The response rate since 2006 is about 75 percent for both males and females.

The NSFG programs produces descriptive statistics which measure factors associated with birth and pregnancy rates, including contraception, infertility, marriage, divorce, and sexual activity, in the U.S. population 15–44; and on behaviors that affect the risk of sexually transmitted diseases (STD), including HIV, and the medical care associated with contraception, infertility, and pregnancy and childbirth.

NSFG data users include the DHHS programs that fund it, including CDC/NCHS and seven others (The Eunice Kennedy Shriver National Institute for Child Health and Human Development (NIH/NICHD); the Office of Population Affairs (DHHS/OPA); the Office of the Assistant Secretary for Planning and Evaluation (DHHS/OASPE); the Children's Bureau (DHHS/ACF/CB); the CDC's Division of HIV/AIDS Prevention (CDC/DHAP); the CDC's Division of STD Prevention (CDC/DSTD); and the CDC's Division of Reproductive Health (CDC/DRH). The NSFG is also used by state and local governments; private research and action organizations focused on men's and women's health, child well-being, and marriage and the family; academic researchers in the social and public health sciences; journalists, and many others.

This submission requests approval for three years. No questionnaire changes are requested in the first 18 months of this clearance (July 2009–December 2010); some limited changes may be requested after that, to be responsive to emerging public policy issues.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Number of respondents | Number of responses per respondent | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|
| 1. Screener Respondents | 14,000 | 1 | 3/60 | 700 |
| 2. Interview respondents | 5,000 | 1 | 1.2 | 6,000 |
| Total | | | | 6,700 |

Dated: October 3, 2008.

**Maryam I. Daneshvar,**

*Acting Reports Clearance Officer, Office of the Chief Science Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–24561 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60 Day-08–0134]**

### Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov.*

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of information technology. Written comments should be received within 60 days of this notice.

**Proposed Project**

Foreign Quarantine Regulations (42 CFR part 71) (OMB Control No. 0920–0134)—Revision—National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), Centers for Disease Control and Prevention (CDC)

*Background and Brief Description*

Section 361 of the Public Health Service Act (42 U.S.C. 264) authorizes the Secretary of Health and Human Services (HHS) to make and enforce regulations necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States. Legislation and the existing regulations governing foreign quarantine activities (42 CFR part 71) authorize quarantine officers and other personnel to inspect and undertake control measures with respect to conveyances, persons, and shipments of animals and etiologic agents entering the United States from foreign ports in order to protect the public health.

Under foreign quarantine regulations, the master of a ship or commander of an airplane entering the United States from a foreign port is required by public health law to report certain illnesses among passengers (42 CFR 71.21(b)). CDC recently reviewed 42 CFR part 71 and determined that five data collection requirements and one recordkeeping requirement had not been included in previous information collection request submissions. Thus, in this request to OMB, CDC is requesting approval for an additional 2,902 burden hours.

The first additional data collection requirement is the designation of yellow fever vaccination clinics. Under 42 CFR 71.3, the Director of CDC delegates to states the responsibility for designation of yellow fever vaccination clinics to states and territories. States and territories then designate the clinics, based on application by the facilities and presentation of evidence. Under the regulation, facilities must provide evidence of adequate facilities and professionally trained personnel for handling, storage, and administration of the vaccine. The designated center must also comply with any instruction issued by the CDC Director for handling, storage, and administration of the vaccine. CDC estimates that approximately 500 professional staff are added each year as a registered stamp holder for the International Certificate of Vaccination or Prophylaxis. The estimated time to gather records and apply to become a stamp holder is one hour. The additional burden for this provision is 500 hours.

The second additional data collection requirement is found in 42 CFR 71.55(c). This provision requires that the remains of a person who died of a communicable disease listed in § 71.32(b) may not be brought back into a U.S. port unless the body is (a) Properly embalmed and placed in a hermetically sealed casket, (b) cremated, or (c) accompanied by a permit issued by the Director of CDC. CDC has determined that the issuance of a permit implies a data collection requirement. CDC estimates a maximum of 5 respondents annually with an average burden of one hour per respondent, for an increase of 5 hours for this provision.

The last three data collection requirements are found under § 71.56. CDC established this section by Interim Final Rule in 2003 (68 FR 62353). This section prohibits the importation of African rodents, or any rodents whose native habitat is Africa, or any products derived from such rodents. Those wishing to import such animals or products may apply to the Director of CDC for an exemption to this prohibition and may appeal the Director's decision. Finally, an individual or company may appeal a CDC order causing an animal to be quarantined, re-exported or destroyed. These data collection requirements were originally approved by OMB under OMB Control No. 0920–0615. This approval expired July 31, 2004. Although CDC collected data from less than 9 respondents annually since the Interim Final Rule went into effect, CDC wishes to reinstate the data collection requirement following recent review of 42 CFR 71. This reinstatement is for 22 burden hours.

Finally, § 71.21(c) requires reporting of the number of cases (including zero) of gastrointestinal illness in passengers and crew recorded in the ship's medical log during the current cruise. CDC had already included the reporting

requirement in its information collection request, but had not included the recordkeeping requirement of the medical log. In addition, CDC is changing the requirement from reporting gastrointestinal illness to reporting all diseases of public health significance. This submission includes the medical log recordkeeping requirement, for an additional 2,375 burden hours.

Respondents include airline pilots, ships' captains, importers, medical professionals, and travelers. The nature of the quarantine response dictates which forms are completed by whom.

There are no costs to respondents except their time to complete the forms.

ESTIMATE OF ANNUALIZED BURDEN HOURS

| Citation | Number of respondents | Responses per respondent | Average burden per respondent (in hours) | Total burden (in hours) |
|---|---|---|---|---|
| 71.21 Radio report death/illness | 9,500 | 1 | 2/60 | 317 |
| 71.21(c) Medical log | 9,500 | 1 | 15/60 | 2,375 |
| 71.3 Designation of yellow fever vaccination centers | 500 | 1 | 1 | 500 |
| 71.33(c) Report by person(s) in isolation or surveillance | 11 | 1 | 3/60 | 1 |
| 71.35 Report of death/illness in port | 5 | 1 | 30/60 | 3 |
| Outbreak of public health significance | 2,700,000 | 1 | 5/60 | 225,000 |
| Reporting of ill passenger(s) | 800 | 1 | 5/60 | 67 |
| 71.51(b)(3) Admission of cats/dogs; death/illness | 5 | 1 | 3/60 | 1 |
| 71.51(d) Dogs/cats; certification of confinement, vaccination | 1,200 | 1 | 15/60 | 300 |
| 71.52(d) Turtle importation permits | 10 | 1 | 30/60 | 5 |
| 71.53(d) Importer registration—nonhuman primates | 40 | 1 | 10/60 | 67 |
| 71.53(d) Recordkeeping | 30 | 4 | 30/60 | 60 |
| 71.55 Permit for dead body | 5 | 1 | 1 | 5 |
| 71.56(a)(ii) Request for exemption | 12 | 1 | 1 | 12 |
| 71.56(a)(iii) Appeal | 5 | 1 | 1 | 5 |
| 71.56(c) Appeal | 5 | 1 | 1 | 5 |
| Total | | | | 228,723 |

Dated: October 1, 2008.

**Maryam I. Daneshvar,**

*Reports Clearance Officer, Centers for Disease Control and Prevention.*

[FR Doc. E8–24568 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Healthcare Infection Control Practices Advisory Committee, (HICPAC)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting for the aforementioned committee:

*Times and Dates:*

9 a.m.–5 p.m., November 13, 2008.
9 a.m.–1 p.m., November 14, 2008.

*Place:* The Washington Marriott, 1221 22nd Street, NW., Washington, DC 20037.

*Status:* Open to the public, limited only by the space available.

*Purpose:* The Committee is charged with providing advice and guidance to the Secretary, the Assistant Secretary for Health, the Director, CDC, and the Director, National Center for Preparedness, Detection, and Control of Infectious Diseases (NCPDCID), regarding (1) The practice of hospital infection control; (2) Strategies for surveillance, prevention, and control of infections (e.g., nosocomial infections), antimicrobial resistance, and related events in settings where healthcare is provided; and (3) Periodic updating of guidelines and other policy statements regarding prevention of healthcare-associated infections and healthcare-related conditions.

*Matters To Be Discussed:* The agenda will include a follow-up discussion of Health and Human Services Healthcare-Associated Infections Elimination Process, Urinary Tract Infections Guideline, and Norovirus Guideline.

Agenda items are subject to change as priorities dictate.

*Contact Person for More Information:* Wendy Vance, HICPAC, Division of Healthcare Quality Promotion, NCPDCID, CDC, l600 Clifton Road, NE., Mailstop D–10, Atlanta, Georgia 30333 Telephone (404) 639–2891.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: October 7, 2008.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention (CDC).*

[FR Doc. E8–24563 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Center for Injury Prevention and Control/ Initial Review Group, (NCIPC/IRG)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned review group:

*Times and Dates:*

7 p.m.–8 p.m., November 18, 2008 (Open).
7:45 a.m.–5 p.m., November 19, 2008 (Closed).
7:45 a.m.–5 p.m., November 20, 2008 (Closed).
7:45 a.m.–5 p.m., November 21, 2008 (Closed).

*Place:* The W Hotel, 3377 Peachtree Road, NE., Atlanta, Georgia 30326, Telephone: (678) 500–3181.

*Status:* Portions of the meetings will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Section 10(d) of Public Law 92–463.

*Purpose:* This group is charged with providing advice and guidance to the Secretary, Department of Health and Human Services, and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received

from academic institutions and other public and private profit and nonprofit organizations, including state and local government agencies, to conduct research on Injury Control and Prevention.

*Matters to be Discussed:* The meeting will include the review, discussion, and evaluation of Injury Control Research Center applications submitted in response to Fiscal Year 2008 Requests for Applications related to the following individual research announcement: CE09–001. This Announcement solicits applications from new or existing injury centers to conduct injury and violence prevention research, build the scientific base for the prevention and control of injuries and violence, integrate professionals from a wide spectrum of disciplines to perform injury and violence prevention research, and encourage research that involves intervention development and testing and intervention adoption and maintenance methods. Agenda items are subject to change as priorities dictate.

*Contact Person for More Information:* J. Felix Rogers, Ph.D., M.P.H., NCIPC, CDC, 4770 Buford Highway, NE., Mailstop F62, Atlanta, Georgia 30341, Telephone: (770) 488–4334–3724.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: October 7, 2008.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. E8–24564 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### National Center for Injury Prevention and Control/ Initial Review Group, (NCIPC/IRG)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting of the aforementioned review group:

*Times and Dates:*
7 p.m.–8 p.m., December 2, 2008 (Open).
7:45 a.m.–5 p.m., December 3, 2008 (Closed).
7:45 a.m.–5 p.m., December 4, 2008 (Closed).
7:45 a.m.–5 p.m., December 5, 2008 (Closed).

*Place:* The W Hotel, 3377 Peachtree Road, NE., Atlanta, Georgia 30326, Telephone: (678) 500–3181.

*Status:* Portions of the meetings will be closed to the public in accordance with provisions set forth in Section 552b(c)(4) and (6), Title 5, U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Section 10(d) of Public Law 92–463.

*Purpose:* This group is charged with providing advice and guidance to the Secretary, Department of Health and Human Services, and the Director, CDC, concerning the scientific and technical merit of grant and cooperative agreement applications received from academic institutions and other public and private profit and nonprofit organizations, including state and local government agencies, to conduct research on Injury Control and Prevention

*Matters To Be Discussed:* The meeting will include the review, discussion, and evaluation of Injury Control Research Center applications submitted in response to Fiscal Year 2008 Requests for Applications related to the following individual research announcement: CE09–001. This Announcement solicits applications from new or existing injury centers to conduct injury and violence prevention research, build the scientific base for the prevention and control of injuries and violence, integrate professionals from a wide spectrum of disciplines to perform injury and violence prevention research, and encourage research that involves intervention development and testing and intervention adoption and maintenance methods.

Agenda items are subject to change as priorities dictate.

*Contact Person for More Information:* J. Felix Rogers, PhD, M.P.H., NCIPC, CDC, 4770 Buford Highway, NE., Mailstop F62, Atlanta, Georgia 30341, Telephone: (770) 488–4334.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: October 7, 2008.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.*

[FR Doc. E8–24565 Filed 10–15–08; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Cardiovascular Epidemiology Members.

*Date:* October 31, 2008.

*Time:* 2:30 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Ann Hardy, DRPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, (301) 435–0695, *hardyan@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Hypersensitivity, Autoimmune, and Immune-Mediated Diseases Member Conflicts.

*Date:* November 6, 2008.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Samuel C. Edwards, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4200, MSC 7812, Bethesda, MD 20892, (301) 435–1152, *edwardss@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Member Conflict: Aging, Development and Bioengineering.

*Date:* November 6, 2008.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Sherry L. Dupere, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5136, MSC 7843, Bethesda, MD 20892, (301) 435–1021, *duperes@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; EPIC Member Conflict Panel II.

*Date:* November 7, 2008.

*Time:* 1 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Scott Osborne, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4114,

MSC 7816, Bethesda, MD 20892, (301) 435–1782, *osbornes@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Neurotechnology-2.

*Date:* November 7, 2008.

*Time:* 12 p.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Robert C. Elliott, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, (301) 435–3009, *elliotro@csr.nih.gov.*

*Name of Committee:* AIDS and Related Research Integrated Review Group; AIDS-associated Opportunistic Infections and Cancer Study Section.

*Date:* November 10, 2008.

*Time:* 8 a.m. to 6:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hotel Palomar, 2121 P Street, NW., Washington, DC 20037.

*Contact Person:* Eduardo A. Montalvo, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Dietary and Physical Activity Assessment Methods.

*Date:* November 12–13, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ann Hardy, DRPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, (301) 435–0695, *hardyan@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; BDCN Member Conflict.

*Date:* November 12–13, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Pat Manos, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5200, MSC 7846, Bethesda, MD 20892, (301) 435–1785, *manospa@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Infectious Diseases Microbiology Fellowships.

*Date:* November 13, 2008.

*Time:* 8:30 a.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Intercontinental Harbor Court Baltimore, 550 Light Street, Baltimore, MD 21202.

*Contact Person:* Alexander D. Politis, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3210, MSC 7808, Bethesda, MD 20892, (301) 435–1150, *politisa@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Epidemiology and Genetics of Cancer.

*Date:* November 13, 2008.

*Time:* 1 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Fungai F. Chanetsa, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3135, MSC 7770, Bethesda, MD 20892, (301) 435–1262, chanetsaf@csr.nih.gov.

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Diversity Fellowships.

*Date:* November 17, 2008.

*Time:* 11 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* John Firrell, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, MSC 7854, Bethesda, MD 20892, (301) 435–2598, *firrellj@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Fellowships: Technology Development.

*Date:* November 18–19, 2008.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Alexander Gubin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4196, MSC 7812, Bethesda, MD 20892, (301) 435–2902, *gubina@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Mass Spectrometry.

*Date:* November 19–20, 2008.

*Time:* 8 a.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person:* Nitsa Rosenzweig, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Cellular Adaptations to Extreme Environmental Conditions.

*Date:* November 19–20, 2008.

*Time:* 8:30 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Anshumali Chaudhari, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210, *chaudhaa@csr.nih.gov.*

*Name of Committee:* AIDS and Related Research Integrated Review Group; AIDS Immunology and Pathogenesis Study Section.

*Date:* November 20, 2008.

*Time:* 8:00 a.m. to 6:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* The Westin St. Francis, 335 Powell St, San Francisco, CA 94102.

*Contact Person:* Shiv A. Prasad, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, (301) 443–5779, *prasads@csr.nih.gov.*

*Name of Committee:* AIDS and Related Research Integrated Review Group; NeuroAIDS and other End-Organ Diseases Study Section.

*Date:* November 24, 2008.

*Time:* 8 a.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Doubletree Guest Suites, 1707 Fourth Street, Santa Monica, CA 90401.

*Contact Person:* Ranga V. Srinivas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, (301) 435–1167, *srinivar@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Nephrology and Urology Applications.

*Date:* November 24–25, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Ryan G. Morris, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4205, MSC 7814, Bethesda, MD 20892, (301) 435–1501, *morrisr@csr.nih.gov.*

*Name of Committee:* Center for Scientific Review Special Emphasis Panel; Molecular, Cellular and Developmental Neurobiological Small Business Applications.

*Date:* November 24, 2008.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.

*Contact Person:* Eugene Carstea, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5199, MSC 7846, Bethesda, MD 20892, (301) 435–0634

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24437 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Children's Study Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

*Name of Committee:* National Children's Study Advisory Committee.

*Date:* November 5–6, 2008.

*Time:* November 5, 2008, 8:30 a.m. to 5 p.m.

*Agenda:* The agenda will include an update on the current status of the Study, including lessons learned, plans for implementation, and other topics of interest.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Time:* November 6, 2008, 9 a.m. to 4 p.m.

*Agenda:* This meeting is open to the public; however, registration is required since space is limited. Please visit the conference Web site for information on meeting logistics and to register for the meeting *http://www.circlesolutions.com/ncs/ncsaclindex.cfm.* For additional information about the NCSAC meeting please contact Circle Solutions at *ncs@circlesolutions.com.*

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Jessica Sapienza, Adjunct Study Program Analyst, National Children's Study, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 3a01, Bethesda, MD 20892, (703) 902–1339, *ncs@circlesolutions.com.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 6, 2009.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24218 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Cancer Institute Clinical Trials Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

*Name of Committee:* National Cancer Institute Clinical Trials Advisory Committee.

*Date:* December 8, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* Update on the Progress of the Implementation of the Clinical Trials Working Group and the Translational Research Working Group Reports.

*Place:* National Institutes of Health, Building 31, 31 Center Drive, 6th Floor, Room 10, Bethesda, MD 20892.

*Contact Person:* Sheila A. Prindiville, MD, Director, Coordinating Center for Clinical Trials, Office of the Director, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Suite 7043, Bethesda, MD 20892, 301–451–5048, *prindivs@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24612 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Research Resources; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Center for Research Resources Special Emphasis Panel, Carbohydrate Conference Applications.

*Date:* November 10, 2008.

*Time:* 12 p.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael L. Bloom, PhD, Scientic Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1090, Bethesda, MD 20892, 301–435–0965, *bloomm2@mail.nih.gov.*

*Name of Committee:* National Center for Research Resources Special Emphasis Panel, NHP and Murine Resource Conference Applications.

*Date:* November 18, 2008.

*Time:* 9 p.m. to 11 a.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael L. Bloom, Ph.D., Scientic Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1090, Bethesda, MD 20892, 301–435–0965, *bloomm2@mail.nih.gov.*

*Name of Committee:* National Center for Research Resources Special Emphasis Panel, Clinical and Educational Conference Grants.

*Date:* November 18, 2008.

*Time:* 12 p.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Michael L. Bloom, Ph.D., Scientic Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1090, Bethesda, MD 20892, 301–435–0965, *bloomm2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24619 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Research Program Project in Cardiovascular Disease.

*Date:* November 3, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* YingYing Li-Smerin, MD, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov.*

*Name of Committee:* National Heart, Lung, and Blood Institute Special Emphasis Panel; Research Program Project in Respiratory Muscle Failure.

*Date:* November 5, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

*Contact Person:* YingYing Li-Smerin, MD, PhD, Scientific Review Officer, Review Branch/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24439 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* Arthritis and Musculoskeletal and Skin Diseases Special Grants Review Committee.

*Date:* October 16–17, 2008.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

*Contact Person:* Helen Lin, PHD, Scientific Review Administrator, NIH/NIAMS/RB, 6701 Democracy Blvd., Suite 800, Plaza One, Bethesda, MD 20817, 301–594–4952, *linh1@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: October 3, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24219 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; Minority Biomedical Research Support.

*Date:* November 5, 2008.

*Time:* 1 p.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, Room 3AN18, 45 Center Drive, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Brian R Pike, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, 301–594–3907, *pikbr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: October 6, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24220 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Mentored Career Development, Institutional Research Training and Pathways to Independence Applications.

*Date:* October 24, 2008.

*Time:* 3 p.m. to 5:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892 (Telephone Conference Call).

*Contact Person:* Kan Ma, PhD, Scientific Review Administrator, NIH/NIAMS, EP Review Branch, One Democracy Plaza Suite 800, Bethesda, MD 20892–4872, 301–594–4952, *mak2@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: October 3, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24221 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; B/START Review.

*Date:* October 24, 2008.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

*Contact Person:* Mark Swieter, PhD, Chief, Training and Special Projects Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6101 Executive Boulevard, Suite 220, Bethesda, MD 20892–8401, (301) 435–1389, *ms8ox@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24444 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 USC. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; NIDA–K Conflicts SEP.

*Date:* November 5, 2008.

*Time:* 5 p.m. to 6 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Melrose Hotel, 2430 Pennsylvania Ave., NW., Washington, DC 20037.

*Contact Person:* Kristen V. Huntley, PhD. Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–435–1433, *huntleyk@mail.nih.gov.*

*Name of Committee:* National Institute on Drug Abuse Special Emphasis Panel; Conference Grant Application Review.

*Date:* December 5, 2008.

*Time:* 1 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6101 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

*Contact Person:* Mark R. Green, PhD, Deputy Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 435–1431, *mgreen1@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24446 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; Skin Diseases Research Core Centers (P30).

*Date:* November 20–21, 2008.

*Time:* 7 am to 5 pm.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

*Contact Person:* Kan Ma, PHD, Scientific Review Officer, NIH/NIAMS, EP Review Branch, One Democracy Plaza Suite 800, Bethesda, MD 20892–4872, 301–594–4952, *mak2@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: October 8, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–24611 Filed 10–15–08; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### National Communications System

**[Docket No. DHS–2008–0098]**

### President's National Security Telecommunications Advisory Committee

**AGENCY:** National Communications System, DHS.

**ACTION:** Notice of partially closed advisory committee meeting.

**SUMMARY:** The President's National Security Telecommunications Advisory Committee (NSTAC) will be meeting by teleconference; the meeting will be partially closed to the public.

**DATES:** November 6, 2008, from 2 p.m. until 3 p.m.

**ADDRESSES:** The meeting will take place by teleconference. For access to the conference bridge and meeting materials, contact Ms. Sue Daage at (703) 235–5526 or by e-mail at *sue.daage@dhs.gov* by 5 p.m. October 27, 2008. If you desire to submit comments regarding the November 6, 2008 meeting they must be submitted by November 13, 2008. Comments must be identified by DHS–2008–0098 and may be submitted by *one* of the following methods: (1) *Federal eRulemaking Portal: http://www.regulations.gov;* (2) *E-mail: NSTAC1@dhs.gov* (Include docket number in the subject line of the message); (3) *Fax:* 1–866–466–5370; or (4) *Mail:* Office of the Manager, National Communications System (Customer Service Branch), Department of Homeland Security, Washington, DC 20529.

*Instructions:* All submissions received must include the words ''Department of Homeland Security'' and DHS–2008–0098, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov*, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received by the NSTAC, go to *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Ms. Kiesha Gebreyes, Deputy Chief, Customer Service Branch at (703) 235–5525, e-mail: *Kiesha.Gebreyes@dhs.gov* or write the Deputy Manager, National Communications System, Department of Homeland Security, CS&C/NCS/CSB, 245 Murray Lane, SW., Building 410, Washington, DC 20528.

**SUPPLEMENTARY INFORMATION:** NSTAC advises the President on issues and problems related to implementing national security and emergency preparedness telecommunications policy. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), Public Law 92–463 (1972), as amended appearing in 5 U.S.C. App.1 *et seq*. (1997).

At the upcoming meeting, between 2 p.m. and 2:30 p.m., the conference call will include government stakeholder feedback on NSTAC initiatives, an update on NSTAC outreach activities, and a discussion and vote on the national security/emergency preparedness internet protocol-based traffic report. This portion of the meeting will be open to the public.

Between 2:30 p.m. and 3 p.m., the NSTAC will discuss core network assurance, cyber collaboration and internet identity. This portion of the meeting will be closed to the public.

Persons with disabilities who require special assistance should indicate this when arranging access to the teleconference and are encouraged to identify anticipated special needs as early as possible.

*Basis for Closure:* During the portion of the meeting to be held from 2:30 p.m. to 3 p.m., the NSTAC will discuss core assurance and physical security of the cyber network, cybersecurity collaboration between the Federal Government and the private sector, and identity management. Such discussions will likely include internal agency personnel rules and practices, specifically, identification of vulnerabilities in the Federal Government's cyber network, along with strategies for mitigating those vulnerabilities and other sensitive law enforcement or homeland security information of a predominantly internal nature which, if disclosed, would significantly risk circumvention of DHS regulations or statutes. NSTAC members will likely inform the discussion by contributing confidential and voluntarily-provided commercial information relating to private sector network vulnerabilities that they would not customarily release to the public. Disclosure of this information can be reasonably expected to frustrate DHS's ongoing cybersecurity programs and initiatives and could be used to exploit vulnerabilities in the Federal Government's cyber network. Accordingly, the relevant portion of this meeting will be closed to the public pursuant to 5 U.S.C. 552b(c)(2), (4) and (9)(B).

**James Madon,**

*Director, National Communications System.*

[FR Doc. E8–24613 Filed 10–15–08; 8:45 am]

**BILLING CODE 4410–10–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R2–ES–2008–N0225; 20124–1112–0000–F2]**

### Regional Habitat Conservation Plan, Comal County, TX

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

**ACTION:** Notice of intent to prepare an environmental impact statement;

announcement of public scoping meeting; request for public comment.

**SUMMARY:** Under the National Environmental Policy Act (NEPA) and its implementing regulations, we, the Fish and Wildlife Service (Service), advise the public that we intend to prepare an environmental impact statement to evaluate the impacts of, and alternatives to, the issuance of an incidental take permit (ITP), under section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act), to Comal County, Texas. Comal County proposes to apply for an ITP, through development and implementation of a Regional Habitat Conservation Plan (RHCP), as required by the Act. The RHCP will provide measures to minimize and mitigate for the impacts of the proposed taking of federally listed species (covered species) and the habitats upon which they depend.

**DATES:** To ensure consideration, we must receive written comments on or before close of business (4:30 p.m. CST) December 15, 2008. We will also accept oral and written comments at a public hearing on December 4, 2008, from 6 p.m. to 8 p.m. at the Comal County Commissioners Court, 199 Main Plaza, New Braunfels, TX 78130.

**ADDRESSES:** Send written comments to Mr. Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758. The public scoping meeting will take place at the Comal County Commissioners Court, 199 Main Plaza, New Braunfels, TX 78130.

**FOR FURTHER INFORMATION CONTACT:** *EIS Information:* Mr. Adam Zerrenner, Field Supervisor, by U.S. mail at U.S. Fish and Wildlife Service, 10711 Burnet Road, Suite 200, Austin, TX 78758; by phone at (512) 490–0057; or by fax at (512) 490–0974.

*Comal County RHCP Information:* Tom Hornseth, County Engineer, by U.S. mail at 195 David Jonas Drive, New Braunfels, TX 78132, or by phone at (830) 608–2090. Additional information is available on the Internet at *http://www.co.comal.tx.us/comalrhcp.*

**SUPPLEMENTARY INFORMATION:** We intend to prepare an EIS to evaluate the impacts of, and alternatives to, the proposed issuance of an ITP under the Act (16 U.S.C. 1531 *et seq.*) to Comal County. We also announce a public scoping meeting and public comment period. Comal County proposes to apply for an ITP supported by development and implementation of its RHCP. The RHCP will include measures necessary to minimize and mitigate for the impacts of the proposed taking of covered species to the maximum extent practicable. We furnish this notice, in compliance with NEPA (42 U.S.C. 4321 *et seq.*) and its implementing regulations (40 CFR 1500–1508), in order to: (1) Advise other Federal and State agencies, affected tribes, and the public of our intent to prepare an EIS; (2) announce the initiation of a public scoping period; and (3) obtain suggestions and information on the scope of issues and alternatives we will consider in our EIS. We intend to gather the information necessary to determine impacts and alternatives for an EIS regarding our potential issuance of an ITP to Comal County, and the implementation of the RHCP.

**Public Availability of Comments**

All comments we receive become part of the public record. Requests for copies of comments will be handled in accordance with the Freedom of Information Act, NEPA, and Service and Department of the Interior policies and procedures. 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 to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

**Background**

Section 9 of the Act and its implementing regulations prohibit the take of animal species listed under the Act as endangered or threatened. The definition of ''take'' under the Act includes the following activities: To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect listed animal species, or attempt to engage in any such conduct (16 U.S.C. 1538). Regulations define ''harm'' as significant habitat modification or degradation that results in actual death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3).

Section 10(a)(1)(B) of the Act requires us to issue incidental take permits to non-Federal entities for the take of endangered and threatened species, provided the following criteria are met: (1) The taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking; (3) the applicant will develop a habitat conservation plan and ensure that adequate funding for the plan will be provided; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) the applicant will carry out any other measures that we may require as being necessary or appropriate for the purposes of the habitat conservation plan.

We anticipate that under the ITP, Comal County will request permit coverage for a period of 30 years from the date of the RHCP approval. Implementation of the RHCP would result in the establishment of preserves intended to provide for the conservation of the covered species occupying those preserves. Research, monitoring, and adaptive management would be used to facilitate accomplishment of these goals.

**Proposed Action**

Our proposed action is the issuance of an ITP for the covered species in Comal County. Comal County would develop and implement the RHCP, which must meet the requirements in Section 10(a)(2)(A) of the Act by providing measures necessary to minimize and mitigate for the impacts of the proposed taking of covered species to the maximum extent practicable.

Activities proposed for coverage under the ITP include otherwise lawful activities that would occur consistent with the RHCP and include, but are not limited to, construction and maintenance of public projects and infrastructure as well as residential, commercial, and industrial development.

Species Comal County has recommended for inclusion as covered species in the RHCP include the golden-cheeked warbler (*Dendroica chrysoparia*) and black-capped vireo (*Vireo atricapilla*). For these covered species, Comal County would seek incidental take authorization. The Comal County RHCP would also address 19 ''evaluation species'' (18 terrestrial or aquatic karst species and the Cagle's map turtle (*Graptemys caglei*)) and 4 ''additional species'' (listed aquatic species known from Comal County). Incidental take authorization for the evaluation species may become necessary during the lifetime of the ITP; however, these species would not initially be included as covered species. Evaluation species are currently unlisted, but may become listed in the foreseeable future. The RHCP may include conservation measures to benefit evaluation species, where practicable, and support research to help fill data gaps regarding the biology, habitat, distribution, and/or management of these species. The research supported by the RHCP may help preclude the need to list these

species or facilitate obtaining incidental take coverage if these species become listed in the future. Comal County would not seek incidental take authorization for the four ''additional species,'' because these species are not likely to experience take from covered activities.

*Alternatives:* The proposed action and alternatives that will be developed in the EIS will be assessed against the No Action/No Project Alternative, which assumes that some or all of the current and future take of covered species in Comal County would be implemented individually, one at a time, and be in compliance with the Act. The No Action/No Project Alternative implies that the impacts from these potential activities on the covered species would be evaluated and mitigated on a project-by-project basis, as is currently the case. For any activities involving take of listed species due to non-Federal actions, individual Section 10(a)(1)(B) permits would be required. Without a coordinated, comprehensive conservation approach for the County, listed species may not be adequately addressed by individual project-specific mitigation requirements, and mitigation would be piecemeal and less cost effective in helping Federal and non-Federal agencies work toward recovery of listed species. In addition to the No Action/No Project Alternative, a reasonable range of alternatives will also be considered, along with the associated impacts of the various alternatives.

**Scoping Meeting**

The primary purpose of this meeting and public comment period is to receive suggestions and information on the scope of issues and alternatives to consider when drafting the EIS. We will accept oral and written comments at this meeting. You may also submit your comments by mail (see **ADDRESSES** above). Once the draft EIS and draft RHCP are completed, additional opportunity for public comment on the content of these documents and an additional public meeting will be provided.

Persons needing reasonable accommodations in order to attend and participate in the public scoping meeting should contact the Service (see **ADDRESSES** above) no later than 1 week prior to the public scoping meeting. Information regarding this proposed action is available in alternative formats upon request.

A primary purpose of the scoping process is to identify, rather than debate, significant issues related to the proposed action. In order to ensure that we identify a range of issues and alternatives related to the proposed action, we invite comments and suggestions from all interested parties. We will conduct a review of this project according to the requirements of NEPA, other appropriate Federal laws, regulations, policies, and guidance, and Service procedures for compliance with those regulations.

**Environmental Review**

The EIS will be prepared in accordance with the requirements of NEPA, other applicable regulations, and the Service's procedures for compliance with those regulations. The EIS will analyze the proposed action, as well as a range of reasonable alternatives and the associated impacts of each. The EIS will be the basis for our evaluation of impacts to the human environment and the range of alternatives to be addressed. We expect the EIS to provide biological descriptions of the affected species and habitats, as well as the effects of the proposed action and alternatives on resources such as: Vegetation, wetlands, wildlife, threatened or endangered species and rare species, geology and soils, air quality, water resources, flood control, water quality, cultural resources (prehistoric, historic, and traditional cultural properties), land use, recreation, water use, local economy, and environmental justice.

After a draft EIS is prepared, we will publish a Notice of Availability along with a request for comment on the draft EIS and Comal County's permit application, which will include the draft RHCP.

The draft EIS and draft RHCP are expected to be completed and available to the public by January 2010.

**Thomas L. Bauer,**

*Acting Regional Director, Southwest Region, Albuquerque, New Mexico.*

[FR Doc. E8–24570 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–19154–18, F–19154–24, F–19154–30; AK–964–1410–KC–P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of decision approving lands for conveyance.

**SUMMARY:** As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving the surface and subsurface estates in certain lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to NANA Regional Corporation, Inc. The lands are in the vicinity of Kivalina and Noatak, Alaska, and are located in:

**Kateel River Meridian, Alaska**

T. 23 N., R. 19 W.,
Secs. 1 to 36, inclusive.
Containing approximately 19,050 acres.
T. 27 N., R. 19 W.,
Secs. 2 to 11, inclusive;
Secs. 15 to 22, inclusive;
Secs. 27 to 34, inclusive.
Containing approximately 16,430 acres.
T. 29 N., R. 27 W.,
Secs. 1 to 36, inclusive.
Containing approximately 21,629 acres.
Aggregating approximately 57,108 acres.

Notice of the decision will also be published four times in the Arctic Sounder.

**DATES:** The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until November 17, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

**ADDRESSES:** A copy of the decision may be obtained from:

Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

**FOR FURTHER INFORMATION CONTACT:** The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov.* Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

**Hillary Woods,**

*Land Law Examiner, Land Transfer Adjudication I.*

[FR Doc. E8–24633 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[F–14874–K; AK–964–1410–KC–P]**

### Alaska Native Claims Selection

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of decision approving lands for conveyance.

**SUMMARY:** As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision approving lands for conveyance pursuant to the Alaska Native Claims Settlement Act will be issued to NANA Regional Corporation, Inc., Successor in Interest to Katyaak Corporation. The lands are in the vicinity of Kiana, Alaska, and are located in:

**Kateel River Meridian, Alaska**

T. 20 N., R. 7 W.,
Secs. 25, 26 and 27;
Secs. 34, 35 and 36.
Containing approximately 3,834 acres.
T. 17 N., R. 8 W.,
Secs. 7, 8, and 9;
Secs. 16 and 17.
Containing approximately 3,190 acres.
Aggregating approximately 7,024 acres.

The subsurface estate in these lands will be conveyed to NANA Regional Corporation, Inc. when the surface estate is conveyed to NANA Regional Corporation, Inc., Successor in Interest to Katyaak Corporation. Notice of the decision will also be published four times in the Arctic Sounder.

**DATES:** The time limits for filing an appeal are:

1. Any party claiming a property interest which is adversely affected by the decision shall have until November 17, 2008 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

**ADDRESSES:** A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

**FOR FURTHER INFORMATION CONTACT:** The Bureau of Land Management by phone at 907–271–5960, or by e-mail at *ak.blm.conveyance@ak.blm.gov*. Persons who use a telecommunication device (TTD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8330, 24 hours a day, seven days a week, to contact the Bureau of Land Management.

**Hillary Woods,**

*Land Law Examiner, Land Transfer Adjudication I.*

[FR Doc. E8–24634 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–JA–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WO–260–08–1060–XQ–24 1A]**

### Wild Horse and Burro Advisory Board; Meeting

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Announcement of meeting.

**SUMMARY:** The Bureau of Land Management (BLM) announces that the Wild Horse and Burro Advisory Board will conduct a meeting on matters pertaining to management and protection of wild, free-roaming horses and burros on the Nation's public lands.

**DATES:** The Advisory Board will meet Monday, November 17, 2008, from 8 a.m. to 5 p.m., local time. This will be a one day meeting.

**ADDRESSES:** The Advisory Board will meet in Reno, Nevada at the Silver Legacy Resort Casino, in the Reno Ballroom, 50 East Fourth Street, Reno, Nevada 89501. The Silver Legacy's address is 407 North Virginia Street, Reno, Nevada 89501. Their phone number is 1–800–687–7733.

Written comments pertaining to the Advisory Board meeting should be sent to: Bureau of Land Management, National Wild Horse and Burro Program, WO–260, Attention: Ramona DeLorme, 1340 Financial Boulevard, Reno, Nevada 89502–7147. Submit written comments pertaining to the Advisory Board meeting no later than close of business November 12, 2008. See the **SUPPLEMENTARY INFORMATION** section for electronic access and filing address.

**FOR FURTHER INFORMATION CONTACT:** Ramona DeLorme, Wild Horse and Burro Administrative Assistant, at 775–861-6583. Individuals who use a telecommunications device for the deaf (TDD) may reach Ms. DeLorme at any time by calling the Federal Information Relay Service at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:**

#### I. Public Meeting

Under the authority of 43 CFR part 1784, the Wild Horse and Burro Advisory Board advises the Secretary of the Interior, the Director of the BLM, the Secretary of Agriculture, and the Chief of the Forest Service, on matters pertaining to management and protection of wild, free-roaming horses and burros on the Nation's public lands. The tentative agenda for the meeting is:

*Monday, November 17, 2008 (8 a.m.–5 p.m.)*

8 a.m. Call to Order & Introductions.
8:15 a.m. Old Business:
Approval of June 2008 Minutes.
Update Pending Litigation.
8:45 a.m. Program Updates:
Gathers.
Adoptions.
Facilities.
Forest Service Update.
Break (9:30 a.m.–9:45 a.m.).
9:45 a.m. Program Updates (continued):
Program Accomplishments.
BLM Response to Advisory Board Recommendations.
Lunch (11:45 a.m.–1 p.m.).
1 p.m. New Business.
Break (2:45 p.m.–3 p.m.).
3 p.m. Public Comments.
4 p.m. Board Recommendations.
4:45 p.m. Recap/Summary/Next Meeting/Date/Site.
5 p.m. Adjourn.

The meeting site is accessible to individuals with disabilities. An individual with a disability needing an auxiliary aid or service to participate in the meeting, such as an interpreting service, assistive listening device, or materials in an alternate format, must notify the person listed under **FOR FURTHER INFORMATION CONTACT** two weeks before the scheduled meeting date. Although the BLM will attempt to meet a request received after that date, the requested auxiliary aid or service may not be available because of insufficient time to arrange it.

The Federal Advisory Committee Management Regulations (41 CFR 101–6.1015(b)), require BLM to publish in the **Federal Register** notice of a meeting 15 days prior to the meeting date.

#### II. Public Comment Procedures

Members of the public may make oral statements to the Advisory Board on November 17, 2008 at the appropriate point in the agenda. This opportunity is anticipated to occur at 3 p.m., local time. Persons wishing to make statements should register with the BLM by noon on November 17, 2008 at the meeting location. Depending on the number of speakers, the Advisory Board may limit the length of presentations. At previous meetings, presentations have been limited to three minutes in length. Speakers should address the specific wild horse and burro-related topics listed on the agenda. Speakers must submit a written copy of their statement to the address listed in the **ADDRESSES** section or bring a written copy to the meeting.

Participation in the Advisory Board meeting is not a prerequisite for submission of written comments. The BLM invites written comments from all interested parties. Your written

comments should be specific and explain the reason for any recommendation. The BLM appreciates any and all comments, but those most useful and likely to influence decisions on management and protection of wild horses and burros are those that are either supported by quantitative information or studies or those that include citations to and analysis of applicable laws and regulations. Except for comments provided in electronic format, speakers should submit two copies of their written comments where feasible. The BLM will not necessarily consider comments received after the time indicated under the **DATES** section or at locations other than that listed in the **ADDRESSES** section.

In the event there is a request under the Freedom of Information Act (FOIA) for a copy of your comments, the BLM will make them available in their entirety, including your name and address. 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. The BLM will release all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, in their entirety, including names and addresses.

### Electronic Access and Filing Address

Speakers may transmit comments electronically via the Internet to: *ramona_delorme@blm.gov*. Please include the identifier ''WH&B'' in the subject of your message and your name and address in the body of your message.

Dated: October 9, 2008.

**Edwin L. Roberson,**

*Assistant Director, Renewable Resources and Planning.*

[FR Doc. E8–24631 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–84–P**

## DEPARTMENT OF THE INTERIOR

## Bureau of Land Management

**[LLAZG01000 L12320000 AL0000 LVRDAZ020000]**

## Proposed Supplementary Rules for the Hot Well Dunes Recreation Area, Public Lands Administered by the Bureau of Land Management Gila District and Safford Field Office, Graham County, AZ

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Proposed Supplementary Rules.

**SUMMARY:** The Bureau of Land Management (BLM) is proposing new supplementary rules for the Hot Well Dunes (HWD) Recreation Area, public lands managed by the Gila District and Safford Field Office in Graham County, Arizona. The rules relate to the health and safety of public land users and protection of natural resources. These supplementary rules will be enforced by BLM law enforcement rangers within the HWD Recreation Area.

Proposed rules address vehicle rider capacity, clinging to or being towed by a vehicle, safety flags, vehicle use, public nudity, firearms, pets, speed limit, camping, waste disposal, and length of stay. All current supplementary rules will be rescinded and replaced by these revised rules for the HWD Recreation Area.

**DATES:** We invite comments until December 15, 2008. In developing final rules, the BLM may not consider comments postmarked or received after this date.

**ADDRESSES:** Written comments may be sent to the following address via regular mail or other delivery service: Bureau of Land Management, Safford Field Office, 711 14th Avenue, Safford, Arizona 85546. Comments may also be submitted via e-mail to *Larry_Ramirez@blm.gov* or faxed to 928–348–4450. You may access the Federal eRulemaking Portal at *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Scott Cooke, Field Manager, or Larry Ramirez, Law Enforcement Ranger, Bureau of Land Management, Safford Field Office, 711 14th Avenue, Safford, Arizona 85546, telephone 928–348–4400.

**SUPPLEMENTARY INFORMATION:**



### I. Comment Procedures

Written comments on the proposed supplementary rules should be specific, confined to issues pertinent to the proposed supplementary rules, and should explain the reason for any recommended change. Where possible, comments should reference the specific section or paragraph of the rules that the comment is addressing. You may also access and comment on the proposed supplementary rules at the Federal eRulemaking Portal by following the instructions at that site (see **ADDRESSES**). The BLM need not consider or include in the Administrative Record for the final supplementary rules: (a) Comments that the BLM receives after the close of the comment period (see **DATES**), unless they are postmarked or electronically dated before the deadline, or (b) comments delivered to an address other than those listed above (see **ADDRESSES**).

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be advised that your entire comment—including your personal identifying information—may be made publicly available at the Safford Field Office, 711 14th Avenue, Safford, Arizona 85546, during regular business hours (8 a.m. to 4 p.m.), Monday through Friday, except Federal holidays. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so. The BLM will make available for public inspection in their entirety all submissions from organizations, businesses, and government agencies, or from individuals identifying themselves as representatives or officials of such entities.

### II. Background and Purpose

These proposed supplementary rules apply to the designated HWD Recreation Area, public lands administered by the Gila District and Safford Field Office. Due to increases in visitation at the HWD, the nature of the terrain and vegetation, and the types of vehicles in use, the following rules are proposed to reduce threats to public health, safety, and property.

These supplementary rules will allow the BLM to increase law enforcement efforts that will help mitigate damage to natural resources and provide for public health and safe public recreation.

### III. Discussion of Supplementary Rules

The Gila District/Safford Field Office proposes to rescind all prior supplementary rules for the HWD

Recreation Area and issue these new supplementary rules under the Federal Land Policy and Management Act (FLPMA), Title 43 U.S.C. 1740 and Title 43 CFR 8365.1–6. The supplementary rules set forth requirements and prohibited acts that are applicable within the HWD Recreation Area, Graham County, Arizona.

**IV. Procedural Matters**

The principal author of the proposed supplementary rules is Larry Ramirez, Gila District/Safford Field Office Law Enforcement Ranger for the Bureau of Land Management.

*Executive Order 12866, Regulatory Planning and Review*

These proposed supplementary rules are not a significant regulatory action and are not subject to review by the Office of Management and Budget under Executive Order 12866. The proposed supplementary rules will not have an annual effect of $100 million or more on the economy. They are not intended to affect commercial activity, but impose rules of conduct on recreational visitors for health protection reasons in a limited area of the public lands. The supplementary rules will not adversely affect, in a material way, the economy, productivity, competition, jobs, environment, public health or safety, or State, local, or tribal governments or communities. The proposed supplementary rules do not materially alter the budgetary effects of entitlements, grants, user fees, or loan programs or the right or obligations of their recipients, nor do they raise novel legal or policy issues. They merely strive to protect human health, safety, and the environment.

*Clarity of the Proposed Supplementary Rules*

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed supplementary rules easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed supplementary rules clearly stated?

(2) Do the proposed supplementary rules contain technical language or jargon that interferes with their clarity?

(3) Does the format of the proposed supplementary rules (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce their clarity?

(4) Would the proposed supplementary rules be easier to understand if they were divided into more (but shorter) sections?

(5) Is the description of the proposed supplementary rules in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed supplementary rules? How could this description be more helpful in making the proposed supplementary rules easier to understand?

Please send any comments you may have on the clarity of the proposed supplementary rules to one of the addresses specified in the **ADDRESSES** section.

*National Environmental Policy Act*

The proposed supplementary rules do not constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, Title 42 U.S.C. 4332(2)(C). This conclusion is set forth in a Finding of No Significant Impact signed by the Field Manager and supported by an Environmental Assessment.

*Regulatory Flexibility Act*

Congress enacted the Regulatory Flexibility Act (RFA) of 1980, as amended, Title 5 U.S.C. 601–612, to ensure that government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. The proposed supplementary rules do not have a significant economic impact on entities of any size, but provide for the protection of persons, property, and resources on specific public lands. Therefore, the BLM has determined under the RFA that the proposed supplementary rules would not have a significant economic impact on a substantial number of small entities.

*Small Business Regulatory Enforcement Fairness Act*

These proposed supplementary rules do not constitute a ''major rule'' as defined at Title 5 U.S.C. 804(2). The proposed supplementary rules merely contain rules of conduct for recreational use of certain public lands. The proposed supplementary rules would have little or no effect on the economy.

*Unfunded Mandates Reform Act*

The proposed supplementary rules do not impose an unfunded mandate on State, local, or tribal governments in the aggregate, or the private sector, of more than $100 million per year; nor would they have a significant or unique effect on small governments. These proposed supplementary rules do not require anything of State, local, or tribal governments. Therefore, the BLM is not required to prepare a statement containing the information required by section 202 of the Unfunded Mandates Reform Act (Title 2 U.S.C. 1532).

*Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)*

The proposed supplementary rules are not a government action capable of interfering with constitutionally protected property rights. The proposed supplementary rules do not address property rights or cause the impairment of anybody's property rights. Therefore, the BLM has determined that these proposed supplementary rules would not cause a ''taking'' of private property or require further discussion of ''takings'' implications under this Executive Order.

*Executive Order 13132, Federalism*

The proposed supplementary rules will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed supplementary rules apply to a limited area of land in only one State, Arizona. Therefore, the BLM has determined that the proposed supplementary rules do not have sufficient Federalism implications to warrant preparation of a Federalism assessment.

*Executive Order 12988, Civil Justice Reform*

Under Executive Order 12988, we have determined that the proposed supplementary rules will not unduly burden the judicial system and that the requirements of sections 3(a) and 3(b)(2) of the Order are met. The supplementary rules contain rules of conduct for recreational use of certain public lands to protect human health and the environment.

*Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

In accordance with Executive Order 13175, the BLM has found that these proposed supplementary rules do not include policies that have tribal implications. The proposed supplementary rules do not affect lands held for the benefit of Indians, Aleuts, or Eskimos.

*Paperwork Reduction Act*

These proposed supplementary rules do not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act, Title 44 U.S.C. 3501 *et seq.*

**Supplementary Rules for the Hot Well Dunes Recreation Area, Graham County, Arizona**

*1. Vehicle Rider Capacity*

A person operating an off-road vehicle within the HWD Recreation Area shall ride only on the permanent, regular seat attached to the off-road vehicle. The operator of an off-road vehicle shall not carry any additional person(s) on an off-road vehicle unless the vehicle is designed and manufactured to carry such additional person(s). No person shall ride an off-road vehicle unless the vehicle is designed and manufactured to carry that person.

*2. Clinging to or Being Towed by a Vehicle*

No person operating an off-road vehicle within the HWD Recreation Area shall attach the off-road vehicle to any object or person and tow such object or person. No person shall cling to, or be towed by, an off-road vehicle.

*3. Safety Flags*

Safety flags are required on all off-road vehicles used within the HWD Recreation Area. An exception to this requirement is made for Recreation Vehicles (RVs), Sport Utility Vehicles (SUVs), pickup trucks, and passenger sedans. Safety flags must be brilliant orange or red in color, and at least six (6) inches by 12 inches in size. Masts must be securely mounted on the off-road vehicle and extend eight (8) feet from the ground to the mast tip. Safety flags must be firmly attached to the top portion of a mast.

*4. Vehicle Use*

No off-road vehicle within the HWD Recreation Area will be allowed within areas enclosed by the metal, tube railings there or where signed as prohibited.

*5. Nudity*

Public nudity within the HWD Recreation Area and, in particular, in the hot tubs there, is prohibited.

*6. Firearms and Archery*

Archery and the discharge of firearms or other weapons, including pneumatic and spring-loaded BB guns and pellet guns, are prohibited within the HWD Recreation Area.

*7. Pets*

Pets must be leashed or otherwise physically restricted at all times within the HWD Recreation Area.

*8. Speed Limit*

The speed limit for off-road vehicles within the HWD Recreation Area is 10 miles per hour on the main access road and within 50 feet on either side of the main access road. The speed limit is also 10 miles per hour within 50 feet of a campsite or any concentration of three (3) or more people. Operating an off-road vehicle above this speed is prohibited.

*9. Camping*

Camping within the HWD Recreation Area is not allowed within the designated parking area; within areas enclosed by metal, tube railings; or where signed as prohibited.

*10. Waste Disposal*

Dumping of sewage or gray water is prohibited within the HWD Recreation Area.

*11. Length of Stay*

To ensure that everyone has an opportunity to enjoy the area, camping is limited to 14 days within any 28-day period.

**Penalties**

Under the Federal Land Policy and Management Act of 1976 (Title 43 U.S.C. 1733(a)), 43 CFR 8365.1–6, and 43 CFR 8360.0–7, persons who violate any of these supplementary rules are subject to arrest and, upon conviction, may be fined up to $1,000 and/or imprisoned for not more than 12 months, and may be subject to the enhanced penalties under Title 18 U.S.C. 3571.

Dated: October 8, 2008.

**Helen M. Hankins,**

*Acting Arizona State Director.*

[FR Doc. E8–24580 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–32–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Notice of Availability of an Environmental Assessment on a Proposed Transfer of Jurisdiction of a Portion of Fort Dupont Park, Washington, DC

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of Availability of an Environmental Assessment for the transfer of jurisdiction to the District of Columbia of a portion of Fort Dupont Park.

**SUMMARY:** In accordance with Sec. 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.,* (NEPA), and the National Park Service's Director's Order 12: *Conservation Planning, Environmental Impact Analysis, and Decision-making,* the National Park Service (NPS) has prepared an Environmental Assessment (EA) for transferring jurisdiction of a portion of NPS property within Fort Dupont Park, one of the Fort Circle Parks, to the District of Columbia (District) for recreational development and uses, and resulting in the possible amendment of the NPS' 2004 Final Management Plan for Fort Circle Parks (*Management Plan*).

**DATES:** Public comment on the EA will be accepted until November 17, 2008.

**ADDRESSES:** Comments may be submitted through the Planning, Environment and Public Comment (PEPC) Web site at *http://parkplanning.nps.gov/NACE* or by mail to: Superintendent, National Capital Parks-East, RE: Fort Dupont Park Land Transfer Proposal, 1900 Anacostia Drive, SE., Washington, DC 20020.

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.

**FOR FURTHER INFORMATION CONTACT:** Gayle Hazelwood, Superintendent, National Capital Parks-East, RE: Fort Dupont Park Land Transfer Proposal, at 1900 Anacostia Drive, SE., Washington, DC 20020 or by telephone at (202) 690–5127, or by e-mail at *gayle_hazelwood@nps.gov*.

**SUPPLEMENTARY INFORMATION:** The NPS is considering transferring jurisdiction to the District over a 15-acre parcel at one end of Fort Dupont Park (the Project Area), that is currently used for recreational purposes. The transfer would facilitate the development of new recreational facilities and programs in the Project Area by the District, including a proposal to create a baseball academy for area youth and another to expand an existing indoor ice skating arena. The District's proposal would involve the help of private-sector partners. If the decision is made to go forward with this transfer, it would

occur pursuant to U.S. Code Title 40 Section 8124 (40 U.S.C. 8124), which authorizes transfers of jurisdiction in the District of Columbia. The 376-acre Fort Dupont Park is one of the Civil War Defenses of Washington and is one of the Fort Circle Parks managed by the NPS. In 2004, the NPS completed the Management Plan and an action to transfer these lands to the District would likely result in amendment of that plan.

The EA studies the potential impacts of the proposed transfer to the District, of the approximately 15 acres situated on the north side of Fort Dupont Park along Ely Place in Southeast Washington, DC. In addition to the indoor ice skating arena, the Project Area contains ballfields, basketball and tennis courts and a parking lot, among other features. The Project Area is not in an area of Fort Dupont Park that is associated with the Civil War Defense of Washington, and does not contain earthworks or other historic or archeological resources. Once transferred, the Project Area would no longer be part of the Park and no longer be managed or administered by the NPS.

The NPS is using this EA to decide whether to go forward with this transfer to the District, and the EA contains the information currently known about the District's plans for the Project Area if the transfer does occur. The EA evaluates two alternatives: The no action alternative (Alternative 1), and the preferred alternative (Alternative 2), which proposes to transfer jurisdiction of the Project Area to the District. Alternative 2, to transfer jurisdiction, provides four separate options for the possible configuration of the Fort Dupont Ice Arena expansion and three separate options on how the proposed Youth Baseball Academy facilities could be configured on the site, with one option that maintains the multi-purpose sports field within the Project Area.

Under Alternative 2, the Fort Dupont Ice Arena would be expanded to approximately twice its current size and a Youth Baseball Academy would be established on site. The Youth Baseball Academy would require the construction of a building to support administrative functions and three ball fields, including one regulation sized baseball field, two softball fields, and associated parking. One of the options presented under Alternative 2 also includes a multi-purpose sports field such as a football/soccer field. The three existing basketball courts and four existing tennis courts located within the Project Area would remain, with responsibility for the facilities there, including the indoor ice skating arena transferred from NPS to the District along with the land which would no longer be part of Fort Dupont Park. The transfer of jurisdiction would necessitate amending the Management Plan, which provides a managerial framework for decisions about use and development within the Fort Circle Parks, including Fort Dupont Park. On the other hand, under Alternative 1, which is the no action alternative, the current layout, condition, and management of Fort Dupont Park would not change. The proposed development would not occur and the Management Plan would not be amended.

Information and comments gathered during public meetings and an extended scoping period were considered in the preparation of this EA to identify the range of issues and potential impacts of this proposed action. The NPS also coordinated and consulted with the District and federal agencies to identify issues and concerns related to the natural and cultural resources.

Dated: October 6, 2008.

**Lisa A. Mendelson-Ielmini,**

*Regional Director, National Capital Region.*

[FR Doc. E8–24500 Filed 10–15–08; 8:45 am]

**BILLING CODE 4312–JU–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### General Management Plan: Lava Beds National Monument, Siskiyou and Modoc Counties, CA; Notice of Termination of the Environmental Impact Statement

**SUMMARY:** The National Park Service is terminating the preparation of an Environmental Impact Statement (EIS) for the General Management Plan, Lava Beds National Monument, Tulelake, California. A Notice of Intent to prepare an EIS was published in the **Federal Register** on July 10, 2006. The National Park Service has since determined that an Environmental Assessment (EA) rather than an EIS is the appropriate environmental documentation for the GMP; this determination includes careful consideration of all public and other agencies' comments during the scoping period. The new GMP for Lava Beds National Monument will update long-term guidance for resource management, visitor services and interpretive programming.

*Background:* The planning team originally scoped the GMP update as an EIS, however no concerns or issues expressed during public scoping and preliminary development of the GMP alternatives convey either the potential for controversy or identify potential significant impacts. In summer of 2007, the planning team drafted three ''action'' alternatives for the GMP. These preliminary alternatives explored ways to enhance long-term preservation of park resources and provide new recreational and educational opportunities. The planning team produced a newsletter and comment form to seek public input on the preliminary alternatives in winter of 2008. All feedback consistently affirmed that the planning team provided an appropriate range of future management directions for the monument. Most of the public comments on the preliminary alternatives were supportive of various aspects of the proposed ''action'' concepts and desired conditions.

To date, no major concerns or issues have been expressed during public involvement for the GMP that would convey the potential for public controversy. Initial analysis of the alternatives has revealed potential for neither major nor significant effects on the human environment or any potential for impairing park resources and values. Most of the potential impacts from the alternatives are expected to be negligible to moderate in magnitude. Many of the actions proposed in the GMP will have benefits to the monument's ecosystems, cultural landscapes and visitor experiences. For these reasons, the NPS determined the appropriate level of conservation planning and environmental impact analysis for the GMP is an EA.

**SUPPLEMENTARY INFORMATION:** The draft GMP and EA will be integrated. The combined document is expected to be distributed for a 60-day public review period by spring/summer of 2009. The NPS will notify the public by mail, Web site postings, local and regional media, and other means, to provide regularly updated information on where and how to obtain a copy of the GMP/EA, how to provide comments, and the confirmed dates and locations for local public meetings. For further information contact Dave Kruse, Superintendent, Lava Beds National Monument, 1 Indian Well Headquarters, Tulelake, CA 96134 (telephone: 530–667–8101; e-mail: *Dave_Kruse@nps.gov*).

Following release of the GMP/EA and due consideration of all comments as may be received, a decision regarding selection of a preferred vision for the new GMP is expected to be made in winter 2009/2010. The official responsible for the final decision is the Regional Director, Pacific West Region, National Park Service. Subsequently the official responsible for implementing

the new GMP would be the Superintendent, Lava Beds National Monument.

Dated: August 14, 2008.

**Cicely A. Muldoon,**

*Acting Regional Director.*

[FR Doc. E8–24503 Filed 10–15–08; 8:45 am]

**BILLING CODE 4310–70–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation No. 337–TA–641]**

### In the Matter of Certain Variable Speed Wind Turbines and Components Thereof; Notice of Commission Decision Not To Review an Initial Determination Granting Complainant's Motion To Amend the Complaint and Notice of Investigation and Extending the Target Date

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (''ID'') (Order No. 10) issued by the presiding administrative law judge (''ALJ'') granting complainant's motion to amend the complaint and notice of investigation and extending the target date.

**FOR FURTHER INFORMATION CONTACT:** Michelle Walters, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on March 31, 2008, based on a complaint filed by General Electric Company (''GE''). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain variable speed wind turbines and components thereof that allegedly infringe certain claims of United States Patent Nos. 5,083,039 and 6,921,985. The complaint, as amended, named Mitsubishi Heavy Industries, Ltd., Mitsubishi Heavy Industries of America, Inc., and Mitsubishi Power Systems Americas, Inc. (collectively, ''MHI'') as respondents.

On July 31, 2008, GE filed a motion to amend the complaint and notice of investigation to add allegations of infringement for claims 1–19 of U.S. Patent No. 7,321,221. MHI opposed the motion, but requested that, in the event complainant's motion was granted, the procedural schedule deadlines be pushed back a minimum of three months. The Commission investigative attorney supported complainant's motion on the condition that the target date be extended.

On September 16, 2008, the ALJ issued the subject ID, granting GE's motion to amend the complaint and notice of investigation and extending the target date by four months from June 30, 2009 to October 30, 2009. No petitions for review of this ID were filed.

The Commission has determined not to review the ALJ's ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: October 8, 2008.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. E8–24554 Filed 10–15–08; 8:45 am]

**BILLING CODE 7020–02–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International—Standards

Notice is hereby given that, on September 9, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), ASTM International (''ASTM'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between May 2008 and September 2008 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on May 16, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 17, 2008 (73 FR 34327).

**Patricia A. Brink,**

*Deputy Director of Operations, Antitrust Division.*

[FR Doc. E8–24288 Filed 10–15–08; 8:45 am]

**BILLING CODE 4410–11–M**

## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

**[Docket No. OSHA–2007–0042]**

### Canadian Standards Association; Reinstated Recognition for Product Test Standard

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Reinstating recognition for product test standard.

**SUMMARY:** This notice announces the Occupational Safety and Health Administration's continued recognition of the Canadian Standards Association for a test standard.

**DATES:** Recognition for the reinstated standard is effective July 3, 2001.

**FOR FURTHER INFORMATION CONTACT:** MaryAnn Garrahan, Director, Office of Technical Programs and Coordination Activities, NRTL Program, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–3655, Washington, DC 20210, or phone (202) 693–2110. Our Web page includes information about the NRTL Program

(see *http://www.osha.gov* and select ''N'' in the site index).

**SUPPLEMENTARY INFORMATION:**

**Notice of Correction**

The Canadian Standards Association (CSA) was recognized by OSHA as a Nationally Recognized Testing Laboratory on December 24, 1992 (57 FR 61452). The notice which announced this recognition included a list of test standards that became part of CSA's scope of recognition. In general, NRTLs use such test standards to test and certify products that OSHA requires to be approved before use in the workplace. One of the test standards included in CSA's initial scope was UL 1563, which is now titled Electric Spas, Equipment Assemblies, and Associated Equipment. At the time, its title was Electric Hot Tubs, Spas, and Associated Equipment. In compliance with its regulations, OSHA renewed CSA's recognition on July 3, 2001 (66 FR 35271). OSHA, however, inadvertently omitted UL 1563 from the **Federal Register** notice published for the CSA renewal. As a result, OSHA is reinstating UL 1563 to CSA's scope of recognition. CSA's capability to test and certify products to this standard has existed since the time of its recognition in December 1992.

This reinstatement is the only change that OSHA is making to CSA's recognition through this notice. All other terms and conditions of its recognition remain the same.

Signed at Washington, DC, this 10th day of October 2008.

**Edwin G. Foulke, Jr.,**

*Assistant Secretary of Labor for Occupational Safety and Health.*

[FR Doc. E8–24566 Filed 10–15–08; 8:45 am]

**BILLING CODE 4510–26–P**

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that ten meetings of the Arts Advisory Panel to the National Council on the Arts will be held at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506 as follows (ending times are approximate):

*Presenting (application review):* November 5–6, 2008 in Room 716. This meeting, from 9 a.m. to 5:30 p.m. on November 5th and 9 a.m. to 4:30 p.m. on November 6th, will be closed.

*Learning in the Arts (application review):* November 5–7, 2008 in Room 714. This meeting, from 9 a.m. to 6 p.m. on November 5th, 9 a.m. to 6:30 p.m. on November 6th, and 9 a.m. to 5:30 p.m. on November 7th, will be closed.

*Music (application review):* November 12–14, 2008 in Room 714. This meeting, from 9 a.m. to 5:30 p.m. on November 12th and 13th, and from 9 a.m. to 4:30 p.m. on November 14th, will be closed.

*Local Arts Agencies (application review):* November 13–14, 2008 in Room 730. This meeting, from 9 a.m. to 5:30 p.m. on November 13th and 9 a.m. to 1 p.m. on November 14th, will be closed.

*Musical Theater (application review):* November 13–14, 2008 in Room 716. This meeting, from 9 a.m. to 5:30 p.m. on November 13th and 9 a.m. to 3 p.m. on November 14th, will be closed.

*Visual Arts (application review):* November 17–19, 2008 in Room 716. This meeting, from 9 a.m. to 5:30 p.m. on November 17th and 18th and 9 a.m. to 4 p.m. on November 19th, will be closed.

*Music (application review):* November 18–20, 2008 in Room 714. This meeting, from 9 a.m. to 5:30 p.m. on November 18th and 19th, and from 9 a.m. to 4:30 p.m. on November 20th, will be closed.

*Theater (application review):* November 18–21, 2008 in Room 730. This meeting, from 9 a.m. to 5:30 p.m. on November 18th, from 9 a.m. to 6 p.m. on November 19th and 20th, and from 9 a.m. to 3 p.m. on November 21st, will be closed.

*National Initiatives/American Masterpieces (application review):* November 20, 2008 in Room 716. This meeting, from 9 a.m. to 5 p.m., will be closed.

*Music (application review):* November 21, 2008 in Room 714. This meeting, from 9 a.m. to 5 p.m., will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY-TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: October 10, 2008.

**Kathy Plowitz-Worden,**

*Panel Coordinator, Panel Operations, National Endowment for the Arts.*

[FR Doc. E8–24557 Filed 10–15–08; 8:45 am]

**BILLING CODE 7537–01–P**

## NUCLEAR REGULATORY COMMISSION

**[NRC–2008–0497]**

### NRC Enforcement Policy Revision

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** NRC Enforcement Policy Revision; correction.

**SUMMARY:** On September 15, 2008, the Nuclear Regulatory Commission (NRC) published a ''Notice of Availability of Draft and Request for Comments'' (See 73 FR 53286) on its proposed revised Enforcement Policy (Enforcement Policy or Policy). Subsequent to the September 15th publication, errors were identified in section 6.3, Materials Operations and section 6.7, Health Physics, of the proposed revised Policy. The NRC has corrected sections 6.3 and 6.7 and is making publicly available the corrected document as described below. No other changes or corrections have been made to the proposed revised Enforcement Policy published on September 15, 2008.

**DATES:** Submit comments on or before November 14, 2008. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

**ADDRESSES:** Comments will be made available to the public in their entirety; personal information, such as your name, address, telephone number, e-mail address, etc. will not be removed from your submission. You may submit comments by any one of the following methods:

*Federal e-Rulemaking Portal: http://www.regulations.gov*; search on docket ID: NRC–2008–0497.

*Mail comments to:* Michael T. Lesar, Chief, Rulemaking, Directives, and

Editing Branch, Office of Administration, Mail Stop: T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

*Hand-deliver comments to:* 11555 Rockville Pike, Rockville, MD 20852, between the hours of 7:45 a.m. and 4:15 p.m., Federal workdays.

You can access publicly available documents related to this notice using the following methods:

*Federal e-Rulemaking Portal*: Documents related to this notice, including public comments, are accessible at *http://www.regulations.gov*, by searching on docket ID: NRC–2008–0497.

*NRC's Public Document Room (PDR)*: The public may examine and have copied for a fee, publicly available documents at the NRC's PDR, Public File Area O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

*NRC's Agencywide Document Access and Management System (ADAMS)*: The corrected draft Enforcement Policy is available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Number ML082800381. From this site, the public can gain entry into ADAMS, which provides text and image files of the NRC's public documents. In addition, the corrected draft Enforcement Policy will be available at *http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html*. If you do not have Internet access or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr.resource@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Doug Starkey, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555; *Doug.Starkey@nrc.gov*, (301) 415–3456.

**Procedural Requirements**

*Paperwork Reduction Act*

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150–0136.

*Public Protection Notification*

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

*Small Business Regulatory Enforcement Fairness Act*

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Dated at Rockville, MD, this 8th day of October 2008.

For the Nuclear Regulatory Commission.

**Cynthia A. Carpenter,**

*Director, Office of Enforcement.*

[FR Doc. E8–24627 Filed 10–15–08; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Office of New Reactors; Interim Staff Guidance on the Necessary Content of Plant-Specific Technical Specifications for a Combined License

**AGENCY:** Nuclear Regulatory Commission (NRC).

**ACTION:** Solicitation of public comment.

**SUMMARY:** The NRC is soliciting public comment on its proposed Interim Staff Guidance (ISG) DC/COL–ISG–08 (ADAMS Accession No. ML082520707). The purpose of this ISG is to change the NRC staff position on the necessary content of plant-specific technical specifications (PTS) when a combined license (COL) is issued. This ISG clarifies the staff guidance contained in Regulatory Guide (RG) 1.206, ''Combined License Applications for Nuclear Power Plants,'' Section C.III.4.3, ''Combined License Information Items That Cannot Be Resolved Before the Issuance of a License,'' and replaces the related guidance in NUREG–0080, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants,'' Chapter 16.0, ''Technical Specifications,'' Revision 2, dated March 2007, regarding the content of PTS to support issuing a COL. The NRC staff issues DC/COL–ISGs to facilitate timely implementation of the current staff guidance and to facilitate activities associated with the review of applications for standard design certifications (DCs) and COLs by the Office of New Reactors. The NRC staff will also incorporate the approved DC/COL–ISG–08 into the next revisions of RG 1.206 and the Standard Review Plan 16.0, and any related guidance documents.

**DATES:** Comments must be filed no later than 30 days from the date of publication of this notice in the **Federal Register**. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

**ADDRESSES:** Comments may be submitted to: Chief, Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Comments should be delivered to: 11545 Rockville Pike, Rockville, Maryland, Room T–6D59, between 7:30 a.m. and 4:15 p.m. on federal workdays. Persons may also provide comments via e-mail at *michael.marshall@nrc.gov*. The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *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 Public Document Room reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *pdr@nrc.gov*.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael L. Marshall, Technical Specification Branch, Division of Construction, Inspection, Operational Programs, Office of the New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–0539 or e-mail at *michael.marshall@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** The agency posts its issued staff guidance in the agency external Web page (*http://www.nrc.gov/reading-rm/doc-collections/isg/*).

The NRC staff is issuing this notice to solicit public comments on the proposed DC/COL–ISG–08. After the NRC staff considers any public comments, it will make a determination regarding the proposed DC/COL–ISG–08.

Dated at Rockville, Maryland, this 8th day of October 2008.

For the Nuclear Regulatory Commission,

**William D. Reckley,**

*Chief, Rulemaking, Guidance and Advanced Reactors Branch, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E8–24624 Filed 10–15–08; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Union Electric Company d/b/a AmerenUE, Notice of Receipt and Availability of Application for a Combined License; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of receipt and availability; Correction.

**SUMMARY:** This document corrects a notice appearing in the **Federal Register** on October 9, 2008 (65 FR 59677), that notices the receipt and availability of an application for a combined license for an evolutionary power reactor nuclear power plant at the existing Callaway Power Plant site located in Callaway County, Missouri. This action is necessary to correct the heading of the document.

**FOR FURTHER INFORMATION CONTACT:** Surinder Arora, Project Manager, Office of New Reactors, telephone (301) 415–1421.

**SUPPLEMENTARY INFORMATION:**

On page 59677, in the third column, the heading is corrected to read as set forth above.

Dated at Rockville, Maryland, this 9th day of October 2008.

For the Nuclear Regulatory Commission.

**Surinder Arora,**

*Project Manager, U.S. EPR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.*

[FR Doc. E8–24628 Filed 10–15–08; 8:45 am]

**BILLING CODE 7590–01–P**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Generalized System of Preferences (GSP): Notice Regarding the 2008 Annual Product Review: Competitive Need Limitations (CNL) Warning List and the Filing of Petitions Requesting CNL Waivers

**AGENCY:** Office of the United States Trade Representative.

**ACTION:** Notice.

**SUMMARY:** This notice is to inform the public of the availability of eight-month 2008 import statistics and to announce that the Office of the United States Trade Representative (USTR) will not be publishing a ''warning list'' of products that may exceed statutory competitive need limitations (CNLs), pertinent to the 2008 GSP Annual Review. Each interested party is responsible for conducting its own review of 2008 import data with regard to the possible application of GSP CNLs and submitting a petition to waive the CNLs if necessary. This information can be found on the U.S. International Trade Commission (USITC) Web site (*http://dataweb.usitc.gov*). The deadline for submission of petitions requesting CNL waivers for consideration in the 2008 GSP Annual Review is 5 p.m., Thursday, November 13, 2008. The list of petitions for CNL waivers accepted for review will be announced in the **Federal Register** at a later date.

**FOR FURTHER INFORMATION CONTACT:** Regina Teeter, GSP Program, Office of the United States Trade Representative, 1724 F Street, NW., Room F–214, Washington, DC 20508. The telephone number is (202) 395–6971, the fax number is (202) 395–9481, and the e-mail address is *Regina_Teeter@ustr.eop.gov*.

**SUPPLEMENTARY INFORMATION:**

#### I. Competitive Need Limitations

The GSP program provides for the duty-free importation of designated articles when imported from designated beneficiary developing countries (BDCs). The GSP program is authorized by title V of the Trade Act of 1974 (19 U.S.C. 2461, *et seq.* ), as amended (the ''1974 Act''), and is implemented in accordance with Executive Order 11888 of November 24, 1975, as modified by subsequent Executive Orders and Presidential Proclamations.

Section 503(c)(2)(A) of the 1974 Act sets out the two competitive need limitations (CNLs). When the President determines that a BDC exported to the United States during a calendar year either: (1) A quantity of a GSP-eligible article having a value in excess of the applicable amount for that year ($135 million for 2008), or (2) a quantity of a GSP-eligible article having a value equal to or greater than 50 percent of the value of total U.S. imports of the article from all countries (the ''50 percent CNL''), the President must terminate GSP duty-free treatment for that article from that BDC by no later than July 1 of the next calendar year. However, Section 503(d) of the 1974 Act sets forth the criteria under which the President may grant a waiver of the CNL for articles imported from specific BDCs. Product petitions requesting CNL waivers for GSP-eligible articles from beneficiary developing countries that exceed the CNLs in 2008 must be filed in the 2008 Annual Review.

Under section 503(c)(2)(F) of the 1974 Act, the President may also waive the 50 percent CNL with respect to an eligible article imported from a BDC if the value of total imports of that article from all countries during the calendar year did not exceed the applicable *de minimis* amount for that year. Comments on *de minimis* waivers will be requested after publication of a separate **Federal Register** notice in February 2008.

#### II. Implementation of Competitive Need Limitations

Exclusions from GSP duty-free treatment where CNLs have been exceeded will be effective July 1, 2009, unless granted a waiver before that date by the President. CNL exclusions will be based on full calendar-year 2008 import statistics. Full calendar-year 2008 data for individual tariff subheadings will be available in February 2009 on the Web site of the U.S. International Trade Commission at *http://dataweb.usitc.gov/*.

#### III. 2008 Competitive Need Limitations Petition Procedure

##### *A. Eight Month Import Data and Announcement That ''Warning List'' Will Not Be Published*

For the purposes of the Competitive Need Limitations, the Office of the United States Trade Representative (USTR) will not be publishing a ''warning list'' of products that may exceed statutory competitive need limitations (CNLs). Each interested party is responsible for conductingits own review of 2008 import data with regard to the possible application of GSP CNLs. This information can be found on the U.S. International Trade Commission (USITC) Web site (*http://dataweb.usitc.gov*). Interested parties, including foreign governments, may submit petitions to waive the ''competitive need limitations'' for individual beneficiary developing countries with respect to specific GSP-eligible articles (these limits do not apply to either least-developed beneficiary developing countries or AGOA beneficiary sub-Saharan African countries). As announced in the May 15, 2008, **Federal Register** notice, petitions requesting CNL waivers must be received by the GSP Subcommittee of the Trade Policy Staff Committee no later than 5 p.m. on Thursday, November 13, 2008, in order to be considered in the 2008 Annual Review. Petitions submitted after the deadline will not be considered for review. The list of product petitions accepted for review will be announced in the **Federal Register** at a later date.

As specified in 15 CFR 2007.1, all petitions requesting CNL waivers for GSP-eligible articles from beneficiary developing countries must include a detailed description of the product and

the identification of the pertinent item number of the Harmonized Tariff Schedule of the United States (HTSUS) under which the product is classified. The HTSUS number for the relevant product should be provided at the 8-digit level. Further, petitions requesting CNL waivers for GSP-eligible articles that exceed the CNLs in 2008 must be filed in the 2008 Annual Review. In order to allow petitioners an opportunity to review additional 2008 U.S. import statistics, these petitions may be filed after Wednesday, June 18, 2008, but must be received on or before Thursday, November 13, 2008, in order to be considered in the 2008 Annual Review. Copies will be made available for public inspection after the November 13, 2008, deadline.

*B. Requirements for Submissions*

Petitions must be submitted, in English, to the Chairman of the GSP Subcommittee of the Trade Policy Staff Committee (TPSC) by the deadline set forth in this notice.

Any person or party making a submission is strongly advised to review the GSP regulations and GSP Guidebook (available at: *http://www.ustr.gov/Trade_Development/Preference_Programs/GSP/General_GSP_Program_Information/Section_Index.html*). Petitions with respect to waivers of the ''competitive need limitations'' must meet the relevant information requirements listed in sections 2007.1 (a) and (c) of the GSP regulations. Furthermore, interested parties submitting petitions that request action with respect to specific products should list on the first page of the petition the following information after typing ''2008 Annual GSP Review'': (1) The requested action to waive the competitive need limits; (2) the HTSUS 8-digit subheading in which the product is classified; and (3) the beneficiary developing country.

In order to facilitate prompt consideration of submissions, USTR requires the petitions to be set out in digital files attached to e-mails transmitted to the following address: *FR0807@ustr.eop.gov* (**Note:** The digit before the number ''8'' in the e-mail address is the number ''zero'' and not a letter.) If you are unable to provide submissions by e-mail, please contact Regina Teeter at USTR's GSP Office at (202) 395–6971 to arrange for an alternative method of transmission. For security reasons, hand-delivered submissions will not be accepted. E-mail submissions should be single copy transmissions in English with the total submission including attachments not to exceed 30 single-spaced standard letter sized pages in 12-point type and three megabytes as a digital file attached to an e-mail transmission. E-mails should use the following subject line: ''2008 Annual GSP Review-CNLW Petition.'' The transmittal message or cover letter accompanying a submission must be set out exclusively in the digital file attached to the e-mail—not in the message portion of the e-mail—and must include the sender's name, organization name, address, telephone and fax numbers, and e-mail address.

Digital files must be submitted in one of the following formats: WordPerfect (''.WPD''), MSWord (''.DOC''), text (''.TXT''), or Adobe (''PDF'') files. Documents cannot be submitted as electronic image files or contain embedded images (for example, ''.JPG'', ''.TIF'', ''.BMP'', or ''.GIF''). Spreadsheet data may be submitted as Excel files, formatted for printing on 8½ x 11 inch paper. To the extent possible, any data accompanying the submission should be included in the same file as the submission itself, and not in a separate file.

If the submission contains business confidential information that the submitter wishes to protect from public disclosure, the confidential version must be marked ''BUSINESS CONFIDENTIAL'' at the top and bottom of each page. In addition, the submission must be accompanied by a non-confidential version that indicates, with asterisks, where confidential information was redacted or deleted. The top and bottom of each page of the non-confidential version must be marked either ''PUBLIC VERSION'' or ''NON-CONFIDENTIAL''. Business confidential comments that are submitted without the required markings or are not accompanied by a properly marked non-confidential version as set forth above may not be accepted or may be treated as public documents.

The digital file name assigned to any business confidential version of a submission should begin with the characters ''BC-'', and the file name of the public version should begin with the characters ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the person (government, company, union, association, etc.) making the submission.

Public versions of all documents in response to this notice will be available for review approximately one week after the due date by appointment in the USTR public reading room, 1724 F Street, NW., Washington, DC. Appointments may be made from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday, by calling (202) 395–6186.

**Marideth Sandler,**

*Executive Director, GSP Program, Chairman, GSP Subcommittee of the Trade Policy Staff Committee.*

[FR Doc. E8–24593 Filed 10–15–08; 8:45 am]

**BILLING CODE 3190–W9–P**

## POSTAL SERVICE

### Product Change—Priority Mail Contract 1 Negotiated Service Agreements

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** Postal Service notice of filing a request with the Postal Regulatory Commission to add Priority Mail Contract 1 to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List pursuant to 39 U.S.C. 3642 and 3632(b)(3).

**DATES:** October 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Scott Reiter, 202–268–2999

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that on September 23, 2008, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract to Competitive Product List and Notice of Establishment of Rates and Class Not Of General Applicability.* Documents are available at *http://www.prc.gov,* Docket Nos. MC2008–8, CP2008–26.

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. E8–24536 Filed 10–15–08; 8:45 am]

**BILLING CODE 7710–12–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11449 and #11450]**

### Indiana Disaster Number IN–00026

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Indiana (FEMA–1795–DR), dated 09/23/2008.

*Incident:* Severe storms and flooding.

*Incident Period:* 09/12/2008 and continuing through 10/06/2008.

*Effective Date:* 10/06/2008.

*Physical Loan Application Deadline Date:* 11/24/2008.

*EIDL Loan Application Deadline Date:* 06/23/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for the State of Indiana, dated 09/23/2008 is hereby amended to establish the incident period for this disaster as beginning 09/12/2008 and continuing through 10/06/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–24644 Filed 10–15–08; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

**[Disaster Declaration #11464 and #11465]**

### Puerto Rico Disaster Number PR–00003

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the Commonwealth of Puerto Rico (FEMA–1798–DR), dated 10/01/2008.

*Incident:* Severe storms and flooding.

*Incident Period:* 09/21/2008 and continuing through 10/03/2008.

*Effective Date:* 10/03/2008.

*Physical Loan Application Deadline Date:* 12/01/2008.

*EIDL Loan Application Deadline Date:* 07/01/2009.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for the Commonwealth of Puerto Rico, dated 10/01/2008 is hereby amended to establish the incident period for this disaster as beginning 09/21/2008 and continuing through 10/03/2008.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

**Herbert L. Mitchell,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. E8–24645 Filed 10–15–08; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### Joint Application of Scenic Airlines, Inc., and Grand Canyon Airlines, Inc., for Certificate Authority

**AGENCY:** Department of Transportation.

**ACTION:** Notice of order to show cause (Order 2008–10–9); Docket DOT–OST–2008–0114.

**SUMMARY:** The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Grand Canyon Airlines, Inc., fit, willing, and able, and transferring to it the certificate of public convenience and necessity to engage in interstate scheduled air transportation of persons, property, and mail reissued to Scenic Airlines, Inc., by Order 2005–5–10.

**DATES:** Persons wishing to file objections should do so no later than October 23, 2008.

**ADDRESSES:** Objections and answers to objections should be filed in Docket DOT–OST–2008–0114 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room W12–140), 1200 New Jersey Avenue, SE., West Building Ground Floor, Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

**FOR FURTHER INFORMATION CONTACT:** Damon D. Walker, Air Carrier Fitness Division (X–56, Room W86–465), U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–9721.

Dated: October 9, 2008.

**Robert S. Goldner,**

*Special Counsel to Assistant Secretary for Aviation and International Affairs.*

[FR Doc. E8–24576 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–9x–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Change in Use of Aeronautical Property at Louisville International Airport, Louisville, KY

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

**ACTION:** Request for public comment.

**SUMMARY:** The FAA is requesting public comment on the request by the Louisville Regional Airport Authority to change a portion of airport property from aeronautical to non-aeronautical use at the Louisville International Airport, Louisville, Kentucky. The request consists approximately of 1.09 acres of formal release. This action is taken under the provisions of Section 125 of the Wendell H. Ford Aviation Investment Reform Act for the 21st Century (AIR 21).

**DATES:** Comments must be received on or before November 17, 2008.

**ADDRESSES:** Comments on this notice may be mailed or delivered in triplicate to the FAA at the following address: Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Charles T. Miller, Executive Director, Louisville Regional Airport Authority, P.O. Box 9129, Louisville, KY 40209–0129.

**FOR FURTHER INFORMATION CONTACT:** Mr. Tommy L. Dupree, Team Lead/Civil Engineer, Federal Aviation Administration, Memphis Airports District Office, 2862 Business Park Drive, Building G, Memphis, TN 38118, (901) 322–8185. The application may be reviewed in person at this same location, by appointment.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the request to release approximately 1.09 acres at the Louisville International Airport, Louisville, KY under the provisions of AIR 21 (49 U.S.C. 47107(h)(2)).

On September 26, 2008, the FAA determined that the request to release property at the Louisville International Airport submitted by the airport owner meets the procedural requirements of the Federal Aviation Administration. The FAA may approve the request, in whole or in part, no later than November 17, 2008.

The following is a brief overview of the request:

The Louisville Regional Airport Authority, owner of the Louisville International Airport, is proposing to formally release approximately 1.09 acres of airport property so the property can be converted to use for industrial development.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon appointment and request, inspect the request, notice and other documents germane to the request in person at the Louisville Regional Airport Authority, P.O. Box 9129, Louisville, KY 40209–0129.

Issued in Memphis, TN on February 20, 2008.

**Tommy L. Dupree,**

*Acting Manager, Memphis Airports District Office, Southern Region.*

**Editorial Note:** This document was received by the Office of the Federal Register on October 8, 2008.

[FR Doc. E8–24260 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Membership Availability in the National Parks Overflights Advisory Group Aviation; Rulemaking Committee—Representative of Native American Tribes

**ACTION:** Notice.

**SUMMARY:** The National Park Service (NPS) and the Federal Aviation Administration (FAA), as required by the National Parks Air Tour Management Act of 2000, established the National Parks Overflights Advisory Group (NPOAG) in March 2001. The NPOAG was formed to provide continuing advice and counsel with respect to commercial air tour operations over and near national parks. This notice informs the public of a vacancy (due to completion of membership on April 2, 2009) on the NPOAG (now the NPOAG Aviation Rulemaking Committee (ARC)) for a representative of Native American tribal concerns and invites interested persons to apply to fill the vacancy.

**DATES:** Persons interested in serving on the NPOAG ARC should contact Mr. Barry Brayer in writing and postmarked or e-mailed on or before November 14, 2008.

**FOR FURTHER INFORMATION CONTACT:** Barry Brayer, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, P.O. Box 92007, Los Angeles, CA 90009–2007, telephone: (310) 725–3800, e-mail: *Barry.Brayer@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

#### Background

The National Parks Air Tour Management Act of 2000 (the Act) was enacted on April 5, 2000, as Public Law 106–181. The Act required the establishment of the advisory group within 1 year after its enactment. The advisory group was established in March 2001, and is comprised of a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as *ex officio* members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairman of the advisory group.

The advisory group provides ''advice, information, and recommendations to the Administrator and the Director—

(1) On the implementation of this title [the Act] and the amendments made by this title;

(2) On commonly accepted quiet aircraft technology for use in commercial air tour operations over a national park or tribal lands, which will receive preferential treatment in a given air tour management plan;

(3) On other measures that might be taken to accommodate the interests of visitors to national parks; and

(4) At the request of the Administrator and the Director, safety, environmental, and other issues related to commercial air tour operations over a national park or tribal lands.''

Members of the advisory group may be allowed certain travel expenses as authorized by section 5703 of Title 5, United States Code, for intermittent Government service.

By FAA Order No. 1110–138, signed by the FAA Administrator on October 10, 2003, the NPOAG became an Aviation Rulemaking Committee (ARC). FAA Order No. 1110–138, was amended and became effective as FAA Order No. 1110–138A, on January 20, 2006.

The current NPOAG ARC is made up of one member representing general aviation, three members representing the air tour industry, four members representing environmental concerns, and two members representing Native American interests. Current members of the NPOAG ARC are: Melissa Rudinger, Aircraft Owners and Pilots Association; Alan Stephen, fixed-winged air tour operator representative; Elling Halvorson, Papillon Airways, Inc.; Matthew Zuccaro, Helicopters Association International; Chip Dennerlein, Siskiyou Project; Gregory Miller, American Hiking Society; Kristen Brengel, The Wilderness Society; Don Barger, National Parks Conservation Association; Rory Majenty, Hualapai Nation; and Richard Deertrack, Taos Pueblo.

#### Public Participation in the NPOAG ARC

In order to retain balance within the NPOAG ARC, the FAA and NPS invite persons interested in serving on the ARC to represent Native American tribes, to contact Mr. Barry Brayer (contact information is written above in **FOR FURTHER INFORMATION CONTACT** ).

Requests to serve on the ARC must be made to Mr. Brayer in writing and postmarked or e mailed on or before November 14, 2008. The request should indicate whether or not you are a member of an association or group related to Native American tribal issues or concerns or have another affiliation with issues relating to aircraft flights over national parks. The request should also state what expertise you would bring to the NPOAG ARC as related to tribal concerns. The term of service for NPOAG ARC members is 3 years.

Issued in Hawthorne, CA on October 6, 2008.

**Barry Brayer,**

*NPOAG Chairman, Manager, Special Programs Staff, Western-Pacific Region.*

[FR Doc. E8–24261 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

### Notice of Final Federal Agency Actions on a Proposed Highway Project in California

**AGENCY:** Federal Highway Administration (FHWA), U.S. DOT.

**ACTION:** Notice of Limitation on Claims for Judicial Review of Actions by FHWA and other Federal agencies.

**SUMMARY:** This notice announces actions taken by the FHWA and other Federal agencies that are final within the meaning of 23 U.S.C. 139(1)(1). These actions relate to a proposed Highway project on these actions grants approval for the project.

**DATES:** By this notice, the FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(1)(1). A

claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before April 14, 2009. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** Cesar Perez, Senior Transportation Engineer, Federal Highway Administration, 650 Capitol Mall, #4–100, Sacramento, CA 95814, weekdays between 7 a.m. and 4 p.m., telephone 916–498–5065, *cesar.perez@fhwa.dot.gov*, or Susanne Glasgow, Deputy Environmental, 4050 Taylor Street, San Diego, California 92110, 619–688–6670.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing approvals for the State Route 11 and Otay Mesa Port of Entry in project in the State of California. The Federal Highway Administration (FHWA) has selected the Western Alternative for the future State Route (SR–) 11 Corridor and the associated Western Site for future development of the Otay Mesa East Port of Entry (POE) in San Diego County, California. The selection of a corridor and site constitute Tier I of the SR–11 and Otay Mesa East POE program. This will allow for the following decisions/actions: (1) Corridor adoption by the California Transportation Commission (CTC); (2) consideration and approval of a conditional Presidential Permit for the POE by the U.S. Department of State (DOS); (3) facilitation of land use and circulation planning in the East Otay Mesa Specific Plan (EOMSP) area by local agencies; (4) support of international cooperation efforts to pursue the development of a new Otay Mesa East POE, and (5) possible future designation of right-of-way (R/W) for each facility. FHWA based its decision on the Final Program Environmental Impact Report/Tier I Environmental Impact Statement for the program (PEIR/PEIS, August 2008) and its supporting studies. With adoption of a Record of Decision (ROD) by FHWA and the California Department of Transportation (Caltrans), and the use of the PEIR/PEIS and its supporting studies by the General Services Administration (GSA) to make its own POE site location NEPA determination, these agencies will proceed with identification and analysis of design and operational alternatives for SR–11 and the POE, and environmental processing of the projects under Tier II, with the knowledge that the overall program has been approved.

Actions by the Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment for the project. The Record of Decision (ROD) was approved on October 3, 2008. The Final Environmental Impact Statement and other documents in the FHWA administrative record file are available by contacting the FHWA or the California Department of Transportation at the addresses provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. General: National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. Air: Clean Air Act 42 U.S.C. 7401–7671(q).

3. Wildlife: Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]. Migratory Bird Treaty Act [16 U.S.C. 703–712].

4. Historic and Cultural Resources: Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa) 11]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

5. Social and Economic: Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209]; The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.

6. Hazardous Materials: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675; Superfund Amendments and Reauthorization Act of 1986 (SARA); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992(k).

7. Executive Orders: E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. I39(1)(1).

Issued on: October 9, 2008.

**Nancy E. Bobb,**

*Director, State Programs, Federal Highway Administration, Sacramento, California.*

[FR Doc. E8–24578 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

**[FHWA Docket No. FHWA–2005–23112]**

### Motorcyclist Advisory Council to the Federal Highway Administration

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of meeting of advisory committee and change to membership.

**SUMMARY:** This document announces the fifth meeting of the Motorcyclist Advisory Council to the Federal Highway Administration (MAC–FHWA). The purpose of this meeting is to advise the Secretary of Transportation, through the Administrator of the Federal Highway Administration, on infrastructure issues of concern to motorcyclists, including: (1) Barrier design; (2) road design, construction, and maintenance practices; and (3) the architecture and implementation of intelligent transportation system technologies, pursuant to section 1914 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU).

**DATES:** The fifth meeting of the MAC–FHWA is scheduled for November 13, 2008, from 9 a.m. until 5 p.m.

**ADDRESSES:** The fifth MAC–FHWA meeting will be held at the Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Halladay, the Designated Federal Official, Office of Safety, 202–366–2288, (*michael.halladay@dot.gov*), or Dr. Morris Oliver, Office of Safety, 202–366–2288, (*morris.oliver@dot.gov*), Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**Background**

On August 10, 2005, the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Pub. L. 109–59, 119 Stat. 1144). Section 1914 of SAFETEA–LU mandates the establishment of the Motorcyclist Advisory Council as follows: ''The Secretary, acting through the Administrator of the Federal Highway Administration, in consultation with the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate, shall appoint a Motorcyclist Advisory Council to coordinate with and advise the Administrator on infrastructure issues of concern to motorcyclists, including—

(1) Barrier design;

(2) Road design, construction, and maintenance practices; and

(3) The architecture and implementation of intelligent transportation system technologies.''

In addition, section 1914 specifies the membership of the council: ''The Council shall consist of not more than 10 members of the motorcycling community with professional expertise in national motorcyclist safety advocacy, including—

(1) At least—

(A) One member recommended by a national motorcyclist association;

(B) One member recommended by a national motorcycle riders foundation;

(C) One representative of the National Association of State Motorcycle Safety Administrators;

(D) Two members of State motorcyclists' organizations;

(E) One member recommended by a national organization that represents the builders of highway infrastructure;

(F) One member recommended by a national association that represents the traffic safety systems industry; and

(G) One member of a national safety organization; and

(2) At least one, and not more than two, motorcyclists who are traffic system design engineers or State transportation department officials.''

To carry out this requirement, the FHWA published a notice of intent to form an advisory committee in the **Federal Register** on December 23, 2005 (70 FR 76353). This notice, consistent with the requirements of the Federal Advisory Committee Act (FACA), announced the establishment of the Council and invited comments and nominations for membership. The FHWA announced the ten members selected to the Council in the **Federal Register** on October 5, 2006 (71 FR 58903). An electronic copy of this document and the previous **Federal Register** notices associated with the MAC–FHWA can be downloaded through the Federal eRulemaking Portal at: *http://www.regulations.gov* and the Office of the Federal Register's home page at: *http://www.archives.gov/federal_register*.

This notice also serves to identify a change in the MAC–FHWA membership due to a change in the relationship between Mr. Steven Zimmer, one of the original members of the MAC–FHWA, and ABATE of Ohio, making him ineligible for the position for which he was nominated. Mr. James D. ''Doc'' Reichenbach II, from ABATE of Florida, will replace Mr. Zimmer on the Council.

The FHWA anticipates that the MAC–FHWA will meet at least once a year, with meetings held in the Washington, DC, metropolitan area, and the FHWA will publish notices in the **Federal Register** to announce the times, dates, and locations of these meetings. Meetings of the Council are open to the public, and time will be provided in each meeting's schedule for comments by members of the public. Attendance will necessarily be limited by the size of the meeting room. Members of the public may present oral or written comments at the meeting or may present written materials by providing copies to Ms. Fran Bents, Westat, 1650 Research Boulevard, Rockville, MD 20850–3195, (240) 314–7557, 10 days prior to the meeting.

The agenda topics for the meetings will include a discussion of the following issues: (1) Barrier design; (2) road design, construction, and maintenance practices; and (3) the architecture and implementation of intelligent transportation system technologies.

**Conclusion**

The fifth meeting of the Motorcyclist Advisory Council to the Federal Highway Administration will be held on November 13, 2008, at the Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, VA 22202 from 9 a.m. until 5 p.m.

**Authority:** Section 1914 of Pub. L. 109–59; Pub. L. 92–463, 5 U.S.C., App. II § 1.

Issued on: October 09, 2008.

**Thomas J. Madison, Jr.,**

*Federal Highway Administrator.*

[FR Doc. E8–24606 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–22–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Notice of Funding Availability and Solicitation of Applications for the SAFETEA–LU Magnetic Levitation Project Selection

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of funding availability; solicitation for applications.

**SUMMARY:** Under this Notice, the FRA announces that $45 million authorized by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) for grants to existing magnetic levitation (maglev) projects located east of the Mississippi River has been appropriated and that project proponents (States or State designated authorities) for the three eligible projects may submit applications for grants to fund such projects. The three eligible projects are the Pittsburgh project, the Baltimore-Washington project, and the Atlanta-Chattanooga project. Funds awarded under this section can be used for preconstruction planning activities and capital costs of the fixed guideway infrastructure of a maglev project. This Notice of Funding Availability does not apply to the $45 million appropriated specifically for the Nevada Department of Transportation to fund the existing proposed maglev project between Las Vegas and Primm, Nevada (*see* section 102 of the SAFETEA–LU Technical Corrections Act of 2008, Pub. L. 110–244 (June 6, 2008)).

**DATES:** To be considered, applications must be received by February 13, 2009. FRA will begin accepting grant applications on Monday, October 20, 2008.

**ADDRESSES:** Applications must be submitted electronically to *http://www.grants.gov* (''Grants.Gov''). Grants.Gov allows organizations electronically to find and apply for competitive grant opportunities from all Federal grant-making agencies. An eligible applicant wishing to submit an application pursuant to this notice should immediately initiate the process of registering with Grants.Gov at *http://www.grants.gov*. To confirm successful registration on Grants.Gov send an e-mail to *paxrail@dot.gov*.

For application materials that an applicant is unable to submit via Grants.Gov (such as oversized engineering drawings), applicants may submit an original and two (2) copies to the Federal Railroad Administration at

the following address: Federal Railroad Administration, Attention: Wendy Messenger, Office of Railroad Development (RDV–13), Mail Stop #20, 1200 New Jersey Avenue, SE., Washington, DC 20590.

Due to delays caused by enhanced screening of mail delivered via the U.S. Postal Service, applicants are encouraged to use other means to assure timely receipt of materials.

**FOR FURTHER INFORMATION CONTACT:** Wendy Messenger, Office of Railroad Development (RDV–13), Federal Railroad Administration, 1200 New Jersey Avenue, SE., Mail Stop #20, Washington, DC 20590. Phone: (202) 493–6396; Fax: (202) 493–6330, or Robert Carpenter, Grants Officer, Office of Acquisition and Grants Services (RAD–30), Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Phone: (202) 493–6153; Fax: (202) 493–6171.

**SUPPLEMENTARY INFORMATION:**

Section 102 of the SAFETEA–LU Technical Corrections Act (Pub. L. 110–244, June 6, 2008) (the 2008 Act), amended SAFETEA–LU, which authorized, but did not appropriate, $90 million for maglev projects, 50 percent of which would go to the maglev project between Las Vegas and Primm, NV, and 50 percent of which would go to an undetermined maglev project located east of the Mississippi River. The 2008 Act made the funding available and modified and clarified the language by dividing the funding equally between fiscal years 2008 and 2009, adding a 20 percent non-Federal match requirement, and allowing the ''east of the Mississippi River'' funding to potentially be distributed among two or more projects.

In the Joint Explanatory Statement of the House Transportation and Infrastructure Committee and the Senate Environmental and Public Works, Banking Housing and Urban Affairs, and Commerce, Science and Transportation Committees accompanying the 2008 Act (the Joint Committee Statement), Congress explained that by changing the language to allow FRA discretion to award funds to ''projects'' located east of the Mississippi River, ''the intent is to limit the eligible projects to three existing projects east of the Mississippi River: Pittsburgh, Baltimore-Washington, and Atlanta-Chattanooga.'' [1] Based upon that clear Congressional direction, the solicitation for applications under this NOFA is limited to those three projects. Through the SAFETEA–LU maglev project selection (Catalog of Federal Domestic Assistance Program Number 20.312), FRA will determine which of the three eligible projects east of the Mississippi River will receive these funds and has the discretion to award funds to one or more of those three projects.

## Background

In the Transportation Equity Act for the 21st Century (Pub. L. 105–178 (July 22, 1998)) (TEA–21), Congress established the Maglev Deployment Program, the purpose of which was to encourage the development and construction of an operating transportation system employing magnetic levitation capable of safe use by the public at a speed in excess of 240 miles per hour. TEA–21 provided $55 million for fiscal years 1999 through 2001 for maglev transportation systems. Congress directed FRA to establish project selection criteria, to solicit applications for funding, to select one or more projects to receive financial assistance for preconstruction planning activities, and, after completion of such activities, to select one of the projects to receive financial assistance for final design, engineering, and construction activities.

FRA received eleven applications and selected seven projects to receive funding. After each of the seven projects completed preliminary environmental documentation and FRA issued a programmatic environmental impact statement and record of decision, in January 2000 two projects were selected for additional funding and further study. The first project was a 54-mile system through Pittsburgh, PA, and the second was a 39-mile system between Baltimore, MD and Washington, DC. Extensive environmental and preliminary engineering work has been completed for both of these projects. Proponents of two of the seven projects not selected in January 2000 continued to study maglev or high-speed ground transportation options, including maglev, with funding from other sources. These two projects are a 40 mile segment between Las Vegas and Primm, NV that is envisioned as part of a system eventually extending to Anaheim, CA, and a 110 mile route between Atlanta, GA and Chattanooga, TN.

In TEA–21, Congress also authorized, but did not appropriate, $950 million in Federal funds for final design, engineering and construction of the most promising projects. TEA–21 expired and Congress never appropriated those funds. In SAFETEA–LU, Congress authorized, but once again did not appropriate, $90 million for a new maglev deployment program. In the 2008 Act, Congress made those funds available. As noted above, half of those funds are allocated to the Las Vegas, NV project. The other half of those funds will be distributed to one or more projects based upon a selection process. By this NOFA, FRA is announcing the initiation of that selection process and notifying the project proponents for the three eligible projects of the selection criteria.

**Authority:** The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59, August 10, 2005), and the SAFETEA–LU Technical Corrections Act (Pub. L. 110–244, June 6, 2008).

*Funding:* The 2008 Act provides $90,000,000 for maglev and directs the Secretary of Transportation to: (1) Allocate 50 percent to the Nevada Department of Transportation for the Las Vegas, NV maglev project; and (2) allocate 50 percent, in the form of one or more grant agreements covering up to 80 percent of the project costs, to one or more of three eligible maglev projects east of the Mississippi River. The Federal share of a selected project or projects shall be 80 percent; the grantee(s) is (are) responsible for providing the other 20 percent. Only expenditures made after the date of enactment of the SAFETEA–LU Technical Corrections Act, provided they are otherwise eligible and covered by an approved scope of work, will be considered potentially eligible as the non-Federal share. The funding provided under these grants will be made available to the grantee(s) on a reimbursement basis. If FRA selects more than one project, FRA may choose to apportion the available funding as the agency determines in its discretion.

*Schedule for Maglev Grant Program:* FRA will begin accepting grant applications on October 20, 2008 and will continue accepting applications until February 13, 2009. Applications submitted before October 20, 2008 will be disregarded. FRA may request that an applicant submit a revised application reflecting a refined scope of work and budget. FRA anticipates making the award(s) made pursuant to this notice during FY 2009.

*Project Eligibility:* Section 1307 of SAFETEA–LU establishes three project

[1] See the Joint Explanatory Statement of the House Committee on Transportation and Infrastructure, and the Senate Committees on Environment and Public Works, on Banking, Housing and Urban Affairs, and on Commerce, Science and Transportation, on the SAFETEA–LU Technical Corrections Act of 2008 at 5 (April 30, 2008).

eligibility standards. To be eligible to receive financial assistance under this program, a project must: (1) Involve a segment or segments of a high-speed ground transportation corridor; (2) result in an operating transportation facility that provides a revenue producing service; [2] and (3) be approved by the FRA Administrator based on an application submitted to the Administrator by a State or authority designated by one or more States. The first two criteria are prerequisites to FRA evaluating an application and must be addressed in the cover letter with supporting documentation in the application package. If those two criteria are not met to FRA's satisfaction, the project is not eligible for funding.

If the project proponents propose service in more than one State, a single State or designated State authority should apply on behalf of all participating States. FRA encourages States to submit applications through their respective Departments of Transportation, which have extensive experience in implementing Federally funded transportation programs.

*Eligible Projects:* As explained in the Joint Committee Statement, only the three existing maglev projects located east of the Mississippi River are eligible. These are the Pittsburgh, Baltimore-Washington, and Atlanta-Chattanooga projects.

*Selection Criteria:* Provided the statutory eligibility criteria have been met, FRA will consider the following selection factors in evaluating applications for grants under this program:

1. Whether the project demonstrates the ability to address at least one or more serious technological or financial/economic problem(s) that challenge the feasibility of widespread adaptation of maglev systems. Examples might include methods to make maglev systems more energy efficient or ways to mitigate initial construction costs (*e.g.*, by reducing vehicle weight or demonstrating new, lower cost ways to construct maglev guideway).

2. Whether funds awarded under this section will result in investments that are beneficial not only to the maglev project, but also to other current or near-term transportation projects. Examples could include the preservation of rights-of-way, and/or the achievement of one or more planning goals. Applicants should keep in mind, however, that Federal funds may not be used for station construction costs.

3. Whether the project demonstrates the potential for a public-private partnership for the corridor in which the maglev project is involved, and/or for the project independently. Any corridor exhibiting partnership potential must meet at least the following two conditions:

(a) Private enterprise entities must be able to operate the corridor—once built and paid for—as a complete, self-sustaining operation. That is, the total fully allocated operating expenses of the maglev service are projected to be offset by revenues attributable to the service; and

(b) The total societal benefits of a maglev corridor must equal or exceed its total societal costs.

4. The extent of the demonstrated financial commitment to the construction of the proposed project from both non-Federal public sources and private sources, including any financial contributions or commitment the applicant has secured from private entities that are expected to benefit from the project. If applicable, also include the extent to which the State or private entities exceed the required 20 percent match.

5. Whether the project demonstrates the ability to meet all applicable Federal and State environmental statutes and regulations.

6. The degree to which the project will demonstrate the variety of maglev operating conditions which are to be expected in the United States. For example, these conditions might include a variety of at-grade, elevated and depressed guideway structures, extreme temperatures, and intermodal connections at terminals.

7. Whether the project demonstrates the ability to meet a top speed of at least 240 miles per hour (MPH). FRA will also consider favorably the ability to meet higher speeds as well as the duration that speeds of at least 240 MPH can be attained.

*Requirements for Grant Applications:* All applications must be submitted through Grants.gov, which is the Federal grants portal. The following points describe the minimum content which will be required in grant applications. These requirements may be satisfied through a narrative statement submitted by the applicant, supported by spreadsheet documents, tables, drawings, and other materials, as appropriate. Each grant application will:

1. Designate a point of contact for the applicant and provide their name and contact information, including phone number, mailing address and e-mail address. The point of contact must be an employee of the applicant.

2. Include a detailed project description, including an explanation of why the project is an eligible project and a thorough discussion of how the project meets all of the selection criteria.

3. Describe the market to be served by the proposed new service, and the existing transportation facilities and service afforded by other public and private modes of transportation in the market area. In addition, the application should describe the operating changes to the target market that are anticipated to result from the introduction of maglev services, as well as assess the major risks or obstacles to maglev's successful deployment and operation.

4. Provide a detailed summary of all work done to date, including any preliminary engineering work, the project's previous accomplishments and funding history, and a chronology of key documents produced and funding events (*e.g.*, grants and contracts).

5. Describe progress toward completing any environmental documentation or clearance required for the proposed project under the National Environmental Policy Act, the National Historic Preservation Act, section 4(f) of the DOT Act, the Clean Water Act, or other applicable Federal or State laws.

Applicants should keep in mind, however, that FRA will not give additional weight to projects that have completed more environmental work. Instead, as explained in the selection criteria, FRA will consider favorably those projects that demonstrate an ability to ultimately fulfill all applicable Federal and State environmental requirements.

6. Include a complete Standard Form 424, ''Application for Federal Assistance,'' a signed Standard Form 424D, ''Assurances—Construction Programs,'' signed copies of FRA's Additional Assurances and Certifications, available at *http://www.fra.dot.gov/downloads/admin/assurancesandcertifications.pdf*, and the most recent audit performed in compliance with OMB Circular A–133. Information on Circular A–133 can be found at *http://www.whitehouse.gov/omb/circulars/a133/a133.html*. If the scope of work includes non-construction activities, applications must also include a signed Standard Form 424B, ''Assurances—Non-Construction Programs.''

[2] Congress titled section 1307 ''Deployment of Magnetic Levitation Transportation Projects'' and the funding provided through section 1101(a)(18) of SAFETEA–LU, as amended by the 2008 Act is made available for the ''deployment of magnetic levitation projects.'' FRA interprets the statute as a whole as evidencing a Congressional intent that the Federal funds be used to directly advance and result in the construction of a maglev project. Thus, in order to be eligible for funding under this program, an application must include evidence that an operating transportation facility that provides a revenue producing service will be constructed.

7. Define the scope of work for the proposed project and the anticipated project schedule. Describe the proposed project's physical location (as applicable), and the extent to which the proposed project consists of planning and/or implementation of capital improvements. Include any drawings, plans, or schematics that have been prepared relating to the proposed project. If the funding from the Program is only going to be a portion of the overall funding for the project, describe the complete project and specify the portion covered by Federal funding.

8. Present a detailed budget for the proposed project. At a minimum, the budget should separate total cost of the project into the following categories, if applicable: (1) Administrative and legal expenses; (2) land, structures, rights-of-way, and appraisals; (3) relocation expenses and payments; (4) architectural and engineering fees; (5) project inspection fees; (6) site work; (7) demolition and removal; (8) construction labor, supervision, and management; (9) materials, by type; (10) miscellaneous; and (11) contingencies. Also specify the amount of costs in each category that are proposed to be funded from Federal funds, and the amount to be funded by non-Federal matching funds.

9. Describe and provide evidence of the source(s) and amount of matching funds.

10. Describe proposed project implementation and project management provisions. Include descriptions of expected arrangements for project contracting, contract oversight, change-order management, risk management, and conformance to Federal requirements for project progress reporting.

11. Describe, in as much detail as possible, the next steps that will be required beyond those described in the application to foster implementation of the planned maglev services, such as technological development or testing, additional planning, engineering or site investigation activities, and right-of-way acquisition.

*Format:* Excluding spreadsheets, drawings, and tables, the narrative statement for grant applications may not exceed thirty pages in length. With the exclusion of oversized engineering drawings (which may be submitted in hard copy to the FRA at the address above), all application materials should be submitted as attachments through Grants.Gov. Spreadsheets consisting of budget or financial information should be submitted via Grants.Gov as Microsoft Excel (or compatible) documents.

**Mark E. Yachmetz,**

*Associate Administrator for Railroad Development.*

[FR Doc. E8–24567 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF THE TREASURY

### Development of a Guarantee Program for Troubled Assets

**AGENCY:** Department of the Treasury, Departmental Offices.

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

**SUMMARY:** The Department of the Treasury invites the general public to comment on a program to guarantee the timely payment of principal of, and interest on, troubled assets originated or issued prior to March 14, 2008, as authorized by Section 102 of the Emergency Economic Stabilization Act of 2008 (EESA).

**DATES:** Written comments should be received on or before October 28, 2008 to be assured of consideration.

*Submission of Comments:* Please submit comments electronically through the Federal eRulemaking Portal—''Regulations.gov.'' Go to *http://www.regulations.gov* to submit or view public comments. The ''How to Use this Site'' and ''User Tips'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

Please include your name, affiliation, address, e-mail address and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** *TARPInsurance@do.treas.gov.*

**SUPPLEMENTARY INFORMATION:** Section 102 of the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343) (EESA) charges the Secretary of the Treasury to develop a program to guarantee the timely payment of principal of, and interest on, troubled assets originated or issued prior to March 14, 2008. The Secretary is authorized to set and collect premiums from participating financial institutions by category or class of asset, taking into consideration the credit risk characteristics of the asset being guaranteed. The premium must be sufficient to cover anticipated claims, based on actuarial analysis, and ensure that taxpayers are fully protected. The structure of the guarantee program may take any number of forms and may vary by asset class.

The Treasury Department is soliciting comments to assist in the development of the guarantee program. The Treasury Department is particularly interested in comments on the specific questions set forth below.

1 What are the key issues Treasury should address in establishing the guarantee program for troubled assets?

1.1 Should the program offer insurance against losses for both individual whole loans and individual mortgage backed securities (MBS)?

1.2 What is the appropriate structure for such a program? How should the program accommodate various classes of troubled assets? Should the program differ by the degree to which an asset is troubled?

1.2.1 What are the key issues to consider with respect to guaranteeing whole first mortgages?

1.2.2 What are the key issues to consider with respect to guaranteeing HELOCs and other junior liens?

1.2.3 What are the key issues to consider with respect to guaranteeing MBS?

1.2.4 What are the key issues associated with guaranteeing financial instruments other than mortgage related assets originated or issued before March 14, 2008 that could be important for promoting financial market stability?

1.3 What are the key issues to consider with respect to setting the payout of the guarantee?

1.3.1 Should the payout be equal to principal and interest at the time the asset was originated or to some other value? What should that value be? What would be the impact of offering guarantees of less than 100 percent of original principal and interest?

1.3.2 Should payout vary by asset class? If so, please describe using the same asset classes as enumerated under 1.21–1.24.

1.4 What event should trigger the payout under the guarantee? Should the holder be able to present the claim at will or should there be a set date? Should this date differ by asset class? Should this date differ by the degree to which the asset is troubled?

1.5 Should the holder be permitted to sell the troubled asset with the program guarantee? If appropriate, should asset sales be restricted to eligible financial institutions or should

there be no restrictions to promote liquidity in the marketplace?

1.6 What are the key issues the Treasury should consider in determining the possible losses to which the government would be exposed in offering the guarantee? What methodology should be used to determine possible losses? Does it differ by asset class? If so, please describe using the same asset classes as enumerated under 1.21–1.24. Does it differ by the degree to which the asset is troubled?

1.7 What are the key elements the Treasury should consider in setting premiums for this program? Is it feasible or appropriate to set premiums reflecting the prices of similar assets purchased under Section 101 of the EESA?

1.7.1 If use of prices of similar assets purchased under Section 101 of the EESA are not feasible or appropriate, should premiums be set by use of market mechanisms similar to (but separate from) those contemplated for the troubled assets purchase program? How would this be implemented? If not feasible or appropriate, what methodologies should be used to set premiums?

1.7.2 Do these considerations of feasibility or appropriateness vary by asset class? If so, please describe using the same asset classes as enumerated under 1.21–1.24. Should the premiums vary by the degree to which the asset is troubled?

1.8 How and in what form should payment of premiums be scheduled?

2 How should a guarantee program be designed to minimize adverse selection, given that the program must be voluntary? Is there a way to limit adverse selection that avoids individually analyzing assets?

3 What legal, accounting, or regulatory issues would such a guarantee program raise?

4 What administrative and/or operational challenges would such a guarantee program create?

4.1 What expertise would Treasury need to operate such a guarantee program? Please describe for all facets of the program.

5 What are the key issues to be considered in determining the eligibility of a given type of financial institution to participate in this program? Should these eligibility provisions differ from those of the troubled asset purchase program?

6 What are the key issues to be considered in determining the eligibility of a given asset to be guaranteed by this program? Should eligibility provisions of assets to be guaranteed under this program differ from those of the troubled asset purchase program?

7 Assuming the guarantee is priced to cover expected claims, are there situations (perhaps created by regulatory or accounting considerations) in which financial institutions would prefer this program to the troubled asset purchase program? Please describe.

7.1 Does this preference differ by type and condition of the asset? For what troubled assets might financial institutions choose to participate in the guarantee program rather than sell under the troubled asset purchase program? Is accommodating this choice likely to best promote the goals of the EESA? Does it adequately protect the taxpayer? If not, what design feature should be included to assure these goals are met?

Dated: October 10, 2008.

**Lindsay Valdeon,**

*Deputy Executive Secretary, Treasury Department.*

[FR Doc. E8–24686 Filed 10–14–08; 4:15 pm]

**BILLING CODE 4810–25–P**

## DEPARTMENT OF THE TREASURY

### Departmental Offices; Debt Management Advisory Committee; Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, section 10(a)(2), that a meeting will be held at the Hay-Adams Hotel, 16th Street and Pennsylvania Avenue, NW., Washington, DC, on November 4, 2008 at 10:30 a.m. of the following debt management advisory committee: Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

The agenda for the meeting provides for a charge by the Secretary of the Treasury or his designate that the Committee discuss particular issues and conduct a working session. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, section 10(d) and Public Law 103–202, section 202(c)(1)(B)(31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, section 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Public Law 103–202, section 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, section 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions, financing estimates and technical charts. This briefing will give the press an opportunity to ask questions about financing projections and technical charts. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Karthik Ramanathan, Acting Assistant Secretary for Financial Markets (202) 622–2042.

Dated: October 3, 2008.

**Anthony W. Ryan,**

*Acting Under Secretary for Domestic Finance.*

[FR Doc. E8–24361 Filed 10–15–08; 8:45 am]

**BILLING CODE 4810–25–M**

## DEPARTMENT OF THE TREASURY

### Financial Management Service; Senior Executive Service: Combined Performance Review Board (PRB)

**AGENCY:** Financial Management Service, Department of the Treasury.

**ACTION:** Notice of Members of Combined Performance Review Board.

**SUMMARY:** Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of the members of the Combined Performance Review Board (PRB) for the Financial Management Service (FMS), Bureau of Engraving and Printing (BEP), the Bureau of the Public Debt (BPD), the United States Mint and the Alcohol and Tobacco Tax and Trade Bureau (TTB). The Board reviews the performance appraisals of career senior executives below the level of bureau head and principal deputy in the bureaus, except for executives below the Assistant Commissioner/Executive Director level in the Financial Management Service and Bureau of the Public Debt. The Board makes recommendations regarding proposed performance appraisals, ratings, bonuses, pay adjustments and other appropriate personnel actions.

*Composition of Combined PRB:* The Board shall consist of at least three voting members. In the case of an appraisal of a career appointee, more than half of the members shall consist of career appointees. The names and titles of the Combined PRB members are as follows:

**Primary Members**

Rita Bratcher, Assistant Commissioner, Debt Management Services, FMS; Pamela J. Gardiner, Deputy Director, BEP; Andrew Brunhart, Deputy Director, United States Mint; Anita Shandor, Assistant Commissioner, Office of Financing, BPD; John J. Manfreda, Administrator, TTB.

**Alternate Members**

Wanda Rogers, Assistant Commissioner, Payment Management, FMS; Scott Wilson, Associate Director, Management, BEP; Marty Greiner, Chief Financial Officer, United States Mint; Lori Santamorena, Executive Director, Government Securities Regulations Staff, BPD; Vicky I. McDowell, Deputy Administrator, TTB.

**DATE:** Membership is effective on 09–30–2008.

**FOR FURTHER INFORMATION CONTACT:** Terry Ford, Director, Human Resources Division, Financial Management Service, 3700 East West Hwy., Hyattsville, MD 20782, Telephone Number: 202–874–7080.

Dated: September 30, 2008.

**Judith R. Tillman,**

*Commissioner, Financial Management Service.*

[FR Doc. E8–24435 Filed 10–15–08; 8:45 am]

**BILLING CODE 4810–35–M**


Federal Register

**Thursday,**
**October 16, 2008**

## Part II

# Department of Agriculture

**Forest Service**

**36 CFR Part 294**

**Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho; Final Rule**

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**36 CFR Part 294**

**RIN 0596–AC62**

## Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho

**AGENCY:** Forest Service, USDA.

**ACTION:** Final rule and record of decision.

**SUMMARY:** The U.S. Department of Agriculture (USDA or Department) is adopting a state-specific, final rule establishing management direction for designated roadless areas in the State of Idaho. The final rule designates 250 Idaho Roadless Areas (IRAs) and establishes five management themes that provide prohibitions with exceptions or conditioned permissions governing road construction, timber cutting, and discretionary mineral development.

The final rule takes a balanced approach recognizing both local and national interests for the management of these lands. The Department and Forest Service are committed to the important challenge of protecting roadless areas and their important characteristics. The final rule achieves this through five land classifications that assign various permissions and prohibitions regarding road building, timber cutting, and discretionary mineral activities. The final rule also allows the Forest Service to continue to be a *good neighbor* and reduce the risk of wildland fires to at-risk communities and municipal water supply systems. The rule does not authorize the building of a single road or the cutting of a single tree; instead it establishes permissions and prohibitions that will govern what types of activities may occur in IRAs. Any decision to build a road, allow mineral activities, harvest a tree, or conduct any other activity permissible under this final rule will require appropriate site-specific analysis under the National Environmental Policy Act (NEPA) and other applicable laws. Projects will also be consistent with the applicable land management plan (LMP) components.

This final rule supersedes the 2001 Roadless Area Conservation Rule (2001 roadless rule) for National Forest System (NFS) lands in the State of Idaho.

**DATES:** *Effective Date:* This rule is effective October 16, 2008.

**FOR FURTHER INFORMATION CONTACT:** Idaho Roadless Rule Team Leader Brad Gilbert at (208) 765–7438. Individuals using telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. Eastern Standard Time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** This document serves as both notice of final rule and record of decision.

### Decision

For the reasons set out below, the Department hereby promulgates a regulation establishing IRAs as described in Alternative 4 of the ''Roadless Area Conservation National Forest System Lands in Idaho Final Environmental Impact Statement,'' USDA Forest Service, 2008, and the supporting record. This decision is not subject to Forest Service appeal regulations.

### Outline

The following section outlines the contents of the preamble.



### Introduction and Background

On October 5, 2006, Idaho Governor James Risch submitted a petition to the Secretary of Agriculture (Secretary) to establish new management for Idaho's inventoried roadless areas on NFS lands. Idaho's petition divided roadless areas into five broad management themes: Wild Land Recreation (WLR); Special Areas of Historic or Tribal Significance (SAHTS); Primitive; Backcountry/Restoration (BCR); and General Forest, Rangeland, and Grassland (GFRG). The petition was submitted under section 553(e) of the Administrative Procedure Act and Department regulations at 7 Code of Federal Regulations (CFR) 1.28. The Roadless Area Conservation National Advisory Committee (RACNAC) (72 FR 13469) reviewed the Idaho petition on November 29 and 30, 2006, in Washington, DC. The committee issued a unanimous, consensus-based recommendation on December 19, 2006, that the Secretary direct the Forest Service, with the State of Idaho as a cooperating agency, to proceed with rulemaking. The Committee's report provided specific advice and suggested clarifications regarding particular issues. After considering the advisory committee's review and report, the Secretary accepted the petition and directed the Forest Service to initiate rulemaking on December 22, 2006.

A notice of intent to prepare an environmental impact statement (EIS) was published in the **Federal Register** April 10, 2007, (72 FR 17816). A notice of availability for the draft environmental impact statement (DEIS) was published on December 21, 2007, (72 FR 72708). The Forest Service published a proposed rule for conservation of NFS inventoried roadless areas within Idaho on January 7, 2008, (73 FR 1135). The notice of availability for the final environmental impact statement (FEIS) was published on September 5, 2008, (73 FR 51815). Additional information, maps, and other materials concerning the FEIS, IRAs, and roadless areas nationally, can be found at *http://roadless.fs.fed.us/*.

The Department is committed to conserving and managing inventoried roadless areas. The Department considers the final rule as the most appropriate solution to address the challenges of inventoried roadless area management on NFS lands in the State of Idaho. Collaborating and cooperating with states and other interested parties regarding the long-term strategy for the conservation and management of inventoried roadless areas allows recognition of both national values and local situations.

The Department believes that the final Idaho Roadless Rule collaboratively resolves an issue of great importance to the people of Idaho and the nation. The management of large tracts of undeveloped land has been a contentious issue since the founding of the Forest Service in 1905. The Forest Service has engaged in numerous approaches and periodic reviews to address how to best manage these lands. The Idaho Roadless Rule represents a unique effort to address these difficult questions. How can the Agency best conserve open space? How can the Agency protect some of the most magnificent areas in Idaho and the nation? How much active management, including reducing fuel levels through timber harvest, should the Agency consider allowing to reduce the risk of

unwanted wildland fire effects on adjacent private and other public lands?

The State of Idaho petition included specific information and recommendations for the management of individual inventoried roadless areas in the State. Additionally, the State of Idaho examined roadless areas sharing boundaries or overlapping with all neighboring states and determined coordination with Montana and Utah was necessary to ensure consistency of management themes assigned to these inventoried roadless areas.

The unique perspectives and knowledge provided by the State and its citizens was of great assistance throughout this rulemaking. Many of these roadless areas form the backdrop for Idaho communities and have become part of their identity. They are used for hiking, camping, hunting, and motorized recreation on backcountry trails. Local communities are also sensitive to the economic consequences of Federal land management, whether for recreation or other multiple-use purposes. Although this rule does not provide management direction for recreation and access management, its emphasis on retaining the roadless characteristics over the vast majority of IRA acres will address recreation and scenery concerns from both national and local perspectives.

Recently, there have been several attempts to resolve the roadless issue nationally and in the State of Idaho. Since the Forest Service Roadless Area Review and Evaluation (RARE II), the Agency has used locally driven forest plans to manage inventoried roadless areas. While these plans accounted for the comments of local communities by considering the characteristics of each individual roadless area, some felt these plans lacked a national perspective and allowed too much modification of roadless characteristics.

The 2001 roadless rule sought to answer these questions from a national perspective, but many felt that the rule's approach would cause undue harm to local communities. Some states and communities felt disenfranchised by the process.

The State of Idaho indicated that its decision to petition was precipitated by the State's belief that it was not provided an adequate opportunity to participate in the development of the 2001 roadless rule. The State expressed concern that the rule could be interpreted as not allowing adequate protection for communities and municipal water supplies from the threat of unwanted wildland fire effects. Additionally, the State indicated its belief that the 2001 roadless rule could negatively affect some local communities that are dependent on use of resources from NFS lands.

On August 12, 2008, the Federal District Court for the District of Wyoming declared that the 2001 Roadless Area Conservation Rule (2001 roadless rule) was promulgated in violation of the National Environmental Policy Act (NEPA) and the Wilderness Act. The court held ''the roadless rule must be set aside'' and that ''[t]herefore, the Court ORDERS that the Roadless Rule, 36 CFR 294.10 to 294.14, be permanently enjoined, for the second time.'' Previously, another Federal district court in California had issued an order that reinstated the 2001 roadless rule, including the Tongass-specific amendment, and specified that ''federal defendants are enjoined from taking any further action contrary to the [2001] Roadless Rule * * *.'' Both these orders have been appealed and the Forest Service has sought relief in both Federal district courts. For purposes of this rulemaking, however, nothing in the pending litigation limits the Secretary from conducting state-specific rulemaking regarding roadless area management or from evaluating the 2001 roadless rule as one alternative in the FEIS.

The Department has continued to seek a middle ground to resolve this issue by using forest plans, the locally driven state petition process, and integrating the national perspective provided by RACNAC. While the proposed rule made strides in accomplishing this objective, several respondents and RACNAC expressed concern whether some provisions could be read to allow portions of the BCR areas to be managed in a way that varied from the Governor's stated intent to manage the BCR similar to the way the area would be managed under the 2001 roadless rule while providing for limited stewardship activities. This was not the intent.

This final rule refines provisions and represents a compromise that balances the nationally recognized need for conservation of IRAs with being more responsive to local communities and citizens. Specifically, the final rule conserves the undeveloped/unroaded character for the vast majority of the IRAs; allows limited fuel treatment activities to reduce the risk of wildland fire effects to private and public property and municipal water supply systems; and accommodates limited exceptions for some communities highly dependent on the natural resources found on NFS lands.

These undeveloped lands will become increasingly important as sources of public drinking water, plant and animal diversity, natural appearing landscapes, and other unique resources as the nation continues to grow in population and faces increasing demands for the various multiple-use resources available from NFS lands.

**Roadless Area Inventories in Idaho**

This rulemaking relies on the most recent inventory available for roadless areas within each national forest in the State of Idaho. Land management plans were used, as well as other assessments and the inventories associated with the 2000 Roadless Area Conservation Final Environmental Impact Statement. Using these inventories, the Forest Service has identified approximately 9.3 million acres of inventoried roadless areas that are the subject of this rule.

The Agency has sought to be particularly sensitive to concerns over the accuracy of the inventories. The 2001 roadless rule used the inventories of record from late 1999 as their basis for boundaries. This final rule uses these inventories as a starting point but also looked at updates identified through land management plan (LMP) revisions, most notably on the Caribou-Targhee National Forest (NF) in 1998 and the southwest Idaho forests (Boise, Payette and Sawtooth NFs) in 2003. New inventories for northern Idaho forests (Idaho Panhandle, Clearwater, and Nez Perce NFs) currently in LMP revision were also used. These inventories are based on agency direction in Forest Service Handbook (FSH) 1909.12, section 70. The oldest inventory used is from the Salmon-Challis NF, which dates to their LMP from mid-1980.

Changes to the roadless inventory reflect improvements in mapping and elimination of some areas that had been developed since the last inventory of record and inclusion of some areas after review. Inventories used for this final rule have all received review and comment by the public during the LMP revision process prior to this rulemaking.

**Purpose and Need for the Idaho Roadless Rule**

The purpose of the Idaho Roadless Rule is to respond to the State's petition to recommend State-specific direction for the conservation and management of inventoried roadless areas within the State of Idaho. The final Idaho Roadless Rule integrates local management concerns and the need to protect these areas with the national objectives for protecting roadless area values and characteristics.

Collaborating with the State of Idaho on the long-term strategy for the

management of IRAs recognizes national values and local situations and resolves unique resource management challenges. Collaboration with others who have a strong interest in the conservation and management of inventoried roadless areas also helps ensure balanced management decisions that maintain the most important characteristics and values of those areas.

The management direction established by the rule is based on individual roadless characteristics for lands containing outstanding or unique features where there is minimal or no evidence of human use; culturally significant areas; general roadless characteristics where human uses may or may not be apparent; as well as some areas displaying high levels of human use. The Department also recognizes there is compelling interest in—

- Reducing the threat to communities, homes, and property from the risk of severe wildfire or other risks associated with adjacent Federal lands;
- Reducing the threat to forests from the negative effects of severe wildfire and insect and disease outbreaks; and
- Assuring access to property, for the State, Tribes, and citizens that own property within roadless areas.

Between 2001 and 2007, wildland fires burned about 3.1 million acres in Idaho, of which about 1 million acres were in IRAs. Wildland fire is a natural component of these roadless areas; however, actions to reduce the risk of wildland fire effects to communities and municipal water supply systems may be needed in some situations. In 2003, Congress recognized the need to improve the capacities of the Departments of Agriculture and Interior to conduct hazardous fuel reduction projects, by passing the Healthy Forests Restoration Act (HFRA) (Pub. L. 108–148).

Aware of all of these concerns and the long unresolved debates over conserving and managing inventoried roadless areas in the absence of wilderness legislation for the State of Idaho and after considering the State's petition, the advice and recommendations of the RACNAC, Tribes, and public; the Secretary determined that regulatory direction for managing Idaho's roadless areas was needed.

**Public Involvement on the Proposed Rule**

- How Was Public Involvement Used in the Rulemaking Process?

A notice of intent to prepare an EIS on ''Roadless Area Conservation; National Forest System Lands in Idaho'' was published in the **Federal Register**, April 10, 2007, (68 FR 17816). The public comment period ended on May 10, 2007. The Forest Service received about 38,000 comments, of which 32,000 were form letters. The remaining letters consisted of original comments or form letters with additional original text.

A notice of availability for the DEIS was published in the **Federal Register** on December 21, 2007, (72 FR 72708). The Forest Service published a proposed rule for conservation of national forests inventoried roadless areas in Idaho on January 7, 2008, (73 FR 1135). A copy of the proposed rule and the DEIS has been available on the World Wide Web/Internet at *http://roadless.fs.fed.us/* since January 7, 2008. A public meeting on the proposed rule was held in Washington, DC on January 14, 2008. Sixteen public meetings were held in Idaho between January 22 and February 28, 2008.

In addition to the suggestions from the RACNAC, the Department received approximately 140,000 responses. Responses included advocacy for a particular outcome or regulatory language, as well as suggestions for analyses to conduct, issues to consider, alternatives to the proposed action, and calls for compliance with laws and regulations. Response to comments on the DEIS are in Appendix R of the FEIS. These comments played a key role in the development of modifications to the proposed rule and the decision made in this record of decision.

It is noteworthy that many of the improvements between draft and final were made in response to requests made by Idaho Indian Tribes. Some of the theme changes were made in direct response to Tribal requests (see FEIS Appendix P). Chapters 3.15 (Cultural Resources) and 3.16 (Idaho and Affected Indian Tribes) were modified in the FEIS based on Tribal input. Section 294.28(h) was added to Scope and Applicability assuring Tribes this rule would not affect any of their rights or Federal Government responsibilities to consult on projects in roadless areas. The Department and Forest Service are grateful for the insights and serious attention the Tribes have provided during this rulemaking.

- How Did the RACNAC Participate in the Rulemaking Process?

The RACNAC held open meetings in various locations across the country. The meetings helped the RACNAC develop recommendations to the Secretary to be considered in the development of the final rule. The RACNAC submitted their final recommendations to the Secretary in a letter dated May 30, 2008.

Through the public meetings as well as Tribal and public comments, the Agency and State repeatedly heard that any exception to the 2001 roadless rule's road building prohibitions must be based on an actual on-the-ground need. Most notable among those needs was the protection of property and municipal water supply systems for at-risk communities, and phosphate development.

The Agency and State sought the RACNAC's advice concerning a framework for better achieving the objectives laid out in the proposed rule. The RACNAC recognized that a one-size-fits-all management regime for the BCR theme was unrealistic. The committee provided advice on a framework for protecting at-risk communities and their water systems after several public meetings and careful deliberation. The Department adopted most of these recommendations in the final rule. The Department carefully considered all input before making a decision in areas where the RACNAC could not reach consensus; for example, building new roads for forest health activities.

The RACNAC served a critical role in advising the Department regarding the critical need to go beyond past differences and focus on the on-the-ground management issues for these lands. This focus led to important adjustments including: (1) Reducing GFGR acres by 200,000; (2) increasing BCR acres by 280,000, primarily in recognition of high fish and wildlife values; (3) lowering the determination threshold for temporary roads and timber cutting within the community protection zone (CPZ), which increases opportunities for the Forest Service to address local communities' concerns with wildfire risks; (4) defining more clearly the permissions for hazardous fuel treatments outside CPZ to clarify that the vast majority of these acres will be subject to management direction that is similar to the 2001 roadless rule; and (5) defining with greater precision where phosphate mining, a nationally strategic mineral, may occur.

The Department recognizes the invaluable work and advice provided by the RACNAC throughout the rulemaking process.

**Alternatives Considered**

*Alternatives Considered by the Department*

The FEIS examines four fully developed alternatives based on public comments: No Action, Existing Plans, Proposed Idaho Roadless Rule, and Modified Idaho Roadless Rule.

Additional alternatives were considered but were eliminated from detailed analysis because they did not meet some aspect of the purpose and need or for other reasons in response to public comments including: Alternative allocations of management themes; additional conservation measures for the GFRG theme; additional limitations on management activities in the various themes; motorized access; and expansion of the scope of the proposal. Chapter 2 of the FEIS provides a more complete discussion of the disposition of these alternatives.

Alternative 1 (No Action) (2001 Rule)

The 2001 roadless rule was the product of a national process and established management direction at the national level with limited focus on state or local issues. The 2001 roadless rule (66 FR 3244, Jan. 12, 2001) proposed to ensure that inventoried roadless areas sustain their values for this generation and for future generations. By sustaining these values, a continuous flow of benefits associated with healthy watersheds and ecosystems was expected.

The Forest Service identified timber cutting and road construction or reconstruction as having the greatest likelihood of altering and fragmenting landscapes and the greatest likelihood of resulting in an immediate, long-term loss of roadless area values and characteristics. Therefore, the 2001 Rule prohibited these activities with certain exceptions in each roadless area.

The 2001 Rule alternative identified a list of exceptions to the prohibitions on road construction (sec. 294.12) that respond to circumstances where the prohibitions might conflict with legal responsibilities to provide for public health and safety or environmental protection. The Department noted that while in some cases, the exceptions could result in effects contrary to the purpose of the rule; the Department determined that they were necessary to honor existing law or address social or economic concerns (66 FR 3255).

The 2001 Rule alternative also allows for timber cutting for activities such as improving threatened, endangered, proposed, or sensitive species habitat; maintaining or restoring the characteristics of ecosystem composition and structure to reduce the risk of uncharacteristic wildfire effects; selling or removing timber incidental to other authorized activities; cutting, selling, or removing timber needed for personal or administrative uses; or improving roadless characteristics that have been substantially altered in a portion of an inventoried roadless area due to the construction of a classified road and subsequent timber harvest.

These exceptions, with some modifications, are carried forward as part of Alternatives 3 and 4.

Alternative 2 (Existing Plans)

Management direction in this alternative represents a roadless area management regime based on each forest's land management plan (LMP). Each forest's plan is unique to its planning area. Collectively the LMPs provide a broad range of management opportunities from wilderness to intensive management. When revising a LMP, each forest or group of forests collaborates with the public to develop management direction for their roadless areas. Overall, as national forests in Idaho have revised the LMPs, the trend has been to move more roadless areas into management prescriptions that emphasize the conservation of roadless characteristics. Under this alternative, management of roadless areas would be governed by the specific management allocations assigned in each LMP. Management direction would be periodically reviewed as plans are revised.

Alternative 3 (Proposed Idaho Roadless Rule) (Proposed Rule)

Alternative 3 considers establishment of regulatory direction based on the State's petition, as presented to the RACNAC and set forth in the Proposed Rule. This alternative represents a strategy for the conservation and management of Idaho Roadless Areas (IRAs) that takes into account State and local situations and unique resource management challenges, while recognizing and integrating the national interest in maintaining roadless characteristics for future generations.

Building from the petition's examination of the management direction assigned in each forest's existing or proposed LMPs, the Proposed Rule assigned the lands within each roadless area to one or more of five broad management themes: Wild Land Recreation (WLR); Special Areas of Historic or Tribal Significance (SAHTS); Primitive; Backcountry/Restoration (BCR); and General Forest, Rangeland, and Grassland (GFRG). These themes span a continuum that includes at one end, a restrictive approach emphasizing passive management and natural restoration approaches, and on the other end, active management designed to accomplish sustainable protection of roadless characteristics. The continuum accounts for stewardship of the uniqueness of each roadless area's landscape and the quality of roadless characteristics in that area.

The Proposed Rule did not apply to other special areas referred to as *forest plan special areas* such as research natural areas; wild and scenic rivers (designated, eligible, and suitable); special interest areas; and visual corridors. Table S–1 in the FEIS shows 334,500 acres as forest plan special areas. These areas would be managed according to applicable current and future LMP direction. However, if the current special status designations for an area are changed in the future, these lands would be subject to the terms of the rule and a modification would be undertaken.

The Proposed Rule presented a continuum of prohibitions and permissions for each roadless area through the allocation of themes. Allocation to a specific theme does not mandate or direct the Forest Service to propose or implement any action; rather, the themes provide an array of permitted and prohibited activities related to cutting, selling or removing timber; road construction or reconstruction; and discretionary mineral activities.

The Proposed Rule would have established prohibitions and permissions for discretionary mineral activities that vary according to an area's classification theme. However, like the 2001 Rule alternative, the Proposed Rule allowed for road construction or reconstruction in the case of reserved or outstanding rights or as provided for by statute or treaty, including roads associated with locatable mineral activities pursuant to the General Mining Law of 1872. The Proposed Rule provided additional direction regarding common variety minerals.

Alternative 4 (Modified Idaho Roadless Rule) (Final Rule)

Alternative 4 considers establishment of regulatory direction based on modifications to the Proposed Rule (Alternative 3). Public comment identified the need for modifications to the Proposed Rule and DEIS. The Department and Forest Service officials, in consultation with the State, reviewed and considered the public comment, Tribal recommendations, and the advice of the RACNAC and concluded the rule could be improved. Many of the suggested modifications contributed to the development of the final rule and FEIS.

Alternative 4 (Final Rule) uses the thematic approach of Alternative 3 but adds refinements to address five principle concerns:

(1) The amount and type of roadless areas placed in the various themes;

(2) The permissions and restrictions for road construction and reconstruction, and timber cutting, sale, and removal in the BCR theme;

(3) Management of lands containing phosphate deposits in BCR areas;

(4) Tribal interests regarding activities in roadless areas and future consultations; and

(5) Public comment requirements for corrections and modifications.

The Final Rule alternative reflects consideration of other adjustments beyond these principal issues as well.

Overall, Alternative 4 provides more protections from development than the 2001 Rule alternative on 3.25 million acres of IRAs. These lands are in the WLR, Primitive, and SAHTS themes. All road construction and reconstruction is prohibited, except when provided by statute or treaty, or pursuant to valid existing rights or other legal duty of the United States. In addition, Alternative 4 prohibits surface use and occupancy and road construction or reconstruction to access new mineral leases. Similarly, Alternative 4 provides the same or more restrictions than the 2001 Rule alternative for cutting, selling, or removing timber for lands in the Primitive and SAHTS themes. By reassigning acres to the WLR, Primitive, or SAHTS themes, Alternative 4 provides greater protection from development for 76,400 acres more than the Existing Plans alternative and 199,500 acres more than the Proposed Rule alternative.

As to lands managed under the BCR theme, Alternative 4 provides similar management direction as the 2001 Rule alternative for 5.26 million acres, although an estimated 442,000 acres would be subject to special consideration of specific situations involving reducing the risk of wildland fire to at-risk communities within the CPZ. Outside the CPZ, temporary roads could be constructed only where, in the regional forester's judgment, such roads are the only reasonable way to meet the objectives of reducing the significant risk of wildland fire effects to an at-risk community or municipal water supply system, and the activity is developed in a way that maintains or improves one or more roadless characteristics over the long-term. Infrequent use of this provision, with its conditions, is anticipated due to resource conditions, agency budgets, and regional forester approval and oversight. CPZ status will be confirmed at the project level, based on the definition of CPZ provided in section 294.21.

Alternative 4 reduces the lands managed under the GFRG theme to 405,900 acres. These areas are mainly managed according to forest plan direction except that roads may not be constructed to access new mineral or energy leases other than to access specific areas of phosphate deposits. Design of projects in these areas will consider roadless characteristics and will meet all environmental laws, and the area will remain on the roadless inventory.

In sum, Alternative 4 assures retention of the roadless characteristics of approximately 8.5 million acres of roadless lands. On the remaining 0.8 million acres (community protection zones in the BCR theme and GFRG acres), the Agency's best estimates indicate only about 0.1 percent of IRAs would likely see any changes in roadless characteristics over the next 15 years.

*The Environmentally Preferred Alternative*

Under NEPA, the Department is required to identify the environmentally preferred alternative (40 CFR 1505.2(b)). This is interpreted to mean the alternative that will promote the national environmental policy as expressed in NEPA's section 101 and that would cause the least damage to the biological and physical components of the environment. This alternative best protects, preserves, and enhances historic, cultural, and natural resources (Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations (46 FR 18026).

The Department believes the alternative that best meets these criteria is Alternative 1 (No Action, 2001 Rule). Alternative 1 generally protects all inventoried roadless areas from adverse environmental impacts associated with limited exceptions for road construction, reconstruction, and tree cutting for commodity purposes and discretionary mineral activities and is projected to result in the least road construction (15 miles) and fewest harvested acres (9,000 acres) over the next 15 years.

Alternatives 2, 3, and 4 allow for an array of vegetation management activities potentially needed to maintain or improve roadless characteristics or restore ecological structure, function, composition, or processes; including reducing the risks of uncharacteristic or unwanted wildland fire effects. In addition, these alternatives provide additional protections to certain lands with outstanding roadless characteristics. However, these alternatives provide varying levels of road construction and reconstruction to facilitate timber cutting and also provide differing levels of limited tree cutting for commodity purposes and mineral resource development. The total projected road construction or reconstruction over the next 15 years is 15 miles (Alternative 1, 2001 Rule), 180 miles (Alternative 2, Existing Plans), 61 miles (Alternative 3, Proposed Rule), and 50 miles (Alternative 4, Modified Rule). Alternative 1 projects the fewest ground disturbing activities and is deemed the environmentally preferred alternative.

**Comments on the Proposed Rule and Changes Made in Response**

The Department received approximately 140,000 comments in response to the proposed rule and DEIS. A detailed analysis and response to public comment is set out in Appendix R of the FEIS. The Forest Service considered all comments as part of the rulemaking. The discussion of public comment below is divided between general comments and those that involve particular regulatory provisions, as well as providing a summary of changes made in the final rule.

*General Comments Not Related to Particular Rule Provisions*

*Comment:* State role in rulemaking. Some respondents expressed concerns over the legality of the State of Idaho's efforts to submit a petition to change current Federal land management or that the State would have undue influence on the outcome of the rule.

*Response:* This is a Federal rule and the Department has, in no way, abdicated or delegated its authority or responsibility for management of these NFS lands. The Governor of Idaho, pursuant to 5 U.S.C. 553(e) and 7 CFR 1.28 filed a petition to conduct rulemaking for these immensely valuable lands. The Forest Service has worked cooperatively with the State of Idaho during consideration of the petition and during the development of this final rule as is expected under numerous statutes, regulations, and Executive orders.

Pursuant to NEPA's implementing regulations, State, local, and Tribal governments are frequently granted cooperating agency status. State governments are especially important partners in management of the nation's land and natural resources. States, particularly in the West, own and manage large tracts of land with tremendous social and biological value. State governments frequently pioneer innovative land management programs

and policies. State governments exert considerable influence over statewide economic development and private land use, both of which significantly affect natural resource management. In addition, State conservation agencies' relationships with others offer additional partnership opportunities. Strong State and Federal cooperation regarding management of inventoried roadless areas can facilitate long-term, community-oriented solutions.

Collaborating with the State of Idaho on the long-term strategy for the management of IRAs recognizes national values and local situations and resolves unique resource management challenges. Collaboration with the State, Tribes and others who have a strong interest in conserving and managing inventoried roadless areas also helps to ensure balanced management decisions that maintain the most important characteristics and values of those areas.

*Comment:* Idaho's Roadless Rule Implementation Commission. Some respondents questioned the role and authority of the Governor's Roadless Rule Implementation Commission (Idaho Executive Order No. 2006–43 of December 21, 2006). Other respondents thought the structure of the commission should be better defined, that there should be a time frame for the commission to respond to a proposed project, and that county commissioners and rural communities should be involved in designing and implementing projects. Some respondents raised concern over the legality of the commission. The RACNAC recommended additional procedural requirements in the rule, which includes collaborative review of projects, especially in the BCR theme, by a State Implementation Commission with a regional advisory committee-like structure.

*Response:* Although it is the Department's position that it cannot mandate the creation of or the scope of the commission's responsibilities to the State, the Department supports this collaborative concept and feels it would be an essential part of the overall collaborative process with the public, Tribes, and local and state governments. The Forest Service shared public comments and the RACNAC recommendations on the composition and function of the implementation commission received during this rulemaking with the State of Idaho. The State of Idaho has already committed to having the implementation commission as its way of providing a collaborative approach pursuant to State of Idaho Executive Order 2006–34 and may continue to determine its own course for providing input and cooperation during the NEPA process for a proposal affecting an IRA. It is the Department intent that the State of Idaho can request cooperating agency status for proposals affecting IRAs like it has done for this rulemaking. It is important to note that although the recommendations provided by the commission will be non-binding on the Agency, the Department encourages the responsible Forest Service officials to give priority to those projects recommended by the commission.

*Comment:* Compliance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Some Tribal officials requested more government-to-government consultation on the proposed rule. One Tribe expressed concern that the change clause builds in categorical exclusions that will exclude public input and Tribal government-to-government consultation on individual projects. One Tribe questioned the use of the theme approach suggesting that maintaining all roadless areas should provide the same or similar values and opportunities. Another Tribe stated the themes do not incorporate the holistic nature of Tribal rights and interests that include areas outside those identified as SAHTS, and clarification was needed so areas of Tribal interest would still have project-by-project consultation with affected Tribes.

*Response:* On September 20, 2007, the State of Idaho and the Forest Service met with the Idaho Council on Indian Affairs and presented a joint overview of the history of the Idaho Roadless Petition and the DEIS associated with development of the proposed rule. The Forest Service and the State of Idaho committed to meeting with each Tribe to discuss in more detail the Idaho Roadless Rule prior to the release of the DEIS. These meetings took place between October 2007 and January 2008 and were tailored to meet each Tribe's preference. After the release of the DEIS and the proposed rule, several staff-to-staff and government-to-government meetings were held between January and August 2008 with each Tribe. Many of the Tribes' ideas and suggestions resulted in improvements to the final rule.

Nothing in the final rule should be construed as eliminating public input or Tribal consultation requirements for future projects conducted in accordance with this rule. The final rule clarifies that it does not modify the unique relationship between the United States and Indian Tribes. The final rule requires the Federal government to work with federally recognized Indian Tribes, government-to-government, as provided for in treaties, laws, or Executive orders. Nor does the final rule limit or modify prior existing Tribal rights, including those involving hunting, fishing, gathering, and protecting cultural and spiritual sites. Finally, the Department listened carefully and understood Tribal concerns that the Tribe's holistic interests are in no way limited to one particular theme or management classification. The SAHTS designation highlights and protects certain areas that possess historically and culturally important attributes, but is not the exclusive indicator of areas that possess such values. The final rule allows continued recognition of Tribal rights and interests in IRAs outside of the SAHTS theme.

*Comment:* NEPA requirements for projects. Some respondents felt an EIS should be required for all projects proposed in IRAs and the use of an environmental assessment (EA) should be disallowed.

*Response:* The Idaho Roadless Rule focuses on general land classifications rather than project-level analysis and documentation requirements. However, since 1992, the Forest Service has routinely required the use of EISs for proposals that ''would substantially alter the undeveloped character of an inventoried roadless area or a potential wilderness area.'' This requirement, originally in its implementing procedures in Forest Service Handbook 1909.15 at section 20.6, is now in the Agency's regulations at 36 CFR 220.5(a) (73 FR 43095). The Department has determined that a general prohibition on the use of EAs is not warranted as some proposed actions will not have significant environmental effects and will not harm roadless characteristics. Public response to scoping for a proposed action in an IRA will help the responsible Forest Service official determine the appropriate level of documentation for compliance with NEPA.

*Comment:* Endangered species consultation. Several respondents expressed concern regarding the proposed rules effects to threatened and endangered species and sought clarifications regarding consultation under the Endangered Species Act (ESA).

*Response:* Idaho Roadless Areas have been identified as an important habitat for a variety of terrestrial and aquatic wildlife and plants, including some threatened and endangered species. The large, relatively undisturbed areas provide biological strongholds and play a key role in proving for diversity of plant and animal communities.

The National Oceanic and Atmospheric Administration (NOAA) Fisheries and the U. S. Fish and Wildlife Service (FWS), have oversight responsibilities for implementation of the Endangered Species Act (ESA). Informal consultation and conferencing on the proposed rule began with frequent discussions among Forest Service, FWS, and NOAA Fisheries biologists. The Agency has prepared a biological assessment on the final rule and formally consulted with the FWS and NOAA. The biological opinions can be found at *http://roadless.fs.fed.us/idaho.shtml* and effects are discussed in the FEIS at sections 3.7 Botanical Resources, 3.8 Aquatic Species, and 3.9 Terrestrial Animal Habitat and Species.

*Summary of Changes and Comments Related to Particular Rule Provisions*

Proposed Section 294.20 Purpose

*Summary of Changes in Proposed Section 294.20 (Final Rule Section 294.20).* Text about the relationship between this rule and other roadless rulemakings was removed from paragraph (a) and is now addressed in section 294.28(a). Paragraph (b) was removed as unnecessary because the multiple-use mission of the Forest Service is well understood and is provided for elsewhere in statute and regulation.

*Comment:* Purpose and need. A respondent suggested the same statement of purpose and need as described in the DEIS should be included in the rule.

*Response:* The regulatory purpose set out in the final rule has been slightly revised and is now a more accurate statement of purpose of the Idaho Roadless Rule as providing State-specific direction for management of roadless areas. The purpose and need statement included with the DEIS served a related but distinct function under NEPA.

Proposed Section 294.21 Definitions

*Summary of Changes in Proposed Section 294.21 (Final Rule Section 294.21).* Definitions of the following terms have been included in response to public comment: *community protection zone, fire hazard and risk, fire occurrence, Forest Plan Special Area, forest type, hazardous fuels, road decommissioning, and uncharacteristic wildland fire effects.* Most of these definitions were added to improve clarity on the use of the exemptions allowed for road construction and reconstruction, timber cutting, and mineral activities. Rational for their inclusion is discussed in the appropriate sections below. Definitions for *significant risk* and the individual management classification themes have been removed. Significant risk is now addressed at section 294.24(c)(1)(ii). The Department believes the themes are best understood in terms of the specific permissions and restrictions established by the rule for each land classification rather than a generalized description of desired conditions.

*Comment:* Definition of road. A respondent stated it was unclear if user-created roads or unclassified roads under the 2001 roadless rule are roads for purposes of this rule and whether deciding officers can designate an unclassified road as a forest road.

*Response:* First, the definition of *forest road* used in the proposed and final rule is drawn from the Agency's definition of that term in the travel management regulations found at 36 CFR part 212. Travel management decisions are not affected by this rule as noted in section 294.26(a). Adjustments to NFS road inventories are made pursuant to the Travel Management rule (70 FR 68264).

*Comment:* Management theme definitions. Several respondents requested clarification of the management themes. Some suggested that specific references to recreation in the theme definitions should be dropped.

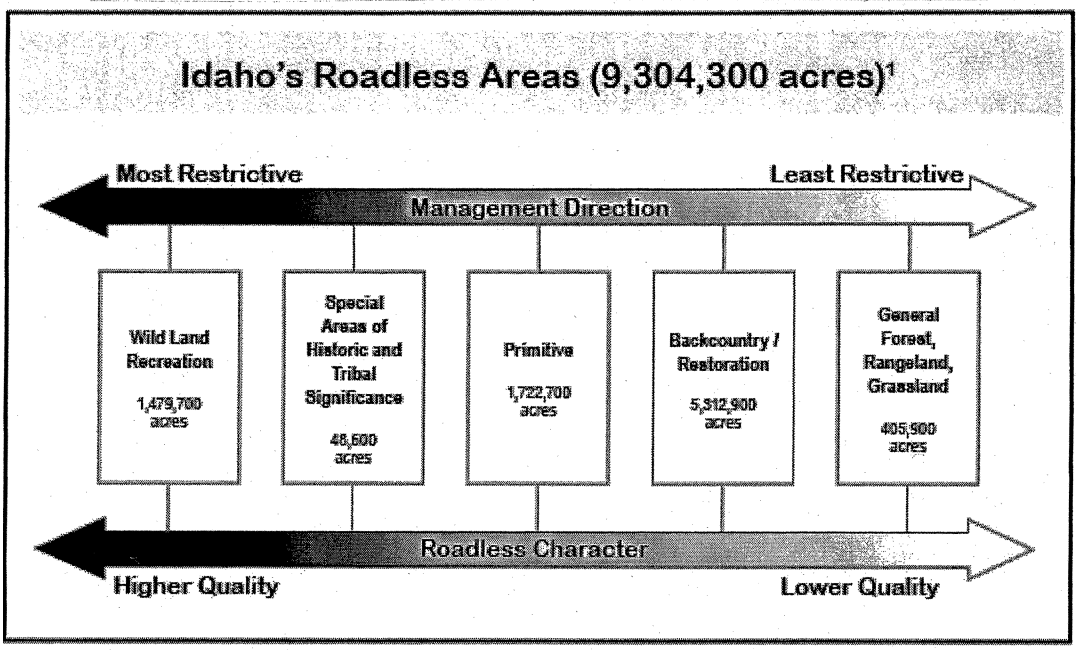
*Response:* Definitions for individual themes are removed in the final rule. The Department believes the prohibitions and permissions established for each individual theme best defines the management intended and the redundant definitions in the proposed rule were unnecessary and led to confusion.

Proposed Section 294.22 Idaho Roadless Areas

*Summary of Changes in Proposed Section 294.22 (Final Rule Section 294.22).* Paragraphs (b) and (c) have been reordered to improve continuity. Similarly, the narrative description of the management continuum that was set out in proposed paragraph (c) has been removed as unnecessary.

The final rule remains structured around five themes: (1) Wild Land Recreation (WLR); (2) Special Areas of Historic or Tribal Significance (SAHTS); (3) Primitive; (4) Backcountry/Restoration (BCR); and (5) General Forest, Rangeland, and Grassland (GFRG). These five themes were proposed following review of the allocations set out in the existing and proposed revisions to land management plans. The five themes and allocations for particular areas were refined in response to public comment on the proposed rule. The themes span a continuum from more restrictive to more permissive (see Figure 1). This continuum accounts for stewardship of each roadless area's unique landscape and the quality of roadless characteristics in that area.

**Figure 1. Roadless Area Conservation Rule for Idaho—Management Themes**




[1] 334,500 acres of forest plan special areas will be managed in accordance with applicable current and future forest plans

Allocation to a specific theme does not mandate or direct the Forest Service to propose or implement any action; rather, the themes provide an array of permitted and prohibited activities regarding road construction, timber cutting, and discretionary mineral activities. Although the ability of the Forest Service to conduct certain activities (road building, activities associated with mineral development, and timber cutting) typically varies from theme-to-theme, other activities (motorized travel, current grazing activities, or use of motorized equipment and mechanical transport) is not changed by this final rule. Although these other activities are not regulated by this rule, these activities and others not addressed by this rule are still subject to the allowances and restrictions of their current LMP and would be subject to future planning and decisionmaking processes of the Forest Service. For example, when allowed under the LMP, the use of prescribed fire as a management tool would be available across all themes as this rule does not require, limit or prohibit the use of prescribed fire. Similarly, some activities (*e.g.*, locatable mineral access and operations) are governed under entirely separate regulations. Additionally, like the 2001 roadless rule, timber cutting, sale, or removal in inventoried roadless areas is permitted when incidental to implementation of a management activity not otherwise prohibited by the final rule. Examples of these activities include, but are not limited to, trail construction or maintenance; removal of hazard trees adjacent to forest roads for public health and safety reasons; fire line construction for wildland fire suppression or control of prescribed fire; survey and maintenance of property boundaries; other authorized activities such as ski runs and utility corridors; or for road construction and reconstruction where allowed by this rule.

*Comment:* Eliminate the use of multiple themes. A respondent suggested the removal of the multiple theme approach from the rule and return to the single theme approach used for the 2001 roadless rule.

*Response:* The Governor's petition sought refinement of the 2001 roadless rule's *one-size-fits-all* approach maintaining that some areas deserved higher protections, others similar, and others less protection then those granted in the 2001 roadless rule. Comments received by the various Idaho County commissioners and other members of the public were in accord. The wide-variety of management regimes given these areas by individual Forest Service LMPs further demonstrates the value of a more measured approach. Therefore, the Department has elected to maintain the flexibility the multiple theme approach allows and has retained it in the final rule.

*Comment:* Theme assignment. Some respondents requested changes in theme assignments for specific IRAs.

*Response:* In response to these requests, some theme assignments were adjusted for the final rule. In general, public requests for changes in theme assignments for IRAs in section 294.29 in this final rule were adopted when the Forest Service review, demonstrated that the theme change would better reflect the uniqueness of the roadless area and the appropriate level of conservation needed for the protection and management of the particular area. The FEIS, Appendix P describes each of the specific requests and the disposition of those requests.

The following changes were made to theme assignments as a result of public and Tribal comments.

(1) Approximately 279,800 acres were changed from GFRG to BCR. This includes important big game habitat and known phosphate lease areas on the Caribou portion of the Caribou-Targhee NF where development would be precluded because of aquatic concerns (portions of Deer Creek).

(2) Approximately 75,900 acres were changed from BCR to GFRG. This includes lands that were already roaded on the Salmon and Targhee NFs and lands adjacent to Jesse Creek Watershed that are outside the CPZ but where the community wildfire protection plans (CWPPs) anticipate treatment is needed to protect the municipal water supply system.

(3) Approximately 149,200 acres were changed from BCR to Primitive.

(4) Approximately 68,400 acres of the Rapid River Roadless Area on the Payette and Nez Perce NFs were changed from Primitive to WLR.

(5) Approximately 10,700 acres of the Selkirk Roadless Area on the Idaho Panhandle NF were changed from Primitive to WLR.

(6) Approximately 21,000 acres of the Pioneer Area in the Mallard Larkins Roadless Area on the Idaho Panhandle NF was changed from SAHTS to WLR.

*Comment:* Management under existing LMPs for certain areas. A respondent suggested areas not recommended for wilderness in the 2001 roadless rule should be removed from this process and be managed under their existing plans.

*Response:* The 2001 roadless rule made no wilderness recommendations. The Forest Service makes preliminary wilderness recommendations through the land management planning process. Recommendations to Congress concerning wilderness recommendations are an authority reserved to the Secretary. However, the suggested approach of directing that preliminarily recommended areas be managed in accordance with existing LMP direction would essentially be achieved through the approach described in FEIS Alternative 2. The Department believes that in the absence of Congressional action, it is appropriate to include such lands in the IRA system.

*Comment:* Wild Land Recreation (WLR) theme. A respondent suggested the WLR theme should be eliminated as it unlawfully creates de facto wilderness. Another respondent felt the rule should maintain current wilderness recommendations, maintain the current type of recreation activities allowed in each individual WLR area, and recommend additional areas for wilderness designation.

*Response:* It is important to note that IRAs are not de facto wilderness areas and the final rule does not make any recommendations for potential wilderness. The Department is mindful that only Congress can establish additions to the National Wilderness Preservation System and that Congress has not called for the creation of protective perimeters or buffer zones around wilderness areas. The Department maintains that the WLR theme provides appropriate protections for selected areas.

It is correct that most lands in the WLR theme were identified and recommended for wilderness designation during the land management planning process. In the context of land management planning, the Forest Service Manual 1923.03 states, ''Any inventoried roadless area recommended for wilderness or designated wilderness study is not available for any use or activity that may reduce the wilderness potential of an area. Activities currently permitted may continue, pending designation, if the activities do not compromise wilderness values of the area.'' Similarly, the final rule does not change current recreational opportunities in WLR areas, including motorized travel (see sections 294.27(a) and 294.28). A wide-array of motorized and mechanical recreation and other multiple-use activities that are not allowed in designated wilderness areas will continue to be available and are unaffected by this rule.

*Comment:* Primitive theme. A respondent suggested the Primitive theme should be avoided because areas designated as Primitive would fall short of the wilderness suitability criteria because of the proposed rule's permitted activities.

*Response:* This rule is not designed to address potential wilderness designations. However, agency wilderness evaluation criteria associated with LMPs provide that although a forest road or other permanently authorized road is one criteria for not considering an area for potential wilderness, Forest Service Handbook (FSH) 1909.12, section 71.11, paragraph 9, provides for including areas where prior timber harvest and road construction is not evident. Road construction and reconstruction is prohibited in the Primitive theme except to access reserved or outstanding rights, or other legal duty of the United States. Any roads constructed for these purposes could affect consideration for wilderness. Timber cutting, sale, or removal is also prohibited except under limited conditions and only when done from an existing road or using aerial systems and is subject to numerous restrictions. The FEIS, section 3.14 Roadless Characteristics, discloses that the existing character may be modified on the edges of a roadless area with the interior kept intact. Future activities in the Primitive theme could have potential effects on the undeveloped and natural qualities of a roadless area but these activities are expected to be limited, infrequent, and would not affect natural ecosystems processes or opportunities for primitive and unconfined recreation.

*Comment:* Backcountry/Restoration theme (BCR). Several respondents felt the use of the BCR theme should be avoided because it would allow road construction, logging, and other development.

*Response:* The BCR theme represents the largest amount of acreage across all of the theme designations in this rule, and it received the majority of the comments. During his original presentation to the RACNAC, Governor Risch expressed a desire to have the areas designated under this theme managed similar to the 2001 roadless rule while also providing for certain stewardship activities. The proposed rule sought to provide this balance by only allowing new road construction or reconstruction facilitating timber cutting where necessary to address significant risks and to facilitate permitted forest health activities.

Many respondents felt that the criteria by which new roads could be constructed were left undefined and potentially could vary from the purpose of the 2001 roadless rule. Specifically, several respondents felt that new road construction to facilitate timber cutting should only be done in cases of imminent threat to people and property, although others felt significant risk was too restrictive and did not have enough flexibility to address forest health issues in IRAs. Based on public comments and advice from the RACNAC, the Department saw a need to refine the scope and conditions by which temporary roads could be constructed in the BCR theme.

The RACNAC spent a considerable amount of time discussing this theme and recognized that the theme did not lend itself to a *one-size-fits-all* management approach, particularly with regard to fuel treatments for protecting at-risk communities and municipal water supply systems, but also felt that the proposed rule was too expansive and needed further clarification and refinement.

The Department agrees that the principles articulated by the RACNAC represented a good starting point. The final rule adopts the RACNAC's advice of borrowing the CPZ concept from HFRA to focus timber cutting and temporary road construction where needed to protect at-risk communities. The definition of *at-risk communities* used in the proposed and final rule reflects the definition of that term as used in the HFRA. Within the CPZ, the Department believes the balance should tip in favor of community protection while ensuring that temporary road construction is not undertaken where in the responsible official's judgment the project cannot reasonably achieve the community protection objectives without a temporary road. Additionally, the RACNAC recognized that the geographic definition from HFRA may not provide enough flexibility for some

IRAs. Therefore, the Department is limiting the scope of temporary road building for fuels treatments outside the CPZ to projects that can demonstrate significant risk of wildland fire effects to an at-risk community or a municipal water supply system while positively determining that one or more roadless characteristics will be maintained or improved over the long-term. The long-term perspective is especially important because a temporary road may have the potential for immediate short-term effects to an area's roadless characteristics, but stand thinning, strategic fuel breaks, and other activities accomplished by building a temporary road could have long-term beneficial effects. The final rule also emphasizes the importance of maximizing the retention of large trees, as appropriate for the forest type, to the extent the trees promote fire resilient stands and exercises restraint by permitting projects that cannot reasonably be accomplished without a temporary road. Notably, the final rule does not permit new road construction for the purpose of conducting limited forest health activities. Under the final rule, the vast majority of the BCR acres will be managed comparable to the 2001 roadless rule with a small amount of additional timber cutting and temporary road construction to allow fuel treatments to better protect vital community interests.

*Comment:* General Forest, Rangeland, and Grassland (GFRG) theme. A respondent suggested elimination of the GFRG theme. Another suggested any small strips of GFRG lands should go into adjacent BCR and felt that the GFRG theme should be eliminated to avoid the conflict of the rule allowing for activities not permissible in LMPs. A respondent thought the Agency should reconsider the roadless character for some of the GFRG designations based on the Idaho Conservation League maps.

*Response:* The FEIS considered the request to eliminate the GFRG theme in, section 2.3, Consideration of Comments and determined that this request was effectively accomplished through examination of the 2001 Rule alternative (Alternative 1). Based on public comment, including Idaho Conservation League's maps, some areas were changed from GFRG to BCR to better retain the roadless character in these areas to respond to Tribal interests and to provide important big game habitat. For example, several small strips adjacent to the outer boundaries of roadless areas were changed to BCR, including lands associated with the East Cathedral, Magee, Mallard Larkins, and Upper Priest Roadless Areas on the Idaho Panhandle NF and the Scotchmans Peak Roadless Area on the Idaho Panhandle and Kootenai NFs. Some developed lands, which are areas that have been previously roaded and harvested, were changed from the BCR theme to the GFRG theme. In total, the land area encompassing the GFRG theme was reduced by approximately 203,700 acres. See Appendices E and P of the FEIS.

*Comment:* Forest Plan Special Areas. Several respondents asked for clarification about whether wild and scenic river management areas and other LMP special areas have precedence over the rule.

*Response:* Under section 294.28(f), Forest Plan Special Areas (FPSA), like wild and scenic river management areas, are managed in accordance with local LMP components. For clarification, a definition of FPSA has been added to the final rule. These lands include areas such as research natural areas, designated and eligible wild and scenic river corridors, developed recreation sites, or lands identified for other specified management purposes. A listing of all the FPSAs is set out in the FEIS, Appendix Q. The State's petition identified that some roadless areas are already part of other land classification systems that are governed by specific agency directives and existing LMP direction. The petition did not request the Forest Service to impose additional or superseding management direction or restrictions for these FPSAs. Instead, the petition identified a preference that these lands be administered under the laws, regulations, and other management direction unique to the special purpose of the applicable land classification. The Department agrees, and although these lands are included in section 294.29 for the sake of completeness, the final rule does not establish any management direction for, or that applies to, any of these identified FPSAs.

Proposed Section 294.23 Road Construction and Reconstruction in Idaho Roadless Areas

*Summary of Changes in Proposed Section 294.23 (Final Rule Section 294.23).* No substantive changes were made to paragraph (a). In response to advice from the RACNAC and public comment, the Department refined the road construction provisions concerning the BCR theme. The proposed rule allowed roads for classes of timber cutting activities per the 2001 roadless rule with the addition of a *significant risk* threshold determination and allowed for forest health activities consistent with the timber cutting provision. The final rule follows the list of excepted activities from the 2001 roadless rule and adds two refined categories of actions.

First, the final rule accepts advice from the RACNAC and public comment to retain the 2001 roadless rule's general exceptions. All exceptions are retained except the minerals roads provision which is separately addressed in section 294.25. Second, there was confusion regarding the expected level of treatment to address significant risk situations in BCR theme areas. RACNAC and many respondents wanted clarification for the situations in which road building would be permitted. Some respondents expressed concern that all 5.3 million acres would be treated under these provisions. This was never the Department's or the State's intention. The State had noted, at the January 2008 RACNAC meeting, that it desired such projects to focus mainly on protecting the wildland urban interface (WUI) and municipal water supply systems. The RACNAC agreed that such refinements were appropriate but were unable to reach consensus regarding road construction for forest health treatments outside CPZ. See the discussion under *Summary of Changes in Proposed Section 294.25 (Final Rule Section 294.24).*

In light of these considerations, the Department refined the final rule and will allow temporary roads in CPZ recognizing that in balancing public interests of community protection and roadless characteristics—the balance tips sharply in favor of communities within the CPZ. Further, the Department has found there is broad support for addressing instances where wildland fire can affect vital community interests and infrastructure even beyond CPZs. Local communities, the RACNAC, and various officials strongly supported providing limited opportunities for hazardous fuel reduction projects in a way that continues to recognize the importance of conserving roadless area characteristics. In contrast to treatments within the CPZ, the Department believes the balance tips in favor of maintaining or improving roadless characteristics over the long-term for projects conducted outside the CPZ. However, the Department will allow temporary roads outside CPZ to protect at-risk communities and municipal water supply systems under limited circumstances. To meet these goals, Forest Service officials will make a positive determination that the community or water supply system is facing a significant risk from a wildland fire disturbance event, and the project

will maintain or improve one or more roadless characteristics over the long-term. A significant risk exists where the history of fire occurrence and fire hazard and risk indicated a serious likelihood that a wildland fire disturbance event would present a high risk of threat to an at-risk community or municipal water supply system. Officials must also determine that the project cannot be reasonably accomplished without a temporary road. Clearly, temporary roads will not need to be constructed to address every significant risk situation inside or outside a CPZ.

In paragraph (c), new wording has been added that specifically directs the minimizing of effects and clarifies the intent to conform to applicable LMP components. Existing LMPs for these areas set out forestwide and area specific direction and make general suitability determinations but do not generally authorize any particular projects. Under this framework the Forest Service examines site-specific environmental effects when projects or activities are actually proposed. *See Ohio Forestry Ass'n* v. *Sierra Club,* 118 S. Ct. 1665, 1668, 1671 (1998). The RACNAC and some members of the public suggested that the requirements for roads under the proposed minerals section be carried forward and applied to all road construction. In response, the final rule at section 294.23(d) provides additional direction concerning temporary roads comparable to that provided for mineral activities. Additionally, a provision has been added that existing roads and those permitted under this final rule may be maintained.

*Comment:* Significant risk. Several respondents requested the establishment of more guidelines to determine what constitutes a significant risk situation. Others suggested that the significant risk criteria should be confined to WUI areas and only apply the imminent threat criteria for the remaining areas. Some respondents felt vegetation activities outside CPZs should have more restrictions than those inside the zone. A respondent suggested inclusion of threats to irrigation and water rights as part of the significant risk exception.

*Response:* The Department, based on public comment and advice from the RACNAC, concluded that the significant risk threshold should not be required for projects, including temporary road construction, in the CPZ as defined in this rule. See also the discussion below under *Summary of Changes in Proposed Section 294.25 (Final Rule Section 294.24.)* However, the Department, based on the RACNAC's advice, does not believe that all BCR theme areas outside the CPZ should have to demonstrate the imminent threat standard of the 2001 roadless rule. Instead, this rule provides the flexibility needed to implement Community Wildfire Protection Plans (CWPPs) where consistent with this rule and allows for limited treatment of hazardous fuels that threaten at-risk communities and municipal water supply systems. Thus, the Department has determined an allowance will be made for individual projects that can demonstrate a significant risk that a wildland fire disturbance event could adversely affect an at-risk community or municipal water supply system and maintain or improve one or more roadless characteristics in the long-term. Notably, the responsible Forest Service official must determine that the activity cannot be reasonably accomplished without a temporary road. For further clarity, a definition taken from the 2006 Interagency *Protecting People and Natural Resources: A Cohesive Fuels Treatment Strategy* (2006 Cohesive Strategy) for hazardous fuels has been added to the Final Rule.

Furthermore, on advice from the RACNAC, the Department has limited the application of the term *significant risk* in geographic terms as well. First, a proposed project must demonstrate that its purpose is to treat hazardous fuels connected to an at-risk community or municipal water supply system. This greatly reduces the potential geographic scope of road building and treatments in the BCR theme from those in the proposed rule. Second, the Department refined the term *significant risk* to situations where the history of fire occurrence, and fire hazard and risk, indicated a serious likelihood that a wildland fire disturbance event would present a high risk of threat to an at-risk community or municipal water supply system. The final rule defines *fire hazard* and *risk* to mean the fuel conditions on the landscape. *Fire occurrence* is defined as the probability of wildfire ignition based on historic fire occurrence records and other information. Under these definitions, this significant risk determination focuses largely on landscape conditions, probability of ignition (serious likelihood), departure from historical fire frequencies, and the severity of the risk of adverse affects (significant) to an at-risk community or municipal water supply system. The Department's experience indicates that much of this pertinent information may be in individual Idaho county CWPPs and encourages responsible officials to use these plans where appropriate in determining whether or not a project qualifies under this exception. The Department expects that responsible officials will give due consideration during the public comment process to input from the State's Collaborative Implementation Commission. The Commission's recommendations would be considered along with other public and Tribal comments.

The Department believes it has appropriately considered roadless area characteristics and the interests in protecting at-risk communities or municipal water supply systems in defining the scope of the significant risk exception. Expansion of the significant risk determination to include irrigation and water rights is beyond the scope of the HFRA provision used as a model for this provision and therefore was not adopted.

*Comment:* Temporary roads standards, reclamation, and alternatives. Several respondents suggested the rule should include plans and standards for temporary road design criteria, identification of the responsible party to close it, and timeframes for rehabilitation. They felt definitions for decommissioning, rehabilitation, and closure of roads should be included in the rule. One respondent suggested that the Agency should require monitoring and funding to occur for temporary roads prior to their construction thus ensuring the temporary road is reclaimed and re-vegetated to meet roadless characteristics. The RACNAC recommended further clarifications when temporary roads could be built, who could use them, and how they would be decommissioned.

*Response:* The final rule now contains a definition of *temporary road.* Use of such roads is restricted, although use of these roads for Forest Service administrative purposes is permissible, as defined at 36 CFR 212.51(a)(5) (involving fire, military, emergency, or law enforcement vehicles for emergency purposes). In the final rule, the use of a discretionary temporary road outside the CPZ will be limited in scope and only occur if no other reasonable alternative for treating the fuels is available. If a temporary road is determined to be necessary to support allowed activities such as fuel treatments to reduce a significant risk situation, the Forest Service can ensure closure and rehabilitation through contract provisions for any associated timber sale or stewardship contract. Temporary roads are sometimes necessary to allow purchasers to access and transport timber. Specific timber

and stewardship contract provisions govern the authorization, construction, operation, and restoration of these temporary roads. In the past, the Agency has sometimes waived the contract's decommissioning requirement because the Agency intended to continue to use the road for other multiple-use purposes, such as post-sale reforestation projects, monitoring, or fire protection. However, closure of these roads then became dependent upon the Agency receiving funding. This led to many temporary roads remaining open without decommissioning. The final rule reinforces that new temporary fuel treatment roads must be decommissioned when the project is completed and will not be open for public use while the project is underway. Additional funding for road closures would not be necessary. A definition for *road decommissioning* is provided in the final rule. Definitions for rehabilitation and closure are not provided as these terms are not used in the final rule. Agency road definitions are found at 36 CFR 212.1, and the regulations found in 36 CFR part 212 are applied for all road construction and do not need to be repeated in this rule. See FEIS Appendix O for more details regarding road construction and decommissioning.

*Comment:* Roads in the BCR theme. Several respondents felt that the proposed rule allowed too many opportunities to build roads in the BCR theme. They suggested that the 2001 roadless rule language should be used to protect these areas. One respondent suggested no roads be built in the BCR theme. Another respondent suggested limiting all roads in BCR to temporary roads and using them only for fire protection needs, not habitat improvement projects. If a permanent road is needed, the respondent wanted more justification requirements. Others suggested more roads should be allowed in the BCR theme without restrictions.

*Response:* The Department agrees with respondents that the scope and conditions for building temporary roads in the BCR theme needed refinement. The Department has concluded that building new roads for fuels treatments should be limited to two circumstances: (1) To conduct fuel treatment activities within the CPZ; and (2) to conduct fuel treatment activities outside the CPZ only where a significant risk of wildfire effects to an at-risk community or municipal water supply system can be demonstrated and only when roadless values can be improved or maintained over the long-term. Other exceptions are made in the BCR theme for public health and safety reasons or for reserved or outstanding rights. The 2001 roadless rule lists the same exemptions. Like the 2001 roadless rule, roads for habitat improvement projects are not allowed. It is anticipated that most roads will be temporary. However, the Department recognizes that a permanent road may need to be constructed in some situations, such as access for a private land inholding. Justification for a permanent road will need to be established for any proposed project.

*Comment:* Roads for forest health activities. Several respondents recommended that no roads be allowed in the BCR and the GFRG themes for the purpose of forest health. Other respondents suggested that temporary roads should be permitted only for vegetation management for wildlife and forest health reasons. Another respondent suggested allowing temporary roads for only forest health activities but not habitat improvement projects in the BCR theme.

*Response:* The RACNAC could not come to a consensus on whether new roads to facilitate forest health activities should be permitted outside the CPZ. After careful deliberation, the Department decided that no new roads (temporary or permanent) for forest health purposes should be built in the BCR theme, but such activities could be conducted from existing permanent roads, temporary roads allowed by this rule, or by aerial harvest systems. The final rule does permit road construction for forest health activities in the GFGR theme as long as the activity is consistent with applicable LMP components.

*Comment:* Responsible official for authorizing construction of permanent roads. One respondent thought that decisions regarding whether or not a permanent road is needed should be made at a higher level than that of the local line officer.

*Response:* The final rule identifies roles for responsible officials in connection with various activities across the different themes. Regional foresters will be responsible for certain determinations, for example road construction activities in BCR theme outside the CPZ. Standard delegation of decisionmaking authority found at Forest Service Manual (FSM) 1230 will operate unless specified otherwise in the final rule.

*Comment:* Roads in GFRG. One respondent felt that no permanent roads should be built GFRG. Another respondent felt that the 2001 roadless rule approach should be the minimum protection for the GFRG theme.

*Response:* Based on public comment, input from Tribal representatives, and RACNAC advice, the Department made a net reduction in the amount of the GFRG theme by approximately 203,700 acres. In addition, roads may not be constructed or reconstructed to access new mineral leases except in association with specific phosphate deposits. The Agency has carefully reviewed existing management direction and potential uses of these lands to ensure that the appropriate management theme is being applied for each IRA. This specific review goes beyond what was undertaken during the 2001 rulemaking and these refinements reflect the best judgment and expertise of the Forest Service.

Proposed Section 294.24 Mineral Activities in Idaho Roadless Areas

*Summary of Changes to Proposed Section 294.24 (Final Rule Section 294.25).* Mineral and energy potential within IRAs was given serious consideration. The minerals portion of the rule has been reorganized and now provides management direction for each theme. Paragraphs (a) and (b) separately identify that the rule provisions apply prospectively and only where the Department exercises discretionary authority.

The final rule does not include the proposed rule's (section 294.24(a)) language ''including any subsequent renewal, reissuance, continuation, extension, or modification, or new legal instruments, for mineral and associated activities on these or adjacent land.'' This provision, in particular, the *adjacent land* phrase allows new access and road building, mainly for phosphate mining, to occur where a post-rule modification to a pre-existing lease resulted in an enlargement of the original lease boundary regardless of theme. The RACNAC could not reach consensus on the issue of phosphate mining. However, there were discussions during committee deliberations expressing support for a recommendation that the final rule eliminate the exception for phosphate mining in the BCR theme lands and move appropriate acres of known phosphate lease areas (KPLAs) and a buffer zone into GFRG theme lands.

Based on these comments, the Department is eliminating the *adjacent lands* provision. New access will only be permitted where the expansion falls within the GFRG theme. This change is not to be construed as limiting access or other related activities associated with mineral leasing, including lease renewals, reissuances, continuations, extensions, or modifications issued prior to the effective date of this rule regardless of the theme. The Forest

Service in cooperation with the State, Bureau of Land Management (BLM), the RACNAC, and other interested parties identified the locations of phosphate mining activities most likely to occur in the future and adjusted the land classifications to focus on a smaller number of acres that could be available for mineral development and conserving the roadless character of the remaining areas. These adjustments allow the Agency to preserve the unroaded character of the vast majority of these lands, especially certain high quality fish and game habitat (e.g., portions of Deer Creek and Bear Creek), while recognizing long-standing interest in limited development of nationally critical phosphate mineral resources by industry and local communities. By adjusting the classifications for specific lands the Agency will provide better resource protection while making essentially the same number of acres available for phosphate development.

Because of these adjustments, the proposed rule's exceptions for new phosphate activities in the BCR theme were no longer necessary and have been removed. Thus, for leases obtained after the effective date of this rule, road construction and other associated activities can only occur in areas designated as GFRG theme to access specific phosphate deposits identified in Figure 3–20 in the FEIS. As a result, under the final rule road construction or reconstruction will only be permissible in specific areas (5,770 acres of KPLAs) where there is very high potential for development in the future. This refinement addresses concerns regarding unbounded geographic scope of these possible activities within IRAs. Road construction is not permitted after the effective date of the final rule for mineral leasing in BCR theme areas, but the final rule does not bar surface occupancy unless prohibited by the applicable LMP.

The Forest Service will no longer recommend, authorize, or consent to road construction or reconstruction associated with post-rule mineral leases in GFRG theme areas, except for phosphates. Currently, the known oil and gas potential is low and some LMPs restrict or prohibit new exploration. Geothermal development is currently speculative in IRAs and a major part of the areas with potential for its development is outside IRAs. Therefore, an exception for oil and gas or geothermal leasing is not warranted. The final rule also clarifies that surface occupancy is permissible within GFRG theme areas unless prohibited by the applicable LMP. This is consistent with the approach taken by the 2001 roadless rule. The Agency will also require that permissible road construction or reconstruction associated with mining activities in the GFRG theme will only be approved after evaluating other access options. The use or sale of common variety mineral materials in the GFRG theme will only be permitted where it is incidental to an otherwise lawful activity.

*Comment:* Mineral activities. One respondent asked for clarifying language concerning surface use and roading for mineral activities with respect to each of the themes. Others felt that the proposed regulations did not provide adequate environmental protection for mineral extraction operations. Some respondents felt there should not be any new roads allowed for mineral development. Others felt there should be no mineral development of any kind on national forests and suggested pursuing a formal statutory withdrawal of lands under the mining laws.

*Response:* After consideration of these comments, the Department determined that surface use and occupancy for leasable minerals will only be permitted in the BCR and GFRG theme areas, and that any such operations may be further restricted or prohibited by the applicable LMP components. Comparatively, these limitations are more restrictive than the 2001 roadless rule, which permitted surface use and occupancy on any inventoried roadless area. However, the Department declines the request submitted by some respondents that USDA request the Secretary of Interior to initiate the Federal Land Policy and Management Act (FLPMA) withdrawal process for all roadless areas or all NFS lands. Instead, the final rule establishes limitations on the future exercise of discretion available to Forest Service responsible officials. These limitations include: (1) No road construction or reconstruction or surface occupancy in the WLR, SAHTS, and Primitive theme areas; (2) no road construction or reconstruction for mineral leases in BCR theme areas; (3) no road construction or reconstruction for mineral leases in GFRG theme areas except for activities associated with phosphate deposits; and (4) in the BCR and GFRG theme areas, the use and sale of common variety mineral materials, and associated road construction access these mineral materials may occur only when the use of these mineral materials is incidental to an activity otherwise permissible by this rule.

*Comment:* Saleable minerals. One respondent suggested that sale of common variety minerals should be restricted within BCR theme areas. Another respondent asked for clarification for why some saleable mineral activities are allowed when associated with other allowable activities, what these other allowable activities would be, how frequent, and what is the pubic benefit. Another suggestion was to provide an exception for the Forest Service to use of common variety minerals in support of its activities, like road or trail maintenance.

*Response:* Commercial permitting of salable minerals in the BCR and GFRG themes is prohibited in the final rule. This addresses public concerns over this type of mineral development. Practically speaking, there is no independent commercial interest in development of these saleable minerals in IRAs. The total average production of mineral materials from NFS lands represents only about 1 percent of the total mineral materials production for all of Idaho (FEIS, section 3.5 Minerals and Energy).

Saleable minerals will only be made available as incidental to an otherwise permissible activity. The majority of saleable mineral use has been gravel for road construction, reconstruction, and maintenance or for Agency facilities development including trails. For example, gravel may be necessary to reduce the sediment from a road permitted in the BCR theme by this rule and could be authorized where an appropriate gravel source is in proximity of the road. This exception is expected to be rarely used, but is important because it allows use of saleable minerals for protection of other resources in IRAs without the increased costs of hauling these materials long distances. It also allows the Agency to use these sources in support of permissible road, trail, or facilities construction or maintenance.

*Comment:* Phosphate and leasable minerals. Several respondents expressed concern over allowing any expansion of phosphate mining in IRAs, especially Primitive and WLR themes, although phosphate is only known to occur on about 14,460 acres in IRAs. Many comments pertained to public concern for the phosphate mining-related effects of selenium on water quality. Some Tribes shared this concern and also expressed concern over the potential loss of trust resources. Respondents requested clarification about how far road construction and development would extend outside of existing leases into roadless areas. The BLM suggested the rule allow for a one-half mile expansion buffer around existing leases as there are some leases outside the known phosphate lease areas (KPLAs) and the rule should not restrict access

to these deposits. The BLM sought other clarifications and urged the Department to provide flexibility to administer existing leases to ensure maximum recovery of the resource by allowing the building of roads, water wells, power lines, and other supporting facilities on off-lease sites. Other respondents stated that the rule should clarify whether modifications of existing leases in an IRA, which are part of the KPLA, are allowed and how existing lease rights are dealt with in the Primitive designation. One respondent felt that all KPLA and existing leases should be moved to the GFRG theme. Other respondents felt phosphate leases should be confined to KPLAs and not to the entire BCR theme. Another respondent suggested known and high potential KPLA areas should be moved to the GFRG theme, and all other KPLAs moved to BCR where their development should not be allowed. Another respondent felt the rule should include requirements for mine clean up and the prevention of any future selenium pollution before any expansion of phosphate mining areas. One respondent felt there should be no expansion of phosphate mines under any circumstances.

*Response:* Mineral activities were one of the areas where the Department made a specific request for public comment in the preamble to the proposed rule (73 FR 1139). The RACNAC could not come to consensus on the issue of phosphate mining within IRAs. However, during RACNAC's deliberations, several committee members recommended that if the Agency were to allow road construction and reconstruction for leases obtained after the effective date of this final rule, that those activities be limited to areas managed pursuant to the GFRG theme.

The Department agrees, and believes that with fine tuning of the allocations, all new road construction or reconstruction associated with post-rule phosphate leases can be limited to the GFRG theme. After careful review of KPLAs and the specific classifications in the proposed rule, the Agency changed the proposed designation of some BCR theme areas in the proposed rule to the GFRG theme in the final. Not all KPLAs with phosphate potential proposed as BCR theme were changed to the GFRG theme. Several areas including the Bear Creek IRA, retain their BCR theme designation because those areas exhibit other high resource values. Approximately 1,280 acres of unleased phosphate are retained in the Primitive theme and 6,500 acres in the BCR theme. In addition, about 910 acres are in the GFRG theme in the Bear Creek Roadless Area but are not specified on figure 3–20. Therefore, roads may not be constructed to access any of these areas.

The Agency also agreed with the BLM's recommendation that, consistent with local land management plan components, the KPLAs should have a one-half mile buffer to allow for any uncertainties about where the ore body is located. For leases obtained after the effective date of this rule, road construction and other associated activities can only occur in areas designated as GFRG theme to access phosphate deposits identified in Figure 3–20 in the FEIS. This rule does not grant automatic access across the GFRG theme to ore bodies depicted in the map. However, it does allow consideration and review of the merits of individual applications which will undergo site-specific environmental analysis, including consideration of access options.

The Department believes maintaining future options within the select GFRG theme areas are important to communities in Southeast Idaho and to the nation because of the increasing demand for phosphate. The Department believes these permissions and restrictions provide a balance between providing access to a limited portion of a significant national resource and protecting roadless area values. Of course, any future development proposals would themselves require site-specific environmental analysis.

Additionally, the final rule directs the responsible official to review other access options and assure consistency with applicable LMP components before authorizing any new road construction associated with mineral activities in IRAs. Similar to the proposed rule, the final rule also directs that temporary road construction must be conducted in a way that minimizes effects on surface resources, is consistent with LMP components, and may only be used for specified purposes. Like the 2001 roadless rule, this final rule honors valid existing leases. In this situation, the Forest Service will permit necessary road construction, road reconstruction, and surface occupancy for existing leases regardless of the theme.

The issue of phosphate mining and selenium pollution is discussed in the FEIS at pp. 186, 187, 205, 208, 210, 211, 216, 259, 262, 264, 267, 277, 291, and 294. The Department has determined that requirements for mine clean up and the prevention of any future selenium pollution is best handled at the site-specific project level.

*Comment:* Locatable minerals. One respondent suggested language allowing access similar to the language proposed under leasable minerals should be included for locatable minerals.

*Response:* The final rule is clear that it does not intend to regulate mining activities conducted pursuant to the General Mining Law of 1872. The Agency has separate requirements relating to road construction and maintenance for locatable minerals at 36 CFR 228.8(f) that adequately provide for these protections. Recently, the Agency proposed a revision of its locatable mineral regulations; questions concerning access to locatable minerals will be governed by that final rule. Therefore, it was determined that no further adjustment of this regulation is necessary.

*Comment:* Energy resources. Several respondents suggested that the rule should not include an exemption for oil and gas or geothermal development as there is currently no known potential for their development. These respondents further asserted that future energy exploration should be dealt with under the proposed change clause, and that there are sufficient places outside roadless areas where alternative energy sources like wind, biomass, and geothermal can be developed.

*Response:* As identified in the FEIS, there is low potential for oil and gas development in Idaho but there is some potential for geothermal energy. Wind energy is more developed in southern Idaho and there appears to be ample opportunities for expansion outside roadless areas. The Western Energy Corridor study was also considered during development of this rule and no corridors have been identified in IRAs. There is currently one geothermal facility in Idaho generating electricity. Because the development of this resource is in its infancy and would be widely available on private and the roaded portion of NFS lands, the Department has determined there is not a need to allow roads for developing geothermal energy in IRAs at this time. If the State or other parties believe new information or circumstances warrant an adjustment, a change of the rule's restrictions can be sought and considered though the rule's modification process. For now, the final rule prohibits new road construction or reconstruction within any theme for post-rule oil and gas, and geothermal leasing. Surface use and occupancy would still be permitted in the BCR and GFRG themes so long as the LMP components do not expressly prohibit such activities.

*Comment:* Consultation with mining and energy interests. A respondent suggested the Agency should consult with State of Idaho agencies and

mining, energy, and geothermal industry representatives to assure the rule does not restrict or confuse development.

*Response:* The Department highlighted its desire for public comment concerning mineral and energy issues in the proposed rule. With regard to phosphates, as noted above, the Agency and State have coordinated with BLM, representatives of the affected industry, Tribal representatives, environmental groups, and other interested parties to identify the IRAs that possess resource values other than phosphate development and placed those areas in themes that would preclude future development. The Forest Service also worked with the BLM to ensure that both agencies understood the extent of phosphate development that would be permissible in IRAs.

*Comment:* Project-by project approach. One respondent recommended that decisions regarding mineral exploration and development should be made project-by-project rather than rule classifications for BCR and GFRG themes.

*Response:* A project-level approach would effectively be the same as the system examined in Alternative 2—Existing Plans, which is analyzed in detail in the draft and final EISs. The Department believes that the final rule (Alternative 4) presents a better approach blending local understanding of these regional interests along with national interest in roadless area management, minerals management, and energy security. Additionally, the modification provision set out in section 294.27 is available for adjustments as needed for individual projects.

Proposed Section 294.25 Timber Cutting, Sale, or Removal in Idaho Roadless Areas

*Summary of Changes in Proposed Section 294.25 (Final Rule Section 294.24).* Paragraph (a) has been reworded for clarity but retains the same limitations on timber cutting in WLR presented in the proposed rule. The proposed rule's use of significant risk in paragraph (b)(1)(ii) in the Primitive and SAHTS themes has been eliminated and has been revised with language that better describes a narrower exception focusing on protection for at-risk communities and municipal water supply systems from uncharacteristic wildland fire effects. As explained in the FEIS at section 3.3, Fuels Management, these fuel treatments are necessary to reduce potential direct and indirect effects of wildland fires to these communities. This aligns more closely to the Department's, Forest Service's, and State's desire to provide protections similar or beyond those provided by the 2001 roadless rule without sacrificing necessary flexibility for the protection of critical community interests. Instead of splitting limitations on these activities across multiple paragraphs as in the proposed rule, section 294.24(b)(2) lists all limitations. The final rule also clarifies that when assessing whether actions maintain or improve roadless characteristics, responsible official's evaluations examine long term effects rather than only immediate consequences.

Several refinements have been made to the provisions concerning timber cutting in the BCR theme. The final rule includes new provisions in section 294.24(c)(1)(i–ii) to refine instances where timber cutting can be conducted to reduce hazardous fuel conditions. The rule now distinguishes between cutting for fuel reduction purposes inside and outside CPZs and requires additional protections and findings for actions taken outside a CPZ. The final rule clarifies that significant risk will be addressed in terms of landscape condition and fire event probability. Consistent with the concepts of the 2006 Cohesive Strategy, the regulation now identifies and defines the factors that go into that determination—history of fire occurrence along with fire hazard and risk. These adjustments parallel changes made in the road construction provision in the final rule discussed above.

The RACNAC and some respondents expressed concern regarding whether temporary roads should be constructed for facilitating forest health or other permissible timber cutting, sale, or removal activities in BCR theme areas. The Department agrees that new roads, even temporary roads, should not be developed to undertake these types of timber cutting activities because of their potential to diminish roadless characteristics. However, the final rule recognizes that with appropriate limitations, such as maximizing the retention of large trees, these activities could make use of roads that already exist and roads authorized under the various provisions of this rule (including temporary roads until decommissioned). By allowing the use of existing and permissible roads to support limited timber cutting activities, the ability to accomplish limited forest health objectives can be met without diminishing roadless characteristics over the long-term. Such roads would not be available to support further timber cutting operations once they are decommissioned. General instructions regarding temporary roads have been added in a new paragraph (d) based on input from RACNAC and the public.

*Comment:* Limits on timber cutting. One respondent suggested limiting timber cutting, sale, or removal in the Primitive theme to only those timber activities that will improve one or more of the roadless characteristics. Several respondents suggested timber cutting should be limited in the Primitive theme to instances where it would improve one or more roadless characteristics and maintain the quality of game and fish habitat and recreation experience. Other respondents suggested that an exception be included for the Primitive theme allowing treatment for human health and safety near trails or other recreation sites. For the BCR theme, it was suggested the cutting, selling, or removing of timber be limited to where it will maintain all roadless characteristics or improve one or more of the roadless characteristics. Another respondent felt the rule should disclose the controversy over the use of logging as a fuels reduction method. Another felt that the proposed rule exceptions were ambiguous and that the DEIS underestimated potential effects. Other respondents wanted to know why language in the 2001 roadless rule concerning generally small diameter and the range of variability were are not carried forward into the proposed rule. Similarly, other respondents asked for clarification about whether large diameter trees can be logged and consideration of a limitation to small diameter trees and/or an old-growth, large tree retention requirements.

*Response:* Based on these comments, the Department has elected to follow the approach used in the Healthy Forests Restoration Act (HFRA) with modifications recommended by the RACNAC. In the Primitive theme, timber cutting under the final rule would be prohibited unless existing roads or aerial systems are used and the cutting, selling, or removing of timber would: (1) Improve threatened, endangered, proposed, or sensitive species habitat; (2) maintain or restore ecosystem composition, structure, and processes; or (3) reduce the risk of uncharacteristic wildfire to at-risk communities and municipal water supply systems. Such cutting, selling, or removing of timber would also have to maintain or improve one or more of the roadless characteristics over the long-term. Some additional requirements for timber cutting were added, including: (1) Timber cutting, selling, or removing must be approved by the regional forester; (2) retention of large trees as appropriate for the forest type to the extent the trees promote fire-resilient

stands must be maximized; and (3) projects must be consistent with applicable plan components. With these limitations, timber cutting activities on these lands is expected to be limited and infrequent. The cutting of hazard trees near trails and recreation sites for human health and safety is allowed under section 294.24(b)(v) as it is incidental to a management activity not otherwise prohibited by this final rule.

For the BCR theme, the final rule modifies the proposed rule's timber cutting provisions (section 294.25(c)(1)(ii)) to be more specific about where and under what conditions timber cutting is permissible. The final rule identifies that timber cutting would only be allowed as follows: (1) To reduce hazardous fuel conditions within the CPZ; (2) to reduce the significant risk of wildland fire effects to an at-risk community or municipal water supply system outside the CPZ; (3) to improve threatened, endangered, proposed, or sensitive species habitat; (4) to maintain or restore the characteristics of ecosystem composition, structure, and process; (5) to reduce the risk of uncharacteristic wildland fire effects; (6) for personal or administrative use; (7) where incidental to implementation of a management activity not otherwise prohibited by this rule; or (8) in a substantially altered portion of an IRA.

Additional conditions were added for actions undertaken to reduce significant risk of wildland fire effects outside of a CPZ; to maintain or restore characteristics of ecosystem composition, structure, and process; and to reduce the risk of uncharacteristic wildland fire. These actions must also maintain or improve one or more of the roadless characteristics over the long-term; maximize the retention of large trees as appropriate for the forest type, to the extent the trees promote fire-resilient stands; are consistent with LMP components; and are approved by the regional forester.

The 2001 roadless rule used the phrase *generally small diameter*. The requirement to *retain large trees as appropriate for the forest type* replaces that terminology. This language was recommended by the RACNAC and has been part of the Agency's implementation of HFRA and the Agency believes the language will be better understood by field personnel. The new language reflects the site-specific flexibility needed to treat certain forest types in Idaho (e.g., lodgepole pine). A definition of *forest type* has been added in the final rule that is drawn from the definition of that term in the Dictionary of Ecology. The Agency will continue to emphasize the use of stand thinning, strategic fuel breaks, and prescribed fire where possible to reduce the forest fuel loading. Similarly, the language ''within the range of variability that would be expected to occur under natural disturbance regimes of the current climatic period'' found in the 2001 roadless rule is not used in this rule because it does not easily account for species like lodgepole pine that routinely experiences stand replacement fires, and although it may not be outside of its natural disturbance regimes, it could pose a significant risk to at-risk communities.

*Comment:* Restrictions on logging methods. One respondent suggested that only selective logging by helicopter should be allowed in themes where timber cutting is allowed because it would allow for better quality wood without habitat destruction. Another respondent felt that the rule should clarify whether maintaining roadless character means that there will be no clear-cutting or seed tree harvest methods.

*Response:* The Department believes selection of logging methods to meet silvicultural treatment objectives is best left to project-specific decisionmaking. A general prohibition on particular harvest systems, like clear-cutting or seed tree harvest methods, could preclude necessary and otherwise permissible activities for treating areas. Some areas with low commercial value, like lodgepole pine stands, may be in need of treatment to protect local communities and municipal water supplies. Restricting logging methods would unnecessarily endanger these at-risk communities and municipal water supplies.

*Comment:* Timber cutting and vegetative treatments to improve roadless characteristics. Several respondents felt it was confusing to allow timber cutting under proposed section 294.25 if it will maintain or improve one or more of the roadless characteristics and suggested changing the standard to be an assurance that timber cutting does not degrade roadless character. One respondent suggested more rationale is needed before conducting vegetative treatments to reduce significant risks or for forest health activities in the Primitive and BCR themes. Other respondents felt language was needed that requires scientific documentation before activities for the maintenance and improvement of threatened, endangered, and sensitive species can be authorized in roadless areas.

*Response:* The final rule language has been modified and section 294.24(c)(2)(i) now provides that actions should maintain or improve roadless characteristics over the long-term. The final rule includes additional definitions and clarifications addressing when and where actions undertaken for maintaining or restoring the characteristics of ecosystem composition, structure, and processes; or *significant risk* situations may occur. Agency procedures already require responsible officials to identify the reasons for their decisions and the scientific and other source material relied upon for agency conclusions. Therefore, additional requirements are not necessary.

*Comment:* Wildland urban interface (WUI). Many respondents requested clarifications and definition concerning WUIs and communities. One respondent felt that a roadless area by definition is not part of the urban interface and should not be included in WUI areas. Some respondents suggested expanding the radius beyond one mile, while others suggested reducing the radius to 200 feet. Still others wanted more application of science when determining WUI boundaries.

*Response:* The proposed rule did not specifically use WUI as a condition for road construction or timber cutting. The proposed rule permitted road construction or reconstruction and timber cutting, sale, or removal in the BCR theme to reduce the significant risk of wildland fire effects. Significant risk was defined as ''a natural resource condition threatening an at-risk community or municipal water supply system.'' WUI as defined by the HFRA includes an area within or adjacent to an at-risk community that is identified in a community wildfire protection plan (CWPP) or is based on default criteria if a CWPP does not exist. CWPPs are completed for all counties in Idaho.

Based on public comment and RACNAC recommendations, the timber cutting section was modified to be more precise about where and under what conditions timber cutting could be done. Timber cutting, sale, or removal could be done in the CPZ as described as an at-risk community in HFRA. The CPZ is an area extending one-half mile from the boundary of an at-risk community; or an area within one and a half miles of the boundary of an at-risk community, where any land (1) has a sustained steep slope that creates the potential for wildfire behavior endangering the at-risk community; (2) has a geographic feature that aids in creating an effective fire break, such as a road or a ridge top; or (3) is in condition class 3 as defined by HFRA meaning areas where fire regimes on

land have been significantly altered from historical ranges; there exists a high risk of losing key ecosystem components from fire; fire frequencies have departed from historical frequencies by multiple return intervals, resulting in dramatic changes to: (1) The size, frequency, intensity, or severity of fires; and (2) landscape patterns; and vegetation attributes have been significantly altered from the historical range of the attributes. The final rule's definition of an *at-risk community* comes from the HFRA.

*Comment:* Use of community wildfire protection plans (CWPPs). Several respondents raised concerns over the legality of using CWPPs in the rule to define the WUI because the development of a CWPP is not solely in the control of the Federal Government. Some felt the Proposed Rule's references to HFRA may unintentionally broaden forest fuels treatments in roadless areas beyond limited community protection needs. Others suggested adding language to cover any updates to the HFRA Interim Field Guide. They also noted the field guidance is not limited to community protection and includes municipal watersheds, ecosystem components, and forest/rangeland resources.

*Response:* CWPPs were not specifically referenced in the proposed rule. However, consideration of CWPPs was implied in provisions regarding timber cutting and road construction to reduce significant risk. The CWPPS were considered when developing the final rule as a way to define a geographic area for projects that reduce significant risks to communities and municipal water supply systems. However, this concept was not considered in detail because it is too difficult to define. Each CWPP is developed based on a variety of information, some more scientific than others; and a set distance may not work in many cases. While CWPPs can provide helpful information, they are not developed and controlled solely by the Federal Government, and can vary widely. In some instances, the county's CWPP indicates the entire county is a WUI including all IRAs within the county. Therefore, the Department decided that reliance exclusively on CWPPs was not appropriate. After consideration of public comments and the RACNAC's recommendation for allowing road building in certain circumstance described above, the Department has decided to use a combination of specific geographic criteria (the CPZs) and added requirements for the situations when road construction and reconstruction could be used to facilitate timber cutting to reduce significant risk outside the CPZs. Responsible officials can consider information from CWPPs as in many instances they may be a useful tool for determining whether a significant risk situation exists.

*Comment:* Vegetation treatments in the BCR theme. One respondent suggested that documentation should be required for maintenance or improvement of habitat for threatened, endangered, proposed, indicator, and sensitive species. Another respondent recommended inclusion of aspen as a type of restoration project. One respondent felt that the rule should be more flexible in the BCR theme to allow for management treatments outside of WUI and municipal watersheds. Another respondent questioned if timber cutting activities in the BCR theme would maintain all roadless characteristics or improve one or more of the roadless characteristics.

*Response:* Agency planning procedures (i.e., NFMA, NEPA, ESA) already require analysis, documentation and disclosure of the scientific and other information relied upon for agency conclusions regarding wildlife habitat. Therefore, additional requirements are not necessary. Treatments in aspen stands are allowed as long as they conform to the requirements of the rule. For a discussion of activities outside of WUI, see the discussions above under significant risk and under *Summary of Changes in Proposed Section 294.25 (Final Rule Section 294.24*). As a clarification, the final rule limits timber cutting in the BCR theme to situations that (1) maintain or improve one or more of the roadless characteristics over the long-term; (2) maximize the retention of large trees as appropriate for the forest type to the extent the trees promote fire-resilient stands; (3) are consistent with LMP components other than those inconsistent with this final rule; and (4) are approved by the regional forester.

*Comment:* Forest health activities. Some respondents were concerned over the possible abuse of this exception and thought the language should be struck from the rule. One respondent thought the two exceptions in proposed section 294.25(c)(1) should stand on their own and the reference to forest health should be removed. Others felt that a definition was needed for the term *forest health* and that further parameters should be included. Another respondent thought forest health projects should not be allowed in the BCR theme, making the proposed rule more like the 2001 roadless rule. One respondent felt forest health should not be confined to the health of trees but other parts of the ecosystem.

*Response:* The final rule has been designed to address vital forest health needs. The final rule removes the proposed criteria that a road could be constructed ''to facilitate forest health activities.'' The final rule does not include a definition for *forest health* because the term is not used. The BCR theme in the final rule does not permit road building for the purpose of conducting limited forest health activities. However, these limited forest health activities may proceed using other means, including the use of aerial systems and existing roads, including those temporary roads authorized by this rule until the road is decommissioned. This adjustment is intended to add a small degree of flexibility under special circumstances while maintaining essentially the same management regime for these lands as directed under the 2001 rule. The final rule does not impose restrictions on forest health activities for the betterment of the ecosystem beyond those expressly addressed by the regulation. For example, stream habitat improvements like willow planting for shade improvement are unaffected by the rule.

Proposed Section 294.26 Other Activities in Idaho Roadless Areas

*Summary of Changes in Proposed Section 294.26 (Final Rule Section 294.26).* The rule language concerning motorized travel, motorized equipment, and mechanical transport has been simplified with no change in intent. Along with other minor wording changes, the grazing provision now uses *permit* rather than *allotment*. The proposed and final rules both indicate that future grazing operations will conform to the rule, but that current operations are not affected. Standard Forest Service grazing permits have a maximum ten-year term. Allotment management planning occurs periodically and has no set term. The Department's intention for bringing future grazing operations into conformance with the rule classifications is more readily accomplished through the mandatory term permit system than through the optional allotment management planning system as not all operations are covered by an existing allotment management plan.

*Comment:* Public involvement during transportation planning. A respondent suggested the rule should require that any present or future roads analysis conducted in an Idaho roadless area

should be shared with county commissioners.

*Response:* The Governor's petition and final rule at section 294.26(a) identify that decisions concerning the future management and/or status of existing roads or trails in IRAs under this rule will be made during the applicable travel management processes. Forest Service responsible officials are already directed to coordinate with counties when engaged in travel management decisionmaking regarding designation or revision of NFS roads, trails, and areas on NFS land as directed in 36 CFR 212.53. No additional regulatory direction is needed.

*Comment:* Ski areas. A respondent suggested ski areas should be taken out of roadless area designations, including the Primitive theme. Several respondents felt ski areas should be moved into the Forest Plan Special Area (FPSA) designation. Another respondent requested a re-evaluation of the ski area permit boundaries in LMPs and the ski area master development plan to consider the actual ski use boundaries.

*Response:* The status and theme assignment for all ski areas was further evaluated based on public comment. Based on the review, it was determined that some existing LMP prescriptions did not match the authorized ski area permit boundary. In the proposed rule, not all the developed winter recreation sites had been placed into the FPSA category. In the final rule, all developed winter recreation sites, based on their permit boundaries are placed into FPSA. These areas would be managed according to the applicable LMP.

For example, the potential for future expansion of Brundage Mountain has been acknowledged in its master development plan, including approximately 7,000 acres in the Patrick Butte Roadless Area. The final rule identifies these lands as a FPSA and, as such, the lands will be managed in accordance with the local land management plan and standard administrative and environmental review processes for evaluation of ski areas will apply. The final rule is neutral regarding potential expansion, neither assuring nor baring the outcome of future decisionmaking.

Classifications for ski areas, or parts of ski areas, where only snowcat skiing is authorized were not adjusted as no rule related activities are associated with these uses.

Proposed Section 294.27 Scope and Applicability

*Summary of Changes in Proposed Section 294.27 (Final Rule Sections 294.27 and 294.28).* Several adjustments were made to the scope and applicability provisions set out in the proposed section 294.27. First, a new paragraph 294.28(a) was added to respond to requests that the rule clarify the relationship of this subpart to the 2001 roadless rule. Paragraph (a) of the final rule is intended to make clear that this rule supersedes the 2001 roadless rule. Therefore the 2001 roadless rule shall have no effect within the State of Idaho regardless of the legal uncertainties of the 2001 roadless rule because of pending litigation as noted above. The Department has reexamined management direction for these lands under various regimes, considering national and local interests, and determined that the final rule represents a balanced solution that best meets the needs of the American public for these lands. A clarification has been added about the relationship of this final rule and LMPs in section 294.28(d). A further clarification of the relationship between the rule and plans was made by adding paragraph 294.28(f) in the final rule that expressly states that the final rule is not intended to overwrite management direction applicable within FPSAs. Paragraphs 294.28(g) and (h) are added to expressly note that nothing in the rule waives any applicable requirements regarding site-specific environmental analysis, public involvement, consultation with Tribes and other agencies, or compliance with applicable laws; nor modifies the relationship between the United States and Indian Tribes. Finally, the corrections and modifications process has been simplified to improve readability and placed in a separate section (294.27).

*Comment:* Role of LMP components during implementation of the rule. Several respondents raised concerns that the proposed rule was silent on meeting LMP standards and guidelines or other interagency standards established to meet resource objectives, for example INFISH.

*Response:* The final rule (section 294.28(d)) makes it clear that applicable LMP components (desired conditions, objectives, suitability, guidelines, and standards) must be adhered to during the planning and implementation of a project. For example, in the GFRG theme, LMP components generally permit road construction. However, some components set sideboards or conditions for road construction (e.g., roads may not be constructed in riparian areas unless certain conditions are met or may not be constructed in grizzly bear habitat unless certain road densities are met). In particular LMPs provide management direction to reduce or minimize adverse effects to threatened and endangered species. This direction is not inconsistent with the final rule. Therefore, these conditions would still apply to actions permissible under the final rule and if the project cannot comply with the plan requirements, the proposed project would have to be modified, abandoned, or the specific LMP component amended. There are some IRAs where the management theme direction established in the final rule would be more permissive than existing LMPs, for example allowing the use of a temporary road for fuels treatment within a CPZ while the existing LMP does not allow for roads in the area. In these few instances, the rule would override the plan's general allocation and road construction could be permitted. However, any such road building must still be consistent with all LMP direction that provides specific criteria for designing projects or activities. In the example above, the road must still meet requirements found in INFISH, PACFISH, southwest Idaho Group Forest-wide requirements, the Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area, the Northern Rockies Lynx Amendment, or other species-specific direction.

*Comment:* Administrative corrections and modifications. Several respondents felt that more clarity was needed on the procedures for boundary changes to the IRA maps identified in proposed section 294.21. Others requested further clarification regarding the proposed significance determination for modifications. Several respondents recommended public involvement no matter the magnitude of change even if the proposed change is perceived by the Agency to be non-significant or an administrative correction. In addition, respondents requested a 30-day public comment period before any change is made. One respondent expressed concern that the change clause would allow incremental erosion of IRA protections. A Tribal respondent felt that the change clause would result in the categorical exclusions of public input and Tribal government-to-government consultation. Other respondents felt that the revision of boundary lines for the themes and roadless areas should be made simpler.

*Response:* The Department identified the correction and modification process as an aspect of the proposed rule where public input was most desired. To improve readability, the final rule establishes a separate provision for corrections and modifications. Although there was widespread agreement that a

modification provision is needed, respondents sought clarifications regarding two particular points: the public comment process and the significance threshold for modifications.

The proposed rule identified that all changes, except correcting typographic or mapping errors, would be subject to an opportunity for public comment. The extent of public involvement was intended to vary depending on whether a proposed change was deemed a significant modification. Some respondents found the proposed rule's approach overly complicated or confusing. Several respondents, including the RACNAC, urged that an opportunity for public comment be provided for all changes. Therefore, the Department has simplified the process. The final rule directs the Chief to provide notice and comment for all changes, including corrections for typographic or mapping errors. Further, the significance test has been eliminated and the Agency will provide a 30-day comment period for corrections and a minimum 45-day comment period for all other modifications. Adjustments will comply with applicable administrative and environmental analysis requirements.

Proposed Section 294.28 List of Designated Idaho Roadless Areas

*Summary of Changes in Proposed Section 294.28 (Final Rule Section 294.29).* The final rule designations reflect adjustments to area boundaries and assigned classifications for specific IRAs based upon further review by Forest Service field units, the State, and in response to public comment since publication of the 2001 roadless rule. The FEIS Appendix A lists each adjustment and identifies the reason the change was made. These roadless areas are based on the most current inventory, found either in existing forest plans, proposed forest plans, or the 2001 roadless rule. In most cases, the boundaries from the three sources are the same.

Most of the Idaho's 2001 roadless rule roadless area boundaries were based on forest plan inventories completed in the mid-1980s. Most of these inventories were not updated for the 2001 roadless rule to reflect activities that had occurred in the 1990s. During LMP revisions since the 2001 roadless rule, national forests in Idaho updated their inventories. Some roadless areas have decreased in size from the inventories used by the 2001 roadless rule due to road construction and timber sales that occurred between the mid-1980 inventory and prior to the implementation of the 2001 roadless rule. Other roadless areas increased in size due to lands gained through land exchanges or a new inventory during a LMP revision found more adjacent lands qualifying for consideration FSH 1909.12 Land Management Planning, Chapter 70 requirements. Additionally, some minor changes were made to correct mapping errors found since the 2001 roadless rule.

*Comment:* Several respondents raised concerns that the proposed theme designations for the propose rule did not correctly reflect current LMP direction for the area. In addition, some respondents felt that too many acres are being placed in the GFRG theme.

*Response:* As previously noted, the GFRG theme was reduced by 203,700 acres (from 609,600 to 405,900 acres) in the final rule as described in FEIS, Appendices E and P. The Forest Service reviewed current LMP direction for each IRA. Based on public comment and Forest Service review, several changes were made to place some additional areas into the forest plan special area (FPSA) category as this category better reflects the management intent of the rule for these areas. They include small developed or designated dispersed sites on the Caribou-Targhee, Payette, and Sawtooth NFs, and the ski areas of Brundage Mountain discussed above. A change was also made to remove potential wild and scenic river corridors from the FPSA in the Idaho Panhandle NFs. Similarly, a change was made on the Challis NF where Management Areas 11 and 12 had been placed into the Primitive theme based on the interpretation of LMP direction. However, after further review by the Challis NF of the road construction or reconstruction activities that have occurred in these management areas, it was determined that the appropriate theme for these two areas is the BCR theme. More information on these changes can be found in Appendix E of the FEIS.

**Regulatory Certifications**

*Regulatory Planning and Review*

This final rule was reviewed under USDA procedures, Executive Order (E.O.) 12866 issued September 30, 1993, as amended by E.O. 13258 and E.O. 13422 on Regulatory Planning and Review and the major rule provisions of the Small Business Regulatory Enforcement and Fairness Act (5 U.S.C. 800). This final rule is not an economically significant rule. This final rule will not have an annual effect of $100 million or more or adversely affect the economy or economic sectors. This final rule is not expected to interfere with an action taken or planned by another agency, nor raise legal or policy issues. This final rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. However, due to the level of interest in roadless area management, this final rule has been designated as significant and is therefore subject to Office of Management and Budget (OMB) review under E.O. 12866.

A regulatory impact analysis has been prepared for this final rule. OMB circulars as well as guidance regarding E.O. 12866 indicate that regulatory impact analysis should include a benefit cost analysis and an assessment of distributional effects. The benefits, costs, and distributional effects of four alternatives referred to as follows: 2001 Roadless Rule (2001 Rule), existing forest plans (Existing Plans), the Proposed Rule and the final rule are analyzed over a 15-year time period from 2008 to 2022. For the purpose of regulatory impact analysis, the 2001 Rule is assumed to be the no action alternative to represent baseline conditions or goods and services provided by national forests and grasslands in the near future in the absence of the final rule. The baseline assumption is consistent with no action alternative used in the final environmental impact statement for the final rule. The IMPLAN modeling framework is used to estimate the economic impacts of the regulatory action.

*Summary of the Results of Impact Analysis*

The regulatory impact analysis examines four alternatives establishing regulatory direction for the management of the 9.3 million acres of Idaho Roadless Areas (IRAs):

(1) Direction based on the 2001 Roadless Area Conservation Rule (2001 Rule);

(2) Direction based on existing land management plans for national forests in Idaho (Existing Plans);

(3) Direction based on the proposed rule (Proposed Rule).

(4) Direction based on this final rule (Final Rule).

The purpose of the Final (and Proposed) Rule is to provide State-specific direction for the conservation and management of Idaho's inventoried roadless areas. The Final Rule integrates local management concerns with the national objectives for protecting roadless area values and characteristics.

*The 2001 Rule*

The 2001 Rule is the baseline alternative. The 2001 Rule alternative presents a roadless area management regime based on prohibitions with exceptions. This alternative prohibits road construction and reconstruction in roadless areas with exceptions. Timber cutting, sale, or removal, is prohibited with exceptions. Unless an exemption applied, road construction would not be allowed for discretionary (leasable and saleable) mineral activities.

*Existing Plans*

The Existing Plans alternative represents an Idaho Roadless Area management regime based on each forest's land management plan (LMP). Generally, LMPs would allow timber cutting and road construction or reconstruction on 1.26 million acres of the 9.3 million acres of IRAs. Road construction and timber cutting would be allowed on an additional 4.48 million acres over the baseline. Permissions for mineral activity vary by each National Forest land management plan from limited to full development.

*Proposed Rule*

The proposed Idaho Roadless Area Conservation Rule is programmatic in nature and consists of five management themes. The themes provide a management spectrum intended to meet the purpose of the rule. Depending on the theme, road construction or reconstruction, timber cutting, and discretionary mineral activities are allowed or prohibited with or without exceptions.

*Final Rule*

The Final Rule refines and clarifies parts of the Proposed Rule based on comments received on the Proposed Rule from the public, Tribes, the State of Idaho, and recommendations from the RACNAC. The major modifications between the Proposed Rule and Final Rule include:

- The amount and type of roadless areas placed in the various themes.
- Clarifications on the permissions and restrictions associated with road construction and reconstruction and timber cutting, sale, or removal with fuel treatments in areas associated with at-risk communities and municipal water supplies.
- Restrictions on road construction in association with leasable minerals other than phosphate.
- The public comment requirements to make changes in the future.

For more information on the alternatives, see discussion under *Alternatives Considered by the Department* section in this preamble and FEIS Chapter 2 (*http://roadless.fs.fed.us/documents/idaho_roadless/feis/feis_vol_1.pdf*).

The final rule establishes five management themes to clarify direction in IRAs in contrast to the single management strategy assigned to all IRAs under the 2001 Rule alternative. The five themes are Wild Land Recreation (WLR), Primitive, Special Areas of Heritage and Tribal Significance (SAHTS), Backcountry/Restoration (BCR), and General Forest, Rangeland, and Grassland (GFRG). In general, these themes vary according to the degree to which road construction, timber cutting, and discretionary minerals activity are prohibited in IRAs, with the WLR theme being the most restrictive and the GFRG theme being the least restrictive. Management direction under the 2001 Rule alternative is most similar to the BCR theme under the final rule. The final rule does not prescribe site-specific activities on the ground nor does it irreversibly commit resources. Direct effects of site-specific activities would be disclosed through NEPA project-level analysis when site-specific decisions are made. Table 1 compares roadless acres by theme, across alternatives.

Because the rule does not prescribe site-specific activities, it is difficult to quantify the benefits and costs of the alternatives. It should also be emphasized that the types of benefits derived from roadless characteristics and the uses of roadless areas are far ranging and include a number of non-market and non-use benefit categories. Consequently, benefits and costs are not monetized, nor are net present values or benefit cost ratios estimated. Instead, increases and/or losses in benefits are discussed separately for each resource area in a quantitative or qualitative way. Benefits and costs are organized and discussed in the context of *local resource concerns* and *roadless characteristics* to remain consistent with overall purpose of the rule, recognizing that benefits associated ''with local concerns may trigger indirect benefits in roadless characteristics in some cases (such as, forest health).'' Table 2 summarizes the potential benefits and costs of the final rule, the 2001 Rule, the Proposed Rule, and Existing Plans alternatives.

Distributional effects or economic impacts, in terms of jobs and labor income, are quantified for Idaho's five economic areas (EAs) using regional impact models (IMPLAN). Economic impacts are evaluated only for changes in activities directly affected by the rule (timber cutting, minerals extraction, and road construction and reconstruction). Distributional effects are also discussed in relation to revenue sharing, small entities, and to the resource dependent communities (counties) most likely to be affected by the rule. Table 3 summarizes distributional effects and economic impacts of the final rule and alternatives. The precision of these estimates are unknown since a formal analysis of uncertainty has not been undertaken. Discussion of estimated economic impacts therefore focuses on the direction of change and the relative differences in impacts across alternatives, not absolute values of impacts.

Details about the environmental effects of the rule are in the Roadless Area Conservation; National Forest System Lands in Idaho Final Environmental Impact Statement (FEIS).

In general, projected activity levels associated with future road construction and timber cutting are anticipated to be greater for the final rule, relative to the 2001 Rule alternative baseline conditions. For example, the final rule projects an increase in road construction by 18 miles over the next 15 years. Reasonably foreseeable levels of activities such as road construction can be projected, but the effects of permitted activities on resource conditions or roadless characteristics are more difficult to predict. As a consequence, the agency is often limited to describing the extent to which particular resource conditions (e.g., highly sensitive soils) overlap with roadless areas where opportunities for activities (e.g., road construction) exist under the different alternatives. The actual extent of resource effects would be significantly smaller than the area of overlap because reasonably foreseeable activities are projected to occur on very small fractions of the total area where activities are permitted under the alternatives. In addition, other requirements to minimize or reduce adverse effects, such as management direction found in land management plans would apply.

*Local Resource Concerns*

Local resource concerns include protecting communities, property, and resources from risk of wildland fire, as well as protecting forests from the adverse effects of wildfire, insects and disease, and ensuring access (see Table 2).

Projected levels of timber cutting for reducing hazardous fuels and/or reducing the risks from insects and disease in roadless areas over 15 years, are greatest under Existing Plans alternative (40,500 acres) followed by

the Proposed Rule alternative (18,000 acres), the final rule (15,000 acres), and the 2001 Rule alternative (9,000 acres). Projected timber cutting is estimated to generate approximately 3.0 million board feet (MMBF) per year for the 2001 Rule alternative, 13.36 MMBF per year for Existing Plans alternative, 5.8 MMBF per year for the Proposed Rule alternative, and 5.0 MMBF per year for the final rule and would account for 2 percent, 11 percent, 5 percent, and 4 percent respectively of the average annual harvests from NFS land in Idaho. A majority of the volume under the final rule is projected for the Idaho Panhandle National Forest (NF) in the northern EA.

Approximately 1.44 million acres in Idaho Roadless Areas (IRAs) are estimated to be at risk of 25 percent or more tree mortality (i.e., high risk) over the next 15 years. Under the 2001 Rule alternative, a majority of the high-risk areas would remain untreated. Under the final rule, opportunities for treatment increase as a result of acreage assigned to the GFRG and BCR themes. Approximately 39,600 of the 1.44 million acres at risk are in the GFRG under the final rule. An estimated 877,000 at-risk acres are in the BCR theme, of which 56,600 acres are in community protection zones (CPZs). The final rule specifies that road construction under the BCR theme is primarily limited to areas in CPZs (or areas determined to be at significant risk) with the intent of focusing treatment opportunities in those areas where reductions in wildfire to at-risk communities and/or community water supplies can be obtained. The areas at high risk of tree mortality that are located in the GFRG theme (39,600 acres) or in CPZs under the BCR theme (56,600 acres) therefore have the most potential to be treated under the final rule.

Compared to the final rule, the Proposed Rule alternative decreases the amount of high risk acreage assigned to the GFRG theme to 25,600 acres and increases high risk acreage assigned to the BCR theme to 939,400 acres. The areas identified in the GFRG theme would have the most potential to be treated given treatment flexibility. Timber cutting in the BCR theme would be limited and would be done to retain roadless characteristics. In contrast to the final rule, the Proposed Rule alternative does not specify that road construction is limited to CPZs or areas at significant risk under the BCR theme. Under the Existing Plans alternative, the high risk acreage assigned to the GFRG theme increases to 187,500 acres while 755,800 acres are assigned to BCR. The Existing Plans alternative provides flexible opportunities to treat high risk acres through timber cutting on lands assigned to BCR and GFRG themes without constraints associated with roadless characteristic retention requirements under the Proposed and final rules.

Approximately 731,000 acres (8 percent) of IRAs are in the Wildland Urban Interface (WUI), and about 418,900 acres (57 percent) of those acres are in high priority fire risk areas as defined by fire regime and condition class. Projected harvests for hazardous fuel reductions could treat the equivalent of approximately 4 percent of high priority areas in the WUI under the Proposed and final rules over a 15 year period. In contrast, approximately 10 percent of high priority WUI areas could be treated under Existing Plans alternative. An insignificant amount of high priority WUI acreage would be treated under the 2001 Rule alternative. As noted above, the final rule is more prescriptive about where road construction is permitted in association with treatments compared to the Proposed Rule alternative, thereby clarifying the intent to focus projected treatments and tree-cutting in areas at high risk of wildland fire, including the WUI.

Opportunities to use a full range of treatment methods to address severe wildland fire risk, particularly in the WUI, are substantially greater under the Proposed and final rules relative to the 2001 Rule alternative. Treatment flexibility expands only slightly under the Proposed and final rules compared to the Existing Plans alternative. Approximately 66 percent of WUI acreage in IRAs is assigned to management themes that permit flexible treatment methods (mechanical or prescribed fire) with road construction under the final rule, compared to 67 percent under the Proposed Rule alternative, and 65 percent under the Existing Plans alternative.

Under the final rule, approximately 16 percent of community public water system acreage that overlaps roadless areas is assigned to themes that permit flexible treatments with road construction. Flexible treatments with road construction are conditionally permitted on an additional 42 percent of community public water systems acreage under the final rule when significant risk conditions are met; these areas are located primarily outside of CPZs. In contrast, flexible treatments with road construction are permitted on 58 percent and 47 percent of community public water systems areas under the Proposed Rule and Existing Plans alternatives respectively.

There is some potential for spreading of noxious weeds under the Existing Plans alternative, with decreasing potential under the Proposed and final rules due to projected amounts of road construction or reconstruction, timber cutting, and mineral activity. However, the limited extent of projected activities would minimize the potential for spreading noxious weeds.

The environmental consequences associated with climate change have been considered in the context of carbon dioxide releases associated with projected activity levels and the varying capability to respond to climate change under the alternatives. Details about these consequences are provided in the vegetation and forest health section of chapter 3 in the final environmental impact statement (FEIS) for the final rule.

Phosphate mining activity on existing leases will be similar across the alternatives over the next 15 years. However, 13,190 acres of unleased IRAs with known phosphate reserves (593 million tons) will be made available for future leasing or lease expansion under the Proposed Rule alternative that would not be accessible under the 2001 Rule alternative. Areas of unleased reserves accessible under the final rule decrease to 5,770 acres (260 million tons) due to additional road construction prohibitions. Opportunities to recover phosphate from unleased areas are negligible under the 2001 Rule alternative. Unleased areas with known phosphate reserves accessible under the Existing Plans alternative are estimated to be 13,620 acres (613 million tons). Development of these areas is expected to occur over an extended period of time (50+ years).

There are negligible opportunities for geothermal development under the 2001 Rule alternative as well as the final rule due to road construction prohibitions. Geothermal opportunities increase under the Proposed Rule alternative where a total of 382,400 acres of land suitable for leasing (less than 40 percent) are assigned to the GFRG theme, though roadless acres (7,033 acres) under current lease applications would not be accessible using road construction. Under the Existing Plans alternative, opportunities increase to include a total of 3,091,900 acres under the BCR and GFRG themes. Roadless areas under current lease applications would be accessible under the Existing Plans alternative. All future phosphate and geothermal lease proposals are subject to NEPA review. There are currently no existing geothermal leases

on NFS lands in Idaho, implying that information is not available to project reasonably foreseeable geothermal activity in roadless areas.

The final rule is not expected to have a significant impact on other local resource issues or concerns including livestock grazing, saleable minerals, other leasable minerals (oil, gas, and coal), locatable minerals, energy corridors, or wind or biomass energy.

*Roadless Characteristics*

Roadless characteristics include: high quality soil, water (including drinking water), air; plant and animal diversity; habitat for sensitive species; reference landscapes and high scenic quality; primitive and semi-primitive recreation; cultural resources; and other locally identified unique characteristics (see Table 2). Shifts in the number of acres assigned to more permissive management themes can increase the potential for adverse effects to roadless characteristics. However, reasonably foreseeable effects in the next 15 years are likely to be limited by the levels of road construction or reconstruction, timber harvest, and leasable minerals activity that are projected to be reasonably foreseeable during that time.

Based on activity prohibitions and the relative acreage assigned to different management themes (e.g., GFRG), the final rule creates greater potential for reductions in scenic integrity compared to the 2001 Rule alternative but lower potential relative to the Proposed Rule and Existing Plans alternatives. Based on projected levels of timber harvest over the next 15 years, reasonably foreseeable reductions in scenic integrity from high to moderate levels are expected to occur on 15,000 acres under the final rule compared to 40,500 acres under the Existing Plans alternative and 18,000 acres under the Proposed Rule alternative. Reasonably foreseeable reductions in scenic integrity from high to low levels from long-term development (50+ years) of the Caribou-Targhee NF's unleased phosphate reserves are also lower under the final rule (5,770 acres) compared to the Proposed Rule alternative (13,190 acres) and the Existing Plans alternative (13,620 acres). Development within a half-mile buffer around long-term future phosphate activity could affect additional acres (e.g., estimated 812 acres under the final rule). Reductions in scenic integrity associated with development of existing phosphate leases are similar across the other three alternatives.

The final rule does not directly affect wilderness designations in the context of the National Wilderness Preservation System, but the changes in activities permitted in IRAs under the final rule have the potential to affect visitor experience in adjacent wilderness and the degree to which IRAs are considered for future wilderness designation. The final rule and Proposed Rule alternatives significantly reduce GFRG theme acreage located adjacent to existing wilderness (9,400 GFRG acres) compared to the Existing Plans alternative (158,300 GFRG acres adjacent to wilderness); thereby limiting the potential for impacts on wilderness experience in adjacent areas. There would be little or no impact on wilderness experience under the 2001 Rule alternative.

Approximately 1,320,500 acres are recommended for wilderness under the Existing Plans alternative. There is no change or effect on recommended wilderness expected under the 2001 Rule alternative. Under the final rule, parts of three of the recommended wilderness areas would be managed under less protective themes (Primitive, BCR); however, eight areas would benefit from a net increase in protection under theme assignments under the final rule. Overall, a total of 1,479,700 acres would be managed under the WLR theme under the final rule, implying 159,200 acres of additional protection of wilderness-type characteristics. The Proposed Rule alternative also offers additional overall protection (1,378,000 acres assigned to the WLR theme) but to a lesser extent compared to the final rule. Parts of three recommended wilderness areas would be assigned to less protective themes with seven areas benefiting from a net increase in protection under the Proposed Rule alternative. No measurable differences in dispersed recreation opportunities are expected across alternatives. Losses in dispersed recreation associated with development of existing phosphate leases are equal for all alternatives over the next 15 years. Development of future leases may affect dispersed recreation associated with 13,620 and 13,190 acres under the Existing Plans and the Proposed Rule alternatives respectively. Potential impacts decrease to 5,770 acres under the final rule. Perceptions of remoteness and solitude may be affected in dispersed recreation areas where timber cutting and road construction occur under all alternatives, but effects are constrained by projected levels of these activities. No adverse effects to hunting and fishing are expected under the final rule with the exception of potential effects to opportunities in areas associated with development linked to phosphate leases.

Approximately 257,700 acres were reassigned from the GFRG theme to the BCR theme under the final rule to provide greater protection of big game habitat compared to the Proposed Rule alternative.

Opportunities for developed recreation are limited under the Proposed and final rule alternatives but increase to some extent under the Existing Plans alternative, though reasonably foreseeable development is minimal (there are no foreseeable developments planned). Opportunities for maintaining dispersed recreation opportunities are high under the 2001 Rule alternative with little potential for increases in developed recreation opportunities. The potential for shifts in recreational opportunity spectrum classes is slight across the alternatives due to relatively limited activity level projections and the focus on temporary roads that are not accessible for recreation. Concerns about access and designations for motorized versus non-motorized recreation were raised in comments during scoping; however, the final rule does not provide direction on where and when off-highway vehicle (OHV) use would be permissible and makes clear that travel planning-related actions should be addressed through travel management planning and individual forest plans.

Existing special use permits for outfitters and guides would be unaffected by the final rule. The potential for adverse effects to outfitter and guide opportunities are expected to be limited because the projected extent of activities or development would be relatively small and localized in any outfitter's area of operation. Likewise, existing permits for ski areas would not be affected by the final rule. There are no foreseeable ski area expansions or developments into roadless areas over the next 15 years for which an EIS does not already exist. Future ski area expansion into roadless areas with road construction would not be permitted under the 2001 Rule alternative. Under the Existing Plans alternative, ski area expansion or development could occur as permitted by the forest plan. Under the Proposed and final rules, existing ski areas with development and any additional development authorized in their master development plans are in the forest plan special area theme and the applicable land management plan direction would apply.

The overall effects of the 2001 Rule alternative on endangered, threatened, candidate, or sensitive species are expected to be beneficial, as are the effects derived from assigning roadless areas to the WLR, Primitive, and SAHTS

themes under the other alternatives. There is some potential for adverse effects from activities permitted under the BCR and GFRG themes, with relative risks being highest under the Existing Plans alternative and lowest under the final rule. Eleven threatened or candidate plant and 339 to 345 sensitive plant populations are known to occur in the BCR and GFRG themes under the Proposed Rule and Existing Plans alternatives. These populations decrease to six and 51 in the GFRG theme and in the CPZ areas within the BCR theme under the final rule. In general, foreseeable effects to sensitive populations and biodiversity are constrained by projected activity levels. No measurable changes in populations are expected across the alternatives; however, activities may impact individuals.

Road building associated with timber cutting will have a negligible effect on high hazard soils under all alternatives. Acres of high sensitivity soils assigned to themes where road construction is permitted decreases from approximately 2 million acres under the Existing Plans and Proposed Rule alternatives to 253,500 acres under the final rule. Land management plan direction that provides guidance on road construction across sensitive soils would apply across all alternatives. Road construction is conditionally permissible on 1,786,400 acres of high sensitivity soils under the final rule. Road construction is not permitted in areas that overlap with highly sensitive soils under the 2001 Rule alternative. Road building is likely to affect high hazard soils in areas associated with existing phosphate leases but effects are equivalent across alternatives. Similar effects associated with future leases are possible but not likely to occur within the next 15 years under the Proposed Rule and Existing Plans alternatives (future leases are not feasible under the 2001 Rule alternative).

Road construction and timber cutting under the 2001 Rule alternative, the Proposed Rule alternative, and the final rule are expected to have negligible effects on the water quality of 303(d)-listed (i.e., impaired water quality) streams and drinking water. Unleased known phosphate areas with potential for development over a period of 50 or more years under the Existing Plans alternative, the Proposed Rule alternative, and the final rule are estimated to overlap with three 303(d)-listed streams, one of which is impaired by selenium, and 640 acres of community water supplies (groundwater). Development of these areas could affect the listed water bodies; however, mine development or expansion would be required to use a variety of environmental commitments and best management practices (BMPs) to reduce the potential for exceeding environmental standards for selenium. The EIS for the Smoky Canyon mine expansion predicts that water quality criteria will not be exceeded. Operators would also be required to monitor for selenium impacts and migration.

The final rule is expected to have negligible adverse effects on other resources associated with roadless characteristics including cultural resources, air quality, and non-timber products based on reasonably foreseeable activity projections. Any adverse impacts to these resources and services would be addressed through analysis conduced in accordance with NEPA and minimized through compliance with forest plan standards and guidelines.

*Agency Costs and Revenues*

Under all alternatives, road construction or reconstruction likely would not see an increase in the foreseeable future (next 15 years) because the appropriated road budget is expected to be flat or declining. Reasonably foreseeable changes in agency costs associated with roads are not likely to be significant under the Proposed or final rules relative to the Existing Plans alternative given the types of roads constructed (e.g., temporary, single-purpose, and/or built by the user) and relative levels of construction or reconstruction projected. None of the alternatives would restrict or limit road maintenance. Given the current backlog of road maintenance, there is no emphasis on constructing new roads that need to be maintained. New roads under the Proposed and final rules must be temporary unless certain exceptions are met. Many roads under the Existing Plans alternative are expected to be single-purpose, closed between uses, and/or temporary. As a result, road maintenance costs are not expected to be significantly different across alternatives.

Timber sales are often used as a least-cost method (revenue is returned to the Federal treasury to offset the costs of preparing and carrying out the timber harvest) of managing vegetation to meet resource objectives or to achieve desired ecosystem conditions. Net revenues associated with reasonably foreseeable volumes may increase under the Proposed and final rules relative to the 2001 Rule alternative, primarily for the Idaho Panhandle NF and the northern EA based on projected levels of timber cutting, though changes in harvest are relatively small and may not result in significant changes to aggregate volumes from all NFS lands. Net revenue may decrease under the Proposed and final rules relative to the Existing Plans alternative.

Vegetation treatments for forest health or fuel reductions can be challenging in roadless areas because of the potential costs of accessing sites and implementing treatment practices in areas that are remote or otherwise dominated by roadless characteristics. Current trends in silvicultural practices often require thinning and other treatments with greater frequency, thus needing road access more often. Thinning to remove excessive forest fuels, before using prescribed fire, or to treat diseased or insect-infested stands is often economically feasible only if a road system is present. Allowing road construction for harvesting timber in the GFRG theme and to a limited degree in the BCR theme under the Proposed and final rules reduces the cost of using treatment methods that may contribute to forest health objectives. Fuel treatments are likely to be more expensive and less efficient to implement under the 2001 Rule alternative because road construction or reconstruction is prohibited, and mechanical treatments would generally occur near the limited number of existing roads.

Based on a qualitative comparison of relative treatment cost per acre, treatments in the WUI are potentially most costly per acre for the 2001 Rule alternative, followed by the Existing Plans alternative, the Proposed Rule alternative and final rule. Relative treatment costs per acre in areas with community public water systems ranked highest for the 2001 Rule alternative, followed by the Existing Plans and Proposed Rule alternatives. Relative costs under the final rule are expected to be similar to the Proposed Rule if all community public water systems are treated using a *significant risk determination*, thereby allowing greater treatment flexibility. Otherwise, final rule treatment costs are likely to fall between the 2001 Rule alternative and the Existing Plans alternative.

*Distributional Effects*

Distributional effects, as represented by changes in employment and income contributed under the final rule, are a function of projected levels of road construction, timber cutting, and discretionary minerals activity in roadless areas under the different alternatives. Employment and income impacts (Table 3) are quantified for

reasonably foreseeable levels of activities over the next 15 years.

Phosphate mining on existing leases is estimated to contribute the greatest number of jobs and income, but jobs from this sector are not projected to differ by alternative. Timber cutting is primarily responsible for differences in jobs and income across alternatives. Under baseline or no-action conditions, as represented by the 2001 Rule alternative, timber harvest and road construction are estimated to contribute 19 jobs per year. Projected harvest and accompanying road construction under the final rule is estimated to contribute an additional 15 jobs and $371,900 in labor income per year, relative to baseline conditions. These contributions are expected to occur in the northern (Idaho Panhandle NF) and southeastern (Caribou/Targhee NF) EAs where current employment in agriculture, mining, and construction sectors is approximately 41,000 jobs in the northern EA and 32,000 jobs in the southeastern EA, suggesting that distributional effects are relatively small or insignificant under the final rule. Employment and income are estimated to decrease by 53 jobs and $1.49 million per year under the final rule compared to conditions expected under the Existing Plans alternative. Impacts relative to the Existing Plans alternative are likely to occur within the northern, southeastern, and central (Clearwater NF) EAs but are again expected to be relatively small compared to current employment levels in these economic areas. Employment and income decreases by only 5 jobs and $134,500 per year under the final rule relative to the Proposed Rule alternative.

Timber-dependent counties where changes in harvest opportunities and corresponding jobs and income may have the most significant impact on local economies are identified by EA. Timber cutting or harvest opportunities increase or remain constant for all counties under the final rule compared to the 2001 Rule alternative. When comparing the opportunities under the final rule to those of the Existing Plans alternative, nine counties are identified for the northern EA, while five such counties are located in the central EA, one of which is located in the State of Washington. One additional county is located in the southeastern EA.

Payments to counties are expected to remain the same under all alternatives as long as the Secure Rural Schools and Community Self-Determination Act (SRSA) remains in effect. Mineral-based payments to states are a function of receipts from leasable minerals, including receipts from phosphate operations, but no differences in phosphate production are projected across alternatives. Opportunities for mining-dependent counties (e.g., Caribou, Oneida, Power, and Bannock) are therefore expected to remain the same in the reasonably foreseeable future (15 years).

TABLE 1—COMPARISON OF ALTERNATIVES—THEMES

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| **Idaho Roadless Rule and equivalent themes for the 2001 Rule and Existing Plans (acres)** | | | | |
| WLR | 0 | 1,320,500 | 1,378,000 | 1,479,700 |
| Primitive | 0 | 1,903,100 | 1,652,800 | 1,722,700 |
| SAHTS | 0 | 0 | 70,700 | 48,600 |
| Similar to BCR * | 9,304,300 | 0 | 0 | 0 |
| BCR | 0 | 4,482,000 | 5,258,700 | 5,312,900 |
| GFRG | 0 | 1,263,200 | 609,600 | 405,900 |
| **Other lands (acres) ** ** | | | | |
| FPSAs | 0 | 334,500 | 334,500 | 334,500 |
| Total Idaho Roadless Area Acres | 9,304,300 | 9,304,300 | 9,304,300 | 9,304,300 |

* The 2001 roadless rule is similar to the BCR theme for timber cutting, and discretionary mineral activities, except for the allowance for road construction or reconstruction to access phosphate deposits, and the allowance for road construction or reconstruction to facilitate timber cutting in specific situations.

** The final rule would not apply to Forest Plan Special Areas (FPSA).

TABLE 2—COMPARISON OF BENEFITS AND COSTS

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| **LOCAL RESOURCE CONCERNS** | | | | |
| **Forest Health** | | | | |
| Insects and disease ..... | Most of the 1.44 million acres currently at risk of 25 percent mortality or significant growth loss (i.e., high-risk forests) would remain untreated.<br>Projected treatments on 9,000 acres likely to be effective over 15 years. | Opportunities for treatment of high-risk forests: 187,500 acres of high-risk forests in GFRG; 755,800 acres in BCR.<br>Projected treatments on 40,500 acres likely to be effective over 15 years. | Opportunities for treatment of high-risk forests: 25,600 acres in GFRG; 939,400 acres in BCR.<br>Opportunities to treat GFRG. Opportunity for treatment in BCR if done for forest health or to reduce hazardous fuels.<br>Projected treatments on 18,000 acres likely to be effective over 15 years. | Opportunities for treatment of high-risk forests: 39,600 acres in GFRG; 877,000 acres in BCR, of which 56,600 acres are in the CPZ.<br>Opportunities to treat GFRG. Opportunity for treatment in BCR if done in the CPZ or to reduce significant risk of wildland fire effects to at-risk communities or municipal water supply systems.<br>Projected treatments on 15,000 acres likely to be effective over 15 years. |
| Noxious weeds—Potential for noxious weed spread. | Spreading is unlikely given limited potential for soil disturbance.<br>42,250 acres of weeds currently in IRAs. | Some potential for spreading based on acreage assigned to GFRG (1.26 million acres); the limited degree of projected road construction, timber cutting, and mineral activity would minimize the potential for spreading.<br>5,170 acres of weeds currently in GFRG. | Some potential for spreading based on acreage assigned to GFRG (609,600 acres); the limited degree of projected construction, harvest, and mineral activity would minimize the potential for spreading.<br>2,750 acres of noxious weeds currently in GFRG. | Some potential for spreading based on acreage assigned to GFRG (405,900 acres); the limited degree of projected construction, harvest, and mineral activity would minimize the potential for spreading.<br>3,070 acres of noxious weeds currently in GFRG. |
| **Fuels Management** | | | | |
| Ability to treat Wildland Urban Interface (WUI) and Community Public Water System (CPWS) areas. | Road construction not permitted in conjunction with treatments on 100 percent of the WUI or CPWS that overlap roadless areas.<br>Treatments more expensive; insignificant acreage treated relative to acres at risk. Limited capacity to treat high-priority Condition class 2 and 3 areas.<br>Projected harvests could treat 2 percent of high-priority areas (Fire Regimes I, II, and III; Condition class 2 and 3) within WUIs or less than half a percent of high-priority areas overall.<br>Does not directly permit timber cutting to reduce risk of unwanted wildland fire. | Treatments (mechanical and prescribed fire) permitted on 89% of the WUI and 93% of CPWS.<br>Treatments with road construction permitted on 65% of WUI and 47% of CPWS.<br>Projected harvests could treat 10 percent of high-priority areas (Fire Regimes I, II, and III; Condition class 2 and 3) within WUIs or 1 percent of high-priority areas overall.<br>May permit timber cutting to reduce risk of unwanted wildland fires.<br>May permit fuel reduction to reduce wildland fire risks to municipal water supply systems. | Treatments (mechanical and prescribed fire) permitted on 89% of the WUI and 92% of CPWS.<br>Treatments with road construction permitted on 67% of WUI and 58% of CPWS.<br>Projected harvests could treat 4 percent of high-priority areas (Fire Regimes I, II and III, Condition class 2 and 3) within WUIs or less than half a percent of high-priority areas overall.<br>Directly permits timber cutting to reduce risk of unwanted wildland fires in the Primitive, BCR, and GFRG themes.<br>Permits fuel-reduction activities to reduce wildland fire risks to CPWSs in the Primitive, BCR, and GFRG themes. | Treatments (mechanical and prescribed fire) permitted on 87% of the WUI and 92% of CPWS.<br>Treatments with road construction permitted on 66% of WUI and 16% of CPWS.<br>Mechanical treatments with road construction are permitted in 42 percent of the CPWS areas only when the significant risk conditions are met.<br>Projected harvests could treat 4 percent of high-priority areas (Fire Regimes I, II, and III; Condition class 2 and 3) within WUIs or less than half a percent of high-priority areas overall.<br>Directly permits timber cutting to reduce significant risk of unwanted wildland fires in the BCR and generally permitted in GFRG themes.<br>Permits fuel-reduction activities to reduce wildland fire risks to CPWS in the Primitive, BCR, and GFRG themes. |

TABLE 2—COMPARISON OF BENEFITS AND COSTS—Continued

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| | Prescribed burning is permitted in 100 percent of the WUI or to protect CPWS areas. | | | |
| Potential for increase in human-caused fire starts. | No increase | Potential for increase | No measurable increase | No measurable increase. |
| **Timber Cutting—Projected** | | | | |
| Timber harvest (Acres over 15 years). | 9,000 | 40,500 | 18,000 | 15,000. |
| Harvest (MBF/year)[1] | 3,000 (2% of annual avg.) | 13,360 (11% of annual avg.). | 5,840 (5% of annual avg.) | 5,040 (4% of annual avg.). |
| **Roads—Projected (miles over 15 years)** | | | | |
| Construction—Permanent | 12 | 72 | 12 | 12. |
| Construction—Temporary | 3 | 33 | 26 | 21. |
| Reconstruction | 0 | 75 | 23 | 17. |
| Total | 15.0 | 180 | 61 | 50. |
| Decommissioning | 1.0 | 3.2 | 2.7 | 2.4. |
| **Leasable Minerals** | | | | |
| Geothermal development | No existing leases on NFS land. Trend data not available to project reasonably foreseeable activity. Current lease applications include 7,033 acres within roadless areas. | | | |
| | Negligible opportunities for development. | No opportunities on 38% of acreage. Development opportunities on 53% of BCR theme (2,354,100 suitable acres) and on 58% of GFRG theme (737,800 suitable acres)[3]. 7,033 under current lease applications accessible. | No opportunities on 93% of acreage. Development opportunities on 63% of GFRG theme (382,400 suitable acres)[3]. 7,033 under current lease applications would not be accessible. | Negligible opportunities for development. |
| Phosphate—Reasonably foreseeable output (short term within 15 years). Phosphate—Reasonable foreseeable development in roadless areas. Phosphate—Additional acres under lease in roadless areas. | Projected output is equal (2,000,000 tons per year) across all alternatives because (i) none of the alternatives prohibit road construction and reconstruction associated with existing leases and (ii) existing leases are expected to meet demand in reasonably foreseeable future. 1,100 acres of road construction and mining disturbance proposed in Sage Creek and Meade Peak Roadless Areas; development over next 15 years. 6,100 acres of remaining unmined phosphate currently under lease in seven roadless areas; development expected to be spread out over 50 or more years. | | | |
| Phosphate—Long term leasing of unleased phosphate deposits (50 or more years). | Opportunities to recover phosphate from IRAs are negligible. | Estimated 613 million tons of phosphate deposits from 13,620 unleased acres available for development. ½ mile buffer could affect additional 1,910 acres. | Estimated 593 million tons of phosphate deposits from 13,190 unleased acres available for development. ½ mile buffer could affect additional 1,850 acres. Road construction prohibited in WLR, SAHTS, Primitive, BCR theme acres. | Estimated 260 million tons of phosphate deposits from 5,770 unleased acres available for development. ½ mile buffer could affect additional 812 acres. Road construction prohibited in WLR, SAHTS, Primitive, BCR themes, and 910 acres of GFRG themes. |
| **Other Resource and Service Areas where Relative Impacts are Insignificant or Negligible** | | | | |
| Livestock Grazing | Differences in activity, revenue, and operating costs are expected to be minimal across alternatives; existing processes will regulate management direction related to grazing (allotments and permitted use). | | | |
| Leasable Minerals: Oil, gas, and coal. | Differences in activity and revenue associated with oil, gas, and coal development are expected to be minimal based on existing trends and inventories. | | | |
| Locatable Minerals: Gold, silver, lead, etc. | None of the alternatives would affect rights of reasonable access to prospect and explore lands open to mineral entry and develop valid claims under the General Mining Law of 1872. Rights to reasonable access continue. | | | |
| Saleable minerals (sand, stone, gravel, pumice, etc.). | Differences in production of saleable minerals are projected to be minimal across alternatives because of the relative inefficiencies of providing saleable minerals from IRAs. | | | |

TABLE 2—COMPARISON OF BENEFITS AND COSTS—Continued

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| Energy corridors | None of the proposed corridors designated for oil, gas, and/or electricity under section 368 of the Energy Policy Act are within IRAs. Opportunities for non-section 368 corridors within IRAs are a function of the themes assigned to the areas proposed for corridor development; differences in opportunities across alternatives cannot be discerned. | | | |
| Wind and biomass energy | Low potential for wind energy in IRAs because of technological, logistical, and environmental issues associated with constructing wind turbines in the more mountainous roadless areas. Biomass energy could be a by-product from any alternative. It is unlikely that any medium- to large-scale wood biomass in roadless areas would be conducted independently. | | | |
| Road Construction allowed for CERCLA violations. | Road construction to address CERCLA violations is allowed in all alternatives. | | | |
| **ROADLESS CHARACTERISTICS** | | | | |
| **Physical Resources—Soils** | | | | |
| Acres of highly sensitive soils where road construction/ reconstruction is permitted (BCR and GFRG themes). | 0 | 2,049,300 | 2,121,300 | 253,500 (GFRG and BCR/ CPZ). |
| Acres of highly sensitive soils where road construction is conditionally permissible. | 0 | 0 | 0 | 1,786,400. |
| Effects from road construction on high-hazard soils. | Land management plan direction that provides guidance on road construction on sensitive soils would apply across all alternatives; therefore although road construction could be permitted land management plans may provide design criteria to minimize effects, such as avoidance or mitigation practices. No or negligible effect from road building associated with timber cutting. Effects to soils are equal for road construction associated with phosphate mining over next 15 years. Effects to high-hazard soils from long-term future (50 or more years) phosphate leases are likely under the Existing Plans and the Proposed Rule, but limited risk under the Final and 2001 Rules. | | | |
| **Physical Resources—Water** | | | | |
| Effect of road construction, reconstruction, and timber harvest on listed streams and drinking water. | Negligible effect | Minimal effect | Negligible effect | Negligible effect. |
| Effect of mining on listed streams and drinking water. | Overlap with unleased phosphate in roadless areas:<br>Three 303(d) streams (one in roadless areas due to selenium);<br>640 acres of community water supplies (groundwater);<br>Possible effect on 303(d) streams from selenium—mitigation required at time of analysis. | Overlap with unleased phosphate in roadless areas:<br>Three 303(d) streams (one in roadless areas due to selenium);<br>640 acres of community water supplies (groundwater);<br>Possible effect on 303(d) streams from selenium—mitigation required at time of analysis. | Overlap with unleased phosphate in roadless areas:<br>Three 303(d) streams (one in roadless areas due to selenium);<br>640 acres of community water supplies (groundwater);<br>Possible effect on 303(d) streams from selenium—mitigation required at time of analysis. | Overlap with unleased phosphate in roadless areas:<br>Three 303(d) streams (one in roadless areas due to selenium);<br>640 acres of community water supplies (ground water);<br>Possible effect on 303(d) streams from selenium—mitigation required at time of analysis. |
| Selenium Mitigation | Mine development or expansion would use a variety of environmental commitments and Best Management Practices to reduce the potential for selenium mobilization and migration from the mine site. Operators required to monitor impacts on water, soils, vegetation, wildlife, and fisheries. Analysis for preferred alternative for Smoky Canyon predicts that groundwater quality protection standards or surface water quality standards would not be exceeded. | | | |
| **Sensitive Species and Biodiversity** | | | | |
| Effects on terrestrial and aquatic animal species or habitat. | Projected activities may impact individuals, but no measurable change in populations is expected. Projects and development would be subject to NEPA and other regulatory requirements related to monitoring and mitigation for sensitive species. | | | |

TABLE 2—COMPARISON OF BENEFITS AND COSTS—Continued

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| | Beneficial | Beneficial in WLR, Primitive, or SAHTS; some potential risk of adverse effects in management prescriptions similar to BCR and GFRG. | Beneficial in WLR, Primitive, or SAHTS; limited potential risk of adverse effects for activities occurring in BCR; some potential risk in GFRG, but less than Existing Plans. | Beneficial in WLR, Primitive, or SAHTS, BCR outside CPZ; limited potential risk of adverse effects for activities occurring in BCR CPZ; some potential risk in GFRG, but less than Existing Plans or the Proposed Rule. |
| Effects on biodiversity of botanical species. | Beneficial | Beneficial in WLR, Primitive, or SAHTS. Some potential risk of adverse effects for activities conducted in the GFRG and BCR themes. | Beneficial in WLR, Primitive, or SAHTS. Some potential risk of adverse effects for activities conducted in the GFRG and BCR themes, but less than Existing Plans. | Beneficial in WLR, Primitive, or SAHTS, BCR outside CPZ. Some potential risk of adverse effects for activities conducted in GFRG and BCR CPZ but less than Existing Plans or the Proposed Rule. |
| | Number of occurrences of known threatened and candidate plant populations, by theme | | | |
| WLR/Primitive/SAHTS | 0 | 0 | 0 | 0. |
| BCR | 16 | 9 | 9 | 11 (6 in BCR CPZ). |
| GFRG | 0 | 2 | 2 | 0. |
| Forest Plan Special Areas | 0 | 5 | 5 | 5. |
| | Number of occurrences of known sensitive plant populations, by theme | | | |
| WLR | 0 | 81 | 90 | 102. |
| Primitive/SAHTS | 0 | 97 | 82 | 100. |
| BCR | 686 | 284 | 336 | 312 (46 in BCR CPZ). |
| GFRG | 0 | 55 | 9 | 3. |
| Forest Plan Special Areas | 0 | 169 | 169 | 169. |
| **Scenic Integrity** | | | | |
| | Potential for change in scenic integrity—based on activity projections | | | |
| Acres that stay in High to Very High scenic integrity. | 9,228,000 | 9,242,980 | 9,234,740 | 9,276,230. |
| Acres likely to change to High or Moderate scenic integrity from timber cutting or road construction or reconstruction. | 9,000 | 40,500 | 18,000 | 15,000. |
| Acres likely to change from High to Low due to development of existing phosphate leases. | 7,200 acres associated with development of existing phosphate mining leases under all alternatives. | | | |
| Acres likely to change to Moderate or Low scenic integrity from phosphate mining over long-term (50 or more years). | 0 | 13,620 | 13,190 | 5,770. |
| **Recreation** | | | | |
| Dispersed Recreation (including Hunting and Fishing). | Feeling of solitude or remoteness may change in areas where projected road construction and timber cutting occur (see above for projected activity levels, by alternative). | | | |
| | No measurable change to dispersed recreation opportunities. | No measurable change to dispersed recreation opportunities, except if unleased phosphate deposits (13,620 acres) are developed. | No measurable change to dispersed recreation opportunities, except if unleased phosphate deposits (13,190 acres) are developed. | No measurable change to dispersed recreation opportunities, except if unleased phosphate deposits (5,770 acres) are developed. |

TABLE 2—COMPARISON OF BENEFITS AND COSTS—Continued

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| Developed recreation—ability to construct or reconstruct roads to access new or expanded developed recreation areas. | There are no foreseeable developments under any of the alternatives. | | | |
| | No road construction/reconstruction permitted to access new developed recreation sites (9.3 million acres). | Road construction/reconstruction generally permitted to access new developed recreation sites in management prescriptions similar to BCR and GFRG (5.7 million acres). | Road construction/reconstruction permitted to access new developed recreation sites management in GFRG (0.6 million acres). | Road construction/reconstruction permitted to access new developed recreation sites management in GFRG (0.4 million acres). |
| Recreation Opportunities[2] | In general, the magnitude of shifts in recreational opportunity spectrum classes is slight across the alternatives because: (i) differences in road construction is minimal, and (ii) many constructed roads are likely to be temporary and not accessible for recreation purposes. As a consequence, changes in dispersed compared to developed recreation opportunities are small across alternatives. Relative differences include the following: | | | |
| | Relatively high potential for maintaining existing dispersed recreation opportunities; little potential for increasing developed recreation. | Greatest opportunity for developed and road-based recreation to occur and expand, but magnitude of shift is tempered by limited amount of construction projected to occur. | High level of protection for dispersed recreation, foreseeable threats from construction and development are remote. | High level of protection for dispersed recreation, foreseeable threats from construction and development are remote. |
| Special uses—Ski areas ... | Existing permits are unaffected. No foreseeable ski area expansions or developments into IRAs over next 15 years. | | | |
| | Expansion or development with roads not permitted. | Expansion or development as permitted by the forest plan. | Existing ski areas with development and any additional development authorized in their master development plans are in FPSA theme and the rule does not apply. | |
| Special uses—Outfitters and Guides. | Existing permits are unaffected. None of the alternatives directly affect the processing or administration of special use permits. Potential for adverse effects is limited because projected levels of activity would be relatively small and localized within any outfitter's area of operation. Recreational experience may change in some areas where activities occur, but outfitter and guide services are not expected to be affected due to the dispersed nature of the activities. | | | |
| Hunting and fishing ..... | No effect on opportunities | Opportunities could be affected in locations of phosphate leasing and geothermal development. No effect from timber cutting and limited road construction. | Opportunities could be affected in locations of phosphate leasing and geothermal development. No effect from timber cutting and limited road construction. | Opportunities could be affected in locations of phosphate leasing. No effect from geothermal development. No effect from timber cutting and limited road construction.<br>Additional protections provided to 257,700 acres moved from GFRG to BCR because of big game habitat. |
| **Wilderness** | | | | |
| Existing wilderness areas (1,723,300 acres of IRAs adjacent to existing wilderness). | Limited to no indirect effects to wilderness from activities in roadless areas. | 158,300 acres of GFRG adjacent to wilderness; 841,900 acres of BCR.<br>Limited potential for impacts to wilderness experience. | 9,400 acres of GFRG adjacent to wilderness; 951,000 acres of BCR.<br>Limited potential for impacts on wilderness experience. | 9,400 acres of GFRG adjacent to wilderness; 951,000 acres of BCR.<br>Limited potential for impacts on wilderness experience. |

TABLE 2—COMPARISON OF BENEFITS AND COSTS—Continued

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| Recommended wilderness | No change or effect on recommended wilderness in Existing Plans. | Existing Plans recommend 1,320,500 as wilderness. | No change to recommendations in Existing Plans.<br>1,378,000 acres in WLR, implying 57,500 acres of additional protection over existing plans.<br>Seven recommended wilderness areas benefit from increased protection on a total of 93,100 acres. Net decreases in protection occur in three areas (total of 35,600 acres). | No change to recommendations in Existing Plans.<br>1,479,700 acres in WLR, implying 159,200 acres of additional protection over Existing Plans.<br>Eight recommended wilderness areas benefit from increased protection on a total of 172,200 acres. Net decreases in protection occur in three areas (total of 13,000 acres). |
| Roadless area characteristics associated with wilderness. | Majority of roadless areas retain their existing character. | Areas developed could have reduced roadless area character. Activities in GFRG may not change roadless character if prior activities are still evident. | | |
| | Based on projections, 99.9 percent unaffected over the next 15 years. | Based on projections, 99.55% of roadless areas unaffected over the next 15 years. | Based on projections, 99.9% of roadless areas unaffected over the next 15 years. | Based on projections, 99.9% of roadless areas unaffected over the next 15 years. |
| **Other Resource and Service Areas where Relative Impacts are Negligible or Minimal** | | | | |
| Non-timber products ..... | Current access for the harvest of non-timber products is not expected to change under the Proposed and Final Rules. Assignment of roadless acres to themes that restrict road construction may limit access opportunities for some individuals, but construction may also reduce availability of some species. | | | |
| Cultural resources ..... | Prior to management actions taking place on the ground under any alternative or theme, cultural resource inventories and appropriate mitigation are required by law. Differences in risk to cultural resources are not expected to be measurable across alternatives because of projected levels of road construction and long-term use and fate of new roads. There is low potential for disturbance/vandalism under all alternatives with the exception of low to moderate potential under Existing Plans. | | | |
| Air Quality ..... | Negligible effects on air quality from fuel reduction projects are expected; subject to strict guidelines for minimizing impacts. | | | |
| **AGENCY COSTS AND REVENUES** | | | | |
| Roads ..... | Reasonably foreseeable changes in agency costs associated with roads (administration, construction, maintenance) are not likely to be significant under the Proposed or Final Rules relative to the 2001 Rule given the types of roads constructed (e.g., temporary, single-purpose, and/or built by the user), relative levels of construction or reconstruction projected, and flat budget expectations. | | | |
| Timber and Vegetation/ Fuel Treatments. | Accessing sites and implementing treatments in remote areas, dominated by roadless characteristics can be costly. Revenue from timber sales are often used to offset the costs of treatments. There is slight potential for gains in net revenues for some forest units (e.g., Idaho Panhandle) under the Final and Proposed Rules, as well as Existing Plans, relative to the 2001 Rule, but projected changes in harvest are relatively small and may not result in significant changes to aggregate volumes from all forest system lands. | | | |
| | Highest cost per acre and less efficient treatments due to road construction prohibitions. | Second highest cost per acre for treatments in the WUI and community public water system (CPWS) areas. | Lowest cost per acre for treatments in the WUI and CPWS areas (and equal to the Final Rule in the WUI). | Lowest cost per acre for treatments in the WUI (and equal to the Proposed Rule).<br>Lowest cost per acre for treatments in CPWS areas if using significant risk determination for CPWS; otherwise, cost per acre is second highest for CPWS areas. |

[1] Percentage of average harvest on all NF land within Idaho that occurred between 2002 and 2006. Harvest primarily attributable to stewardship and treatments for forest health and fuels management.
[2] The alternatives do not provide direction on where and when OHV use would be permissible.
[3] Suitability based on areas with acceptable slopes for leasing (<40% slope).
CPZ = Community Protection Zone
CPWS = Community Public Water System
GFRG = General Forest, Rangeland, and Grassland theme
NF = National Forest
SAHTS = Special Areas of Historical and Tribal Significance theme
WUI = Wildland Urban Interface

TABLE 3—SUMMARY OF DISTRIBUTIONAL EFFECTS AND ECONOMIC IMPACTS

| | 2001 rule | Existing plans | Proposed rule | Final rule |
|---|---|---|---|---|
| **Timber Cutting** | | | | |
| Jobs per year (1) | 17 | 75 | 35 | 30. |
| Labor income per year (1) | $452,700 | $1,902,800 | $849,600 | $741,900. |
| Location of jobs: BEA Economic Areas (EA). | Northern EA (Idaho Panhandle NF). | Northern (Idaho Panhandle), Southeastern (Caribou/Targhee NF), and Central (Clearwater and Nez Perce NF) EAs. | Northern (Idaho Panhandle), and Southeastern (Caribou/Targhee NF) EAs. | Northern (Idaho Panhandle), and Southeastern (Caribou/Targhee NF) EA. |
| **Leasable Minerals: Phosphate** | | | | |
| Jobs and labor income per year (1). | No changes in jobs (582/year) or labor income ($23.5 million) contributed by phosphate on existing leases within IRAs, due to the fact that none of the alternatives affect existing leases. | | | |
| | No new leases in roadless areas likely to be feasible. | Jobs and income from new leases on unleased phosphate reserves within IRAs in the southeastern EA are expected to occur in the future over an extended period of time (50 or more years). | | |
| **Road Construction** | | | | |
| Jobs per year (1) | 2 | 12 | 4 | 4. |
| Labor income per year (1) | $52,900 | $462,500 | $162,400 | $135,600. |
| Location of jobs: BEA Economic Areas (EA). | Northern and Southeastern EAs. | Northern, Southeastern, and Central EAs. | Northern and Southeastern EAs. | Northern and Southeastern EAs. |
| **Revenue Sharing and Resource-Dependent Counties** | | | | |
| Resource-dependent counties where potential opportunities decrease. | Opportunities increase for all timber-dependent counties under the Final or Proposed Rule relative to the 2001 Rule. Opportunities for mining-dependent counties (e.g., Caribou, Oneida, Power, and Bannock) remain the same based on reasonably foreseeable phosphate output (over next 15 years) that remains constant across alternatives. Potential opportunities decrease for the following timber-dependent counties under the Final and Proposed Rule relative to Existing Plans (2):<br>Northern EA: Boundary, Bonner, Kootenai, Benewah, Latah, Ferry (WA), Pend Oreille (WA), Shoshone, and Stevens (WA).<br>Central EA: Clearwater, Idaho, Lewis, Nez Perce, and Asotin (WA).<br>Southeastern EA: Bear Lake. | | | |
| Revenue sharing | Payments to counties are expected to remain the same under all alternatives as long as the Secure Rural Schools and Community Self-Determination Act remains in effect. Mineral-based payments to states are a function of leasable receipts, but no differences in phosphate production are projected across alternatives over the next 15 years. | | | |
| Adverse impacts to small entities. | Greatest potential given prohibitions in roadless areas; most protective of sectors that benefit from resource conditions associated with roadless areas. | Least potential given fewest prohibitions and theme assignments; least protective of sectors that benefit from resource conditions associated with roadless areas. | Limited potential for losses of small entity opportunities. Opportunity losses are not expected to result in significant adverse economic impacts and/or affect substantial numbers of small entities, including recreational special use permit holders that may benefit from resource conditions associated with roadless characteristics. | |

(1) Jobs and income contributed annually (2007$). Based on projected levels of timber harvest, road construction, and phosphate mining output per year, conversion of physical output to final demand ($) and application of regional economic multipliers.
(2) Counties where 10% of total labor income is attributable to timber-related sectors and that are located in economic areas (EAs) where there is a significant net decrease in acreage assigned to the GFRG theme.

*Proper Consideration of Small Entities*

This final rule has also been considered in light of E.O. 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Forest Service with the assistance of the State of Idaho has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the E.O. 13272 and SBREFA, because the final rule does not subject small entities to regulatory requirements. Therefore, a regulatory flexibility analysis is not required for this final rule.

For many activities and/or program areas, small entity opportunities under the final rule are projected to increase, relative to the 2001 Rule alternative (i.e., baseline or no-action alternative) as a result of (1) easing of restrictions on selected activities under the BCR management theme under the final rule, and (2) adopting the less-restrictive GFRG theme for some roadless acres under the final rule. There is some potential for reasonably foreseeable decreases in small entity opportunities to occur for special uses (recreation—outfitters and guides) under the final rule, relative to the 2001 Rule alternative. When comparing the impacts to entities associated with wood products, the number of jobs under the final rule are projected to increase relative to the 2001 Rule, though the magnitude of this increase is less than corresponding increases projected to occur under existing plans or the Proposed Rule. None of these

opportunity losses are expected to result in significant economic impacts and/or affect a substantial number of small entities.

Jobs and income related to timber harvest are projected to increase under the final rule relative to the 2001 Rule for all EAs, in large part, because prohibitions on road construction and timber cutting are eased under the GFRG theme and some areas under the BCR theme (e.g., CPZs). In contrast, jobs and income decrease under the final rule, relative to the Existing Plans alternative primarily for the northern and central EAs, implying potential decreases in small entity opportunities associated with timber harvest (opportunities are not expected to decrease significantly in other EAs). However, the decrease in jobs associated with timber cutting in roadless areas under the final rule is only 45 jobs relative to the Existing Plans alternative. This number of jobs is relatively small (less than 1%) when compared to 4,581 workers employed by small business establishments within the forestry/logging/sawmill sectors in Idaho. The decreases in timber harvest projected under the final rule for these EAs are representative of volumes from roadless acres only, and it should be noted that recent harvests from IRAs, as represented by projected harvests under the 2001 Rule alternative have been equal to or less than the volumes projected under the final rule. As a consequence, reasonably foreseeable opportunities for timber harvest from roadless areas under the final rule are projected to be equal to or larger than timber volumes harvested from IRAs in recent years or volumes projected under the 2001 Rule alternative. Timber sales to small businesses are currently exceeding established small business shares in all forest units within the northern and central EAs, with the exception of the Kanisku portion of the Idaho Panhandle NF. This suggests that economic impacts to small businesses in the wood product sectors are not expected to be significant nor are a substantial number of small businesses likely to be adversely affected under the final rule.

In the context of special use permits for recreation (320 outfitter and guide permits are associated with Idaho's NFs, as of fall 2006), none of the four alternatives address the processing or administration of special use permits directly. All decisions regarding existing and future special use permits will be project-specific and require compliance with all environmental regulations. Relative to the 2001 Rule alternative, increases in timber harvest opportunities projected for roadless areas under the final rule suggest the potential for losses in desirable resource conditions and corresponding decreases in small business opportunities for outfitters and guides for the southeastern EA. However, the magnitude of these decreases is expected to be small given minimal overlap between existing permit locations and the location of projected harvests on IRAs, as well as the relatively small percentage of roadless areas projected to be affected by timber cutting (less than 0.01% of roadless area per year) within the southeastern EA. Economic impacts to small businesses are therefore not expected to be significant in this EA. Similar effects in the northern EA (approximately 0.02% of roadless areas affected by timber cutting per year) are also not expected to result in significant economic impacts, nor affect a substantial number of small businesses (22 of the 320 outfitter and guide permits are associated with the Idaho Panhandle NF in the northern EA).

Reasonably foreseeable opportunities for small businesses linked to phosphate mining over the next 15 years are expected to remain the same across all alternatives because projected phosphate output from existing leases is not projected to vary across alternatives. In the long-term, a greater number of acres associated with unleased known phosphate reserves would be made accessible under the final rule, relative to the 2001 Rule, implying greater opportunities for small businesses. Unleased phosphate acreage accessible under the Existing Plans alternative (13,620 acres) and the Proposed Rule alternative (13,190 acres) is greater than corresponding acreage under the final rule (5,770 acres), but the impacts of these differences are expected to occur over a period of 50 years or more. It is also noted that none of the companies currently operating phosphate mines in Idaho can be classified as small businesses. Adverse economic impacts are therefore not expected to occur to small entities associated with phosphate mining in the reasonably foreseeable future.

There are no changes in small business opportunities under the final rule compared to the 2001 Rule alternative because opportunities for geothermal development are negligible under both alternatives due to prohibitions on road construction for this purpose. Under the Existing Plans and Proposed Rule alternatives, road construction associated with geothermal development is permitted primarily in acres assigned to the GFRG theme. Given the stated permission for road construction for geothermal development under the Existing Plans and Proposed Rule alternatives, and the corresponding prohibition of road construction for geothermal purposes under the final rule, there is some potential for decreases in opportunities for geothermal development under the final rule. However, the absence of existing geothermal leases on NFS land in Idaho, combined with evidence that 11 of 14 pending or authorized geothermal leases on BLM land in Idaho are held by a company that cannot be considered a small business per the definitions set forth by the Small Business Administration, suggests that these opportunity losses will not result in significant economic impacts nor affect a substantial number of small businesses in the reasonably foreseeable future.

Decreases in small entity opportunities under the final rule are expected to be minimal or negligible for other sectors, including construction (*i.e.*, roads), saleable minerals, oil and gas, livestock, non-forest timber products, ski areas, and other special uses (energy corridors).

Thirty eight of Idaho's 44 counties are considered small with population size of less than 50,000. Thirty five of these small counties are considered rural and are natural resource-dependent counties. Opportunities increase for all timber-dependent counties under the final rule or Proposed Rule alternative relative to the 2001 Rule alternative. Opportunities for mining-dependent counties (e.g., Caribou, Oneida, Power, and Bannock) remain the same based on reasonably foreseeable phosphate output (over the next 15 years) that remains constant across alternatives. When comparing the final rule or the Proposed Rule alternative relative to the Existing Plans alternative, potential opportunities may be decreased for the following timber-dependent counties: *Northern EA:* Boundary, Bonner, Kootenai, Benewah, Latah, Ferry (WA), Pend Oreille (WA), Shoshone, and Stevens (WA); *Central EA:* Clearwater, Idaho, Lewis, Nez Perce, and Asotin (WA); and *Southeastern EA:* Bear Lake.

Revenue sharing with counties (i.e., secure payments to counties, payments in lieu of taxes) is expected to remain the same under all alternatives as long as the Secure Rural School and Community Self-Determination Act (SRSA) remains in effect. Counties that may experience losses in funding associated with 25% revenue-sharing, in the event that SRSA is not reauthorized, are those counties that share land with national forests where revenue-

generating opportunities potentially decrease. These counties may include timber-dependent counties in the northern and central EAs when comparing the final rule to the Existing Plans or Proposed Rule alternatives. However, reasonably foreseeable levels of revenue-sharing from timber harvest from roadless areas under the final rule are expected to be equal to or larger than revenue shares derived from harvest projected to occur under the 2001 Rule or volumes harvested from roadless areas in recent years. Revenue-sharing opportunities increase or remain the same for all counties under the final rule compared to the 2001 Rule, indicating that the final rule is not expected to have a significant adverse economic impact on small government entities. Mineral-based payments to states are a function of receipts from leasable minerals, including receipts from phosphate operations, but no differences in phosphate production are projected across alternatives. Opportunities for mining-dependent counties (e.g., Caribou, Oneida, Power, and Bannock) are therefore expected to remain the same in the reasonably foreseeable future (15 years).

Mitigation measures for small entity impacts associated with the final rule are not relevant in many cases, because the final rule eases restrictions on a number of activities in many areas, implying increases in potential opportunities for small entities, as noted above. Mitigation measures associated with existing programs and laws regarding revenue sharing with counties and small business shares or set-asides will continue to apply (e.g., SRSA).

*Environmental Impact*

The Agency has prepared a FEIS in concert with this rule. In it, the direct, indirect, and cumulative effects of the final rule and alternatives are disclosed. The FEIS may be viewed at *http://www.roadless.fs.fed.us/idaho*.

The Agency has prepared a biological assessment on the potential effects of the final rule on threatened, endangered, and proposed species and formally consulted with the FWS and NOAA. The biological opinions can be found at *http://roadless.fs.fed.us/idaho.shtml* and effects are discussed in the FEIS at sections 3.7 Botanical Resources, 3.8 Aquatic Species, and 3.9 Terrestrial Animal Habitat and Species.

*Energy Effects*

This final rule has been reviewed under E.O. 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this final rule does not constitute a significant energy action as defined in the Executive order.

As explained in greater detail in the FEIS, this final rule is not expected to significantly affect energy supplies, distribution, or use. The final rule does not disturb existing access or mineral rights, restrictions on saleable mineral materials are narrow, and no oil and gas leasing is currently underway or projected for these lands. The final rule is not expected to have a significant impact on wind or biomass energy. Opportunities for geothermal development are negligible under both the final rule and the 2001 Rule alternative.

No novel legal or policy issues regarding adverse effects to supply, distribution, or use of energy are anticipated beyond what has already been addressed in the FEIS or the Regulatory Impact Analysis. None of the proposed corridors designated for oil, gas, and/or electricity under section 368 of the Energy Policy Act of 2005 are within IRAs.

The final rule also provides a regulatory mechanism for consideration of requests for modification of restrictions if adjustments are determined to be necessary in the future. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

*Controlling Paperwork Burdens on the Public*

This rule does not call for any additional record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

*Federalism*

The Department has considered this rule under the requirements of E.O. 13132 issued August 4, 1999, *Federalism.* The Department assessed that the rule conforms with the Federalism principles set out in this Executive order; would not impose any compliance costs on the states; and would not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among the various levels of government. Therefore, the Department concludes that this rule does not have Federalism implications. This rule is based on a petition submitted by the State of Idaho under the Administrative Procedure Act at 5 U.S.C. 553(e) and pursuant to Department of Agriculture regulations at 7 CFR 1.28. The State's petition was developed with involvement of local governments. The State has been a cooperating agency for the development of the EIS for this rule. State and local governments were encouraged to comment on this rule in the course of this rulemaking process.

*Consultation With Indian Tribal Governments*

Pursuant to E.O. 13175 of November 6, 2000, ''Consultation and Coordination with Indian Tribal Governments,'' the Agency has assessed the impact of this rule on Indian Tribal governments and has determined the rule does not significantly or uniquely affect Indian Tribal governments. The rule deals with future permitted road construction, timber cutting, and certain mineral development projects in IRAs and has no direct effect on the current occupancy or use of these NFS lands. The rule does not waive any applicable requirements regarding site-specific environmental analysis, public involvement, consultation with Tribes, and other agencies or compliance with applicable laws. Nor does the rule modify the unique relationship between the United States and Indian Tribes that requires the Federal Government to work with federally recognized Indian Tribes government-to-government as provided for in E.O. 13175. Nothing herein limits or modifies prior existing Tribal rights, including those involving hunting, fishing, or gathering. The Agency has also determined this rule does not impose substantial direct compliance costs on Indian Tribal governments. This rule does not mandate Tribal participation in NFS planning. Rather, the rule recognizes the responsibility of Forest Service officials to consult early with Tribal governments and to work cooperatively with them where planning issues affect Tribal interests.

*No Takings Implications*

This rule has been analyzed in accordance with the principles and criteria in E.O. 12630, Governmental Actions and Interference with Civil Constitutionally Protected Rights. It has been determined that the rule does not pose the risk of a taking of private property. The rule effects only NFS lands and contains exemptions that prevent the taking of constitutionally protected private property.

*Civil Justice Reform*

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

*Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this final rule on State, local, and Tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

**List of Subjects in 36 CFR Part 294**

National Forests, Navigation (air), Recreation areas, State petitions for inventoried roadless area management.

■ Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend part 294 of Title 36 of the Code of Federal Regulations by adding new subpart C to read as follows:

## PART 294—SPECIAL AREAS

## Subpart C—Idaho Roadless Area Management

Sec.



**Authority:** 16 U.S.C. 472, 529, 551, 1608, 1613; 23 U.S.C. 201, 205.

### § 294.20 Purpose.

The purpose of this subpart is to provide, in the context of multiple-use management, State-specific direction for the conservation of inventoried roadless areas in the national forests within the State of Idaho. This subpart sets forth the procedures for management of Idaho Roadless Areas consistent with the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528–531).

### § 294.21 Definitions.

The following terms and definitions apply to this subpart.

*At-risk community:* As defined under section 101 of the Healthy Forests Restoration Act (HFRA).

*Community protection zone:* An area extending one-half mile from the boundary of an at-risk community or an area within one and a half miles of the boundary of an at-risk community, where any land:

(1) Has a sustained steep slope that creates the potential for wildfire behavior endangering the at-risk community;

(2) Has a geographic feature that aids in creating an effective fire break, such as a road or a ridge top; or

(3) Is in condition class 3 as defined by HFRA.

*Fire hazard and risk:* The fuel conditions on the landscape.

*Fire occurrence:* The probability of wildfire ignition based on historic fire occurrence records and other information.

*Forest Plan Special Area:* Certain lands identified on the Idaho Roadless Area Maps, § 294.22(c) and listed in § 294.29 shall be managed pursuant to applicable land management components. These lands include areas such as research natural areas, designated and eligible wild and scenic river corridors, developed recreation sites, or other specified management purposes, as described in the Roadless Area Conservation; National Forest System Lands in Idaho, Final Environmental Impact Statement, Appendix Q.

*Forest road:* As defined at 36 CFR 212.1, the term means a road wholly or partly within or adjacent to and serving the National Forest System that the Forest Service determines is necessary for the protection, administration, and use of the National Forest System and the use and development of its resources.

*Forest type:* A forest stand that is essentially similar throughout its extent in composition under generally similar environmental conditions, including temporary, permanent, climax, and cover types.

*Hazardous fuels:* Excessive live or dead wildland fuel accumulations that increase the potential for uncharacteristically intense wildland fire and decrease the capability to protect life, property, and natural resources.

*Idaho Roadless Areas:* Areas designated pursuant to this rule and identified in a set of maps maintained at the national headquarters office of the Forest Service.

*Municipal water supply system:* As defined under section 101 of the Healthy Forests Restoration Act, the term means the reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, and other surface facilities and systems constructed or installed for the collection, impoundment, storage, transportation, or distribution of drinking water.

*Responsible official:* The Forest Service line officer with the authority and responsibility to make decisions about protection and management of Idaho Roadless Areas pursuant to this subpart.

*Road:* As defined at 36 CFR 212.1, the term means a motor vehicle route over 50 inches wide, unless identified and managed as a trail.

*Road construction and reconstruction:* As defined at 36 CFR 212.1, the terms mean supervising, inspecting, actual building, and incurrence of all costs incidental to the construction or reconstruction of a road.

*Road decommissioning:* As defined at 36 CFR 212.1, the term means activities that result in the stabilization and restoration of unneeded roads to a more natural state.

*Road maintenance:* The ongoing upkeep of a road necessary to retain or restore the road to the approved road management objective.

*Road realignment:* Activity that results in a new location of an existing road or portions of an existing road, and treatment of the old roadway.

*Roadless characteristics:* Resources or features that are often present in and characterize Idaho Roadless Areas, including:

(1) High quality or undisturbed soil, water, and air;

(2) Sources of public drinking water;

(3) Diversity of plant and animal communities;

(4) Habitat for threatened, endangered, proposed, candidate, and sensitive species, and for those species dependent on large, undisturbed areas of land;

(5) Primitive, semi-primitive non-motorized, and semi-primitive motorized classes of dispersed recreation;

(6) Reference landscapes;

(7) Natural appearing landscapes with high scenic quality;

(8) Traditional cultural properties and sacred sites; and

(9) Other locally identified unique characteristics.

*Substantially altered portion:* An area within an Idaho Roadless Area where past road construction, timber cutting, or other uses have materially diminished the area's roadless characteristics.

*Temporary road:* As defined at 36 CFR 212.1, the term means a road necessary for emergency operations or authorized by contract, permit, lease, or other written authorization that is not a forest road and that is not included in a forest transportation atlas. Temporary roads are available for administrative use until decommissioned.

*Uncharacteristic wildland fire effects:* An increase in wildland fire size, severity, and resistance to control; and the associated impact on people, property, and fire fighter safety compared to that which occurred in the native system.

**§ 294.22 Idaho Roadless Areas.**

(a) *Designations.* All National Forest System lands within the State of Idaho listed in § 294.29 are hereby designated as Idaho Roadless Areas.

(b) *Management classifications.* Management classifications for Idaho Roadless Areas express a management continuum. The following management classifications are established:

(1) Wild Land Recreation;

(2) Special Areas of Historic or Tribal Significance;

(3) Primitive;

(4) Backcountry/Restoration; and

(5) General Forest, Rangeland, and Grassland.

(c) *Maps.* The Chief shall maintain and make available to the public a map of each Idaho Roadless Area, including records regarding any corrections or modifications of such maps pursuant to § 294.27.

(d) Activities in Idaho Roadless Areas shall be consistent with the applicable management classification listed for each area under § 294.29.

**§ 294.23 Road construction and reconstruction in Idaho Roadless Areas.**

(a) *Wild Land Recreation, Special Areas of Historic or Tribal Significance, or Primitive.* Road construction and reconstruction are prohibited in Idaho Roadless Areas designated as Wild Land Recreation, Special Areas of Historic or Tribal Significance, or Primitive if pursuant to statute, treaty, reserved or outstanding rights, or other legal duty of the United States.

(b) *Backcountry/Restoration.* (1) Road construction and reconstruction are only permissible in Idaho Roadless Areas designated as Backcountry/Restoration where the Regional Forester determines:

(i) A road is needed to protect public health and safety in cases of an imminent threat of flood, wildland fire, or other catastrophic event that, without intervention, would cause the loss of life or property;

(ii) A road is needed to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or to conduct a natural resource restoration action under CERCLA, section 311 of the Clean Water Act, or the Oil Pollution Act;

(iii) A road is needed pursuant to statute, treaty, reserved or outstanding rights, or other legal duty of the United States;

(iv) A road realignment is needed to prevent irreparable resource damage that arises from the design, location, use, or deterioration of a road and cannot be mitigated by road maintenance. Road realignment may occur under this subsection only if the road is deemed essential for public or private access, natural resource management, or public health and safety;

(v) Road reconstruction is needed to implement a road safety improvement project on a road determined to be hazardous based on accident experience or accident potential on that road; or

(vi) The Secretary of Agriculture determines that a Federal Aid Highway project, authorized pursuant to Title 23 of the United States Code, is in the public interest or is consistent with the purpose for which the land was reserved or acquired and no other reasonable and prudent alternative exists.

(2) A responsible official may authorize temporary road construction or road reconstruction for community protection zone activities pursuant to § 294.24(c)(1)(i) if in the official's judgment the community protection objectives cannot be reasonably accomplished without a temporary road.

(3) The Regional Forester may approve temporary road construction or road reconstruction to reduce hazardous fuel conditions outside a community protection zone where in the Regional Forester's judgment the circumstances set out below exist. Temporary road construction or road reconstruction to reduce hazardous fuel conditions under this provision will be dependent on forest type and is expected to be infrequent.

(i) There is a significant risk that a wildland fire disturbance event could adversely affect an at-risk community or municipal water supply system pursuant to § 294.24(c)(1)(ii). A significant risk exists where the history of fire occurrence, and fire hazard and risk, indicate a serious likelihood that a wildland fire disturbance event would present a high risk of threat to an at-risk community or municipal water supply system.

(ii) The activity cannot be reasonably accomplished without a temporary road.

(iii) The activity will maintain or improve one or more roadless characteristics over the long-term.

(c) *General Forest, Rangeland, and Grassland.* (1) A forest road may be constructed or reconstructed or a temporary road may be constructed in Idaho Roadless Areas designated as General Forest, Rangeland, and Grassland, unless prohibited in § 294.25(e).

(2) Forest roads constructed or reconstructed pursuant to § 294.23(c)(1) must be conducted in a way that minimizes effects on surface resources and must be consistent with land management plan components as provided for in § 294.28(d).

(d) *Temporary roads.* (1) Temporary road construction must be conducted in a way that minimizes effects on surface resources, is consistent with land management plan components as provided for in § 294.28(d), and may only be used for the specified purpose(s).

(2) Temporary roads must be decommissioned upon completion of the project or expiration of the contract or permit, whichever is sooner. A road decommissioning provision will be required in all such contracts or permits and may not be waived.

(e) *Road maintenance.* Maintenance of temporary and forest roads is permissible in Idaho Roadless Areas.

(f) *Roads associated with mineral activities.* Road construction or reconstruction associated with mineral activities is provided for in § 294.25.

**§ 294.24 Timber cutting, sale, or removal in Idaho Roadless Areas.**

(a) *Wild Land Recreation.* The cutting, sale, or removal of timber is prohibited in Idaho Roadless Areas designated as Wild Land Recreation under this subpart, except:

(1) For personal or administrative use, as provided for in 36 CFR part 223; or

(2) Where incidental to the implementation of a management

activity not otherwise prohibited by this subpart.

(b) *Special Areas of Historic or Tribal Significance and Primitive.* (1) The cutting, sale, or removal of timber is prohibited in Idaho Roadless Areas designated as a Special Area of Historic or Tribal Significance or as Primitive under this subpart, except:

(i) To improve threatened, endangered, proposed, or sensitive species habitat;

(ii) To maintain or restore the characteristics of ecosystem composition, structure, and processes;

(iii) To reduce the risk of uncharacteristic wildland fire effects to an at-risk community or municipal water supply system;

(iv) For personal or administrative use, as provided for in 36 CFR part 223; or

(v) Where such cutting, sale or removal is incidental to the implementation of a management activity not otherwise prohibited by this subpart.

(2) Any action authorized pursuant to paragraphs § 294.24(b)(1)(i) through (iii) shall be limited to situations that:

(i) Maintain or improve one or more of the roadless characteristics over the long-term;

(ii) Use existing roads or aerial harvest systems;

(iii) Maximize the retention of large trees as appropriate for the forest type, to the extent the trees promote fire-resilient stands;

(iv) Are consistent with land management plan components as provided for in § 294.28(d); and

(v) Is approved by the regional forester.

(c) *Backcountry/Restoration.* (1) The cutting, sale, or removal of timber is permissible in Idaho Roadless Areas designated as Backcountry/Restoration only:

(i) To reduce hazardous fuel conditions within the community protection zone if in the responsible official's judgment the project generally retains large trees as appropriate for the forest type and is consistent with land management plan components as provided for in § 294.28(d);

(ii) To reduce hazardous fuel conditions outside the community protection zone where there is significant risk that a wildland fire disturbance event could adversely affect an at-risk community or municipal water supply system. A significant risk exists where the history of fire occurrence, and fire hazard and risk, indicate a serious likelihood that a wildland fire disturbance event would present a high risk of threat to an at-risk community or municipal water supply system;

(iii) To improve threatened, endangered, proposed, or sensitive species habitat;

(iv) To maintain or restore the characteristics of ecosystem composition, structure, and processes;

(v) To reduce the risk of uncharacteristic wildland fire effects;

(vi) For personal or administrative use, as provided for in 36 CFR part 223;

(vii) Where incidental to the implementation of a management activity not otherwise prohibited by this subpart; or

(viii) In a portion of an Idaho Roadless Area designated as Backcountry/Restoration that has been substantially altered due to the construction of a forest road and subsequent timber cutting. Both the road construction and subsequent timber cutting must have occurred prior to October 16, 2008.

(2) Any action authorized pursuant to paragraphs § 294.24(c)(1)(ii) through (v) shall be approved by the Regional Forester and limited to situations that, in the Regional Forester's judgment:

(i) Maintains or improves one or more of the roadless characteristics over the long-term;

(ii) Maximizes the retention of large trees as appropriate for the forest type to the extent the trees promote fire-resilient stands; and

(iii) Is consistent with land management plan components as provided for in § 294.28(d).

(3) The activities in paragraph § 294.24(c)(1) may use any forest roads or temporary roads, including those authorized under § 294.23(b)(2 and 3) until decommissioned.

(d) *General Forest, Rangeland, and Grassland.* Timber may be cut, sold, or removed within Idaho Roadless Areas designated as General Forest, Rangeland, and Grassland but shall be consistent with the land management plan components as provided for in § 294.28(d).

**§ 294.25 Mineral activities in Idaho Roadless Areas.**

(a) Nothing in this subpart shall be construed as restricting mineral leases, contracts, permits, and associated activities authorized prior to October 16, 2008.

(b) Nothing in this subpart shall affect mining activities conducted pursuant to the General Mining Law of 1872.

(c) *Wild Land Recreation, Special Areas of Historic or Tribal Significance, or Primitive.* (1) For mineral leases, contracts, permits, and other associated activities authorized after the effective date of this subpart the Forest Service will not recommend, authorize, or consent to road construction, road reconstruction, or surface occupancy associated with mineral leases in Idaho Roadless Areas designated as Wild Land Recreation, Special Areas of Historic or Tribal Significance, or Primitive themes.

(2) After October 16, 2008, the Forest Service will not authorize sale of common variety mineral materials in Idaho Roadless Areas designated as Wild Land Recreation, Special Areas of Historic or Tribal Significance, or Primitive themes.

(d) *Backcountry/Restoration.* (1) For mineral leases, contracts, permits, and other associated activities authorized after the effective date of this subpart, the Forest Service will not recommend, authorize, or consent to road construction or road reconstruction associated with mineral leases in Idaho Roadless Areas designated as Backcountry/Restoration. Surface use or occupancy without road construction or reconstruction is permissible for all mineral leasing unless prohibited in the applicable land management plan.

(2) After October 16, 2008, the Forest Service may authorize the use or sale of common variety mineral materials, and associated road construction or reconstruction to access these mineral materials, in Idaho Roadless Areas designated as Backcountry/Restoration only if the use of these mineral materials is incidental to an activity otherwise permissible in backcountry/restoration under this subpart.

(e) *General Forest, Rangeland, and Grassland.* (1) For mineral leases, contracts, permits, and other associated activities authorized after October 16, 2008, the Forest Service will not recommend, authorize, or consent to road construction or reconstruction associated with mineral leases in Idaho Roadless Areas designated as General Forest, Rangeland, and Grassland theme; except such road construction or reconstruction may be authorized by the responsible official in association with phosphate deposits as described in Figure 3–20 in section 3.15 Minerals and Energy in the Roadless Area Conservation; National Forest System Lands in Idaho Final Environmental Impact Statement. Surface use or occupancy without road construction or reconstruction is permissible for all mineral leasing unless prohibited in the land management plan components.

(2) After October 16, 2008, the Forest Service may authorize the use or sale of common variety mineral materials, and associated road construction or reconstruction to access these mineral materials, in Idaho Roadless Areas designated as General Forest,

Rangeland, and Grassland only if the use of these mineral materials is incidental to an activity otherwise permissible in General Forest, Rangeland, and Grassland under this subpart.

(3) Road construction or reconstruction associated with mining activities permissible under this subsection may only be approved after evaluating other access options.

(4) Road construction or reconstruction associated with mining activities permissible under this subsection must be conducted in a manner that minimizes effects on surface resources and must be consistent with land management plan components as provided for in § 294.28(d). Roads constructed or reconstructed must be decommissioned upon completion of the project, or expiration of the lease, or permit, or other authorization, whichever is sooner.

**§ 294.26 Other activities in Idaho Roadless Areas.**

(a) *Motorized travel.* Nothing in this subpart shall be construed as affecting existing roads or trails in Idaho Roadless Areas. Decisions concerning the future management of existing roads or trails in Idaho Roadless Areas shall be made during the applicable travel management process.

(b) *Grazing.* Nothing in this subpart shall be construed as affecting existing grazing permits in Idaho Roadless Areas. Future road construction associated with livestock operations shall conform to this subpart.

(c) *Motorized equipment and mechanical transport.* Nothing in this subpart shall be construed as affecting the use of motorized equipment and mechanical transport in Idaho Roadless Areas.

**§ 294.27 Corrections and modifications.**

Correction or modification of designations made pursuant to this subpart may occur under the following circumstances:

(a) *Administrative corrections.* Administrative corrections to the maps of lands identified in § 294.22(c) include, but are not limited to, adjustments that remedy clerical errors, typographical errors, mapping errors, or improvements in mapping technology. The Chief may issue administrative corrections after a 30-day public notice and opportunity to comment.

(b) *Modifications.* The Chief may add to, remove from, or modify the designations and management classifications listed in § 294.29 based on changed circumstances or public need. The Chief shall provide at least a 45-day public notice and opportunity to comment for all modifications.

**§ 294.28 Scope and applicability.**

(a) After October 16, 2008 subpart B of this part shall have no effect within the State of Idaho.

(b) This subpart does not revoke, suspend, or modify any permit, contract, or other legal instrument authorizing the occupancy and use of National Forest System land issued prior to October 16, 2008.

(c) This subpart does not revoke, suspend, or modify any project or activity decision made prior to October 16, 2008.

(d) The provisions set forth in this subpart shall take precedence over any inconsistent land management plan component. Land management plan components that are not inconsistent with this subpart will continue to provide guidance for projects and activities within Idaho Roadless Areas; as shall those related to protection of threatened and endangered species. This subpart does not compel the amendment or revision of any land management plan.

(e) The prohibitions and permissions set forth in the subpart are not subject to reconsideration, revision, or rescission in subsequent project decisions or land and resource management plan amendments or revisions undertaken pursuant to 36 CFR part 219.

(f) This subpart shall not apply to Forest Plan Special Areas within Idaho Roadless Areas.

(g) Nothing in this subpart waives any applicable requirements regarding site-specific environmental analysis, public involvement, consultation with Tribes and other agencies, or compliance with applicable laws.

(h) This subpart does not modify the unique relationship between the United States and Indian Tribes that requires the Federal Government to work with federally recognized Indian Tribes government-to-government as provided for in treaties, laws or Executive orders. Nothing herein limits or modifies prior existing tribal rights, including those involving hunting, fishing, gathering, and protection of cultural and spiritual sites.

(i) If any provision of the rules in this subpart or its application to any person or to certain circumstances is held invalid, the remainder of the regulations in this subpart and their application remain in force.

**§ 294.29 List of designated Idaho Roadless Areas.**

The acronyms used in the list are Wild Land Recreation (WLR), Backcountry/Restoration (BCR), General Forest, Rangeland, and Grassland (GFRG), Special Areas of Historic or Tribal Significance (SAHTS) and Forest Plan Special Areas (FPSA).

| Forest | Idaho roadless area | # | WLR | Primitive | BCR | GFRG | SAHTS | FPSA |
|---|---|---|---|---|---|---|---|---|
| Boise | Bald Mountain | 019 | | | X | | | X |
| Boise | Bear Wallow | 125 | | X | | | | X |
| Boise | Bernard | 029 | | | X | | | X |
| Boise | Black Lake | 036 | | | X | | | X |
| Boise | Blue Bunch | 923 | | | X | | | X |
| Boise | Breadwinner | 006 | | | X | | | X |
| Boise | Burnt Log | 035 | | | X | | | X |
| Boise | Cathedral Rocks | 038 | | X | | | | X |
| Boise | Caton Lake | 912 | | | X | X | | X |
| Boise | Cow Creek | 028 | | X | | | | |
| Boise | Danskin | 002 | | X | | | | X |
| Boise | Deadwood | 020 | | X | X | | | X |
| Boise | Elk Creek | 022 | | | X | | | X |
| Boise | Grand Mountain | 007 | | | X | | | X |
| Boise | Grimes Pass | 017 | | | X | X | | X |
| Boise | Hanson Lakes | 915 | X | X | | | | X |
| Boise | Hawley Mountain | 018 | | X | | | | |
| Boise | Horse Heaven | 925 | | | X | X | | |
| Boise | House Mountain | 001 | | X | | | | X |
| Boise | Lime Creek | 937 | | X | | | | |

| Forest | Idaho roadless area | # | WLR | Primitive | BCR | GFRG | SAHTS | FPSA |
|---|---|---|---|---|---|---|---|---|
| Boise | Lost Man Creek | 041 | | X | | | | X |
| Boise | Meadow Creek | 913 | | | X | X | | X |
| Boise | Mt Heinen | 003 | | X | | | | |
| Boise | Nameless Creek | 034 | | | X | | | |
| Boise | Needles | 911 | X | X | X | X | | X |
| Boise | Peace Rock | 026 | | X | X | | | X |
| Boise | Poison Creek | 042 | | | X | | | |
| Boise | Poker Meadows | 032 | | | X | | | X |
| Boise | Rainbow | 008 | | X | | | | X |
| Boise | Red Mountain | 916 | X | X | X | X | | X |
| Boise | Reeves Creek | 010 | | | X | | | |
| Boise | Sheep Creek | 005 | | X | | | | X |
| Boise | Smoky Mountains | 914 | | X | | | | X |
| Boise | Snowbank | 924 | | X | | | | |
| Boise | Steel Mountain | 012 | | X | | | | X |
| Boise | Stony Meadows | 027 | | X | X | | | |
| Boise | Ten Mile/Black Warrior | 013 | X | X | | X | | X |
| Boise | Tennessee | 033 | | | X | | | X |
| Boise | Whiskey | 031 | | | X | | | |
| Boise | Whiskey Jack | 009 | | X | | | | |
| Boise | Whitehawk Mountain | 021 | | | X | X | | |
| Boise | Wilson Peak | 040 | | X | | | | |
| Caribou | Bear Creek | 615 | | X | X | X | | X |
| Caribou | Bonneville Peak | 154 | | | X | X | | X |
| Caribou | Caribou City | 161 | X | | X | | | X |
| Caribou | Clarkston Mountain | 159 | | | X | X | | |
| Caribou | Deep Creek | 158 | | | X | X | | X |
| Caribou | Dry Ridge | 164 | | | X | X | | |
| Caribou | Elkhorn Mountain | 156 | | | X | X | | |
| Caribou | Gannett-Spring Creek | 111 | | X | X | X | | X |
| Caribou | Gibson | 181 | | | X | X | | |
| Caribou | Hell Hole | 168 | | | | X | | X |
| Caribou | Huckleberry Basin | 165 | | | X | X | | |
| Caribou | Liberty Creek | 175 | | | X | X | | X |
| Caribou | Meade Peak | 167 | | X | X | X | | X |
| Caribou | Mink Creek | 176 | | | X | X | | X |
| Caribou | Mount Naomi | 758 | X | | X | X | | X |
| Caribou | North Pebble | 155 | | | X | X | | |
| Caribou | Oxford Mountain | 157 | | | X | X | | X |
| Caribou | Paris Peak | 177 | | | X | X | | |
| Caribou | Pole Creek | 160 | | | X | X | | |
| Caribou | Red Mountain | 170 | | X | X | | | |
| Caribou | Sage Creek | 166 | | | X | X | | |
| Caribou | Schmid Peak | 163 | | | X | X | | |
| Caribou | Scout Mountain | 152 | | | X | X | | X |
| Caribou | Sherman Peak | 172 | | | X | X | | |
| Caribou | Soda Point | 171 | | | X | X | | X |
| Caribou | Station Creek | 178 | | | X | X | | |
| Caribou | Stauffer Creek | 173 | | | X | | | |
| Caribou | Stump Creek | 162 | | X | X | X | | X |
| Caribou | Swan Creek | 180 | | | X | | | |
| Caribou | Telephone Draw | 169 | | | X | X | | X |
| Caribou | Toponce | 153 | | X | X | | | |
| Caribou | West Mink | 151 | | | X | X | | X |
| Caribou | Williams Creek | 174 | | | X | X | | X |
| Caribou | Worm Creek | 170 | | | X | X | | X |
| Challis | Blue Bunch Mountain | 923 | | | X | | | |
| Challis | Borah Peak | 012 | X | | X | | | X |
| Challis | Boulder-White Clouds | 920 | X | | X | | | |
| Challis | Camas Creek | 901 | | | X | | | |
| Challis | Challis Creek | 004 | | | X | | | |
| Challis | Cold Springs | 026 | | | X | | | |
| Challis | Copper Basin | 019 | | | X | | | |
| Challis | Diamond Peak | 601 | | | X | | | X |
| Challis | Greylock | 007 | | | X | | | |
| Challis | Grouse Peak | 010 | | | X | | | |
| Challis | Hanson Lake | 915 | | | X | | | |
| Challis | Jumpoff Mountain | 014 | | | X | | | |
| Challis | King Mountain | 013 | | | X | | | |
| Challis | Lemhi Range | 903 | | | X | | | X |
| Challis | Loon Creek | 908 | | | X | | | |
| Challis | Pahsimeroi Mountain | 011 | | | X | | | |
| Challis | Pioneer Mountains | 921 | X | | X | | | X |
| Challis | Prophyry Peak | 017 | | | X | | | |

| Forest | Idaho roadless area | # | WLR | Primitive | BCR | GFRG | SAHTS | FPSA |
|---|---|---|---|---|---|---|---|---|
| Challis | Railroad Ridge | 922 | | | X | | | |
| Challis | Red Hill | 027 | | | X | | | |
| Challis | Red Mountain | 916 | | | X | | | |
| Challis | Seafoam | 009 | | | X | | | |
| Challis | Spring Basin | 006 | | | X | | | |
| Challis | Squaw Creek | 005 | | | X | | | |
| Challis | Taylor Mountain | 902 | | | X | | | |
| Challis | Warm Creek | 024 | | | X | | | |
| Challis | White Knob | 025 | | | X | | | |
| Challis | Wood Canyon | 028 | | | X | | | |
| Clearwater | Bighorn-Weitas | 306 | | | X | | X | X |
| Clearwater | Eldorado Creek | 312 | | | X | | X | |
| Clearwater | Hoodoo | 301 | X | | | | X | |
| Clearwater | Lochsa Face | 311 | | X | X | | X | X |
| Clearwater | Lolo Creek (LNF) | 805 | | | X | | | |
| Clearwater | Mallard-Larkins | 300 | X | X | X | | | |
| Clearwater | Meadow Creek—Upper North Fork | 302 | | X | X | | | |
| Clearwater | Moose Mountain | 305 | | X | X | | | |
| Clearwater | North Fork Spruce—White Sand | 309 | X | X | X | | | |
| Clearwater | North Lochsa Slope | 307 | | X | X | | X | X |
| Clearwater | Pot Mountain | 304 | | | X | | | X |
| Clearwater | Rackliff-Gedney | 841 | | | X | | | X |
| Clearwater | Rawhide | 313 | | X | X | | | |
| Clearwater | Siwash | 303 | | | X | | | |
| Clearwater | Sneakfoot Meadows | 314 | X | X | X | | | X |
| Clearwater | Weir-Post Office Creek | 308 | | | X | | X | X |
| Idaho Panhandle | Beetop | 130 | | | X | | | |
| Idaho Panhandle | Big Creek | 143 | | | X | | | |
| Idaho Panhandle | Blacktail Mountain | 122 | | | X | | | X |
| Idaho Panhandle | Blacktail Mountain | 161 | | | X | | | |
| Idaho Panhandle | Buckhorn Ridge | 661 | | | X | | | |
| Idaho Panhandle | Continental Mountain | 004 | | | X | | | |
| Idaho Panhandle | East Cathedral Peak | 131 | | | X | | | X |
| Idaho Panhandle | East Fork Elk | 678 | | | | X | | |
| Idaho Panhandle | Gilt Edge-Silver Creek | 792 | | | X | | | |
| Idaho Panhandle | Graham Coal | 139 | | | X | | | X |
| Idaho Panhandle | Grandmother Mountain | 148 | X | | X | X | | X |
| Idaho Panhandle | Hammond Creek | 145 | | | X | | | |
| Idaho Panhandle | Hellroaring | 128 | | | | X | | |
| Idaho Panhandle | Katka Peak | 157 | | | X | X | | |
| Idaho Panhandle | Kootenai Peak | 126 | | | | X | | |
| Idaho Panhandle | Little Grass Mountain | 121 | | | X | | | |
| Idaho Panhandle | Lost Creek | 137 | | | X | | | X |
| Idaho Panhandle | Magee | 132 | | | X | | | |
| Idaho Panhandle | Mallard-Larkins | 300 | X | | X | | | X |
| Idaho Panhandle | Maple Peak | 141 | | | X | | | |
| Idaho Panhandle | Meadow Creek-Upper N. Fork | 302 | | | X | | | X |
| Idaho Panhandle | Midget Peak | 151 | | | X | | | X |
| Idaho Panhandle | Mosquito-Fly | 150 | | | X | | | X |
| Idaho Panhandle | Mt. Willard-Lake Estelle | 173 | | | X | | | X |
| Idaho Panhandle | North Fork | 147 | | | X | | | X |
| Idaho Panhandle | Packsaddle | 155 | | | X | | | |
| Idaho Panhandle | Pinchot Butte | 149 | | | X | | | |
| Idaho Panhandle | Roland Point | 146 | | | X | | | |
| Idaho Panhandle | Saddle Mountain | 154 | | | X | | | |
| Idaho Panhandle | Salmo-Priest | 981 | X | | | | | X |
| Idaho Panhandle | Schafer Peak | 160 | | | X | X | | |
| Idaho Panhandle | Scotchman Peaks | 662 | X | | X | | | X |
| Idaho Panhandle | Selkirk | 125 | X | | X | X | | X |
| Idaho Panhandle | Sheep Mountain-State Line | 799 | | | X | | | X |
| Idaho Panhandle | Skitwish Ridge | 135 | | | X | | | |
| Idaho Panhandle | Spion Kop | 136 | | | X | | | X |
| Idaho Panhandle | Stevens Peak | 142 | | | X | | | |
| Idaho Panhandle | Storm Creek | 144 | | | X | | | |
| Idaho Panhandle | Tepee Creek | 133 | | | X | | | |
| Idaho Panhandle | Trestle Peak | 129 | | | X | | | |
| Idaho Panhandle | Trouble Creek | 138 | | | X | | | X |
| Idaho Panhandle | Trout Creek | 664 | | | X | | | X |
| Idaho Panhandle | Upper Priest | 123 | | | X | | | X |
| Idaho Panhandle | White Mountain | 127 | | | X | X | | |
| Idaho Panhandle | Wonderful Peak | 152 | | | X | | | |
| Kootenai | Mt. Willard-Lake Estelle | 173 | | | X | | | X |
| Kootenai | Roberts | 691 | | | X | | | |
| Kootenai | Scotchman Peaks | 662 | | | X | | | |

| Forest | Idaho roadless area | # | WLR | Primitive | BCR | GFRG | SAHTS | FPSA |
|---|---|---|---|---|---|---|---|---|
| Kootenai | West Fork Elk | 692 | | | X | | | |
| Nez Perce | Clear Creek | 844 | | | X | | | |
| Nez Perce | Dixie Summit—Nut Hill | 235 | | | X | | | X |
| Nez Perce | East Meadow Creek | 845 | | X | | | | X |
| Nez Perce | Gospel Hump | 921 | | | X | | | |
| Nez Perce | Gospel Hump Adjacent to Wilderness. | | | | X | | | |
| Nez Perce | John Day | 852 | | | X | | | |
| Nez Perce | Lick Point | 227 | | | X | | | |
| Nez Perce | Little Slate Creek | 851 | | | X | | | |
| Nez Perce | Little Slate Creek North | 856 | | | X | | | X |
| Nez Perce | Mallard | 847 | | | X | | | |
| Nez Perce | North Fork Slate Creek | 850 | | | X | | | |
| Nez Perce | O'Hara—Falls Creek | 226 | | | X | | | X |
| Nez Perce | Rackliff—Gedney | 841 | | | X | | | X |
| Nez Perce | Rapid River | 922 | X | | | | | X |
| Nez Perce | Salmon Face | 855 | | | X | | | |
| Nez Perce | Selway Bitterroot | | | X | | | | |
| Nez Perce | Silver Creek—Pilot Knob | 849 | | | | | X | |
| Nez Perce | West Fork Crooked River | | | | X | | | |
| Nez Perce | West Meadow Creek | 845 | | | X | | | X |
| Payette | Big Creek Fringe | 009 | | | X | | | X |
| Payette | Caton Lake | 912 | | | X | | | X |
| Payette | Chimney Rock | 006 | | | X | | | X |
| Payette | Cottontail Point/Pilot Peak | 004 | | X | X | | | X |
| Payette | Council Mountain | 018 | | X | | | | X |
| Payette | Crystal Mountain | 005 | | | X | | | X |
| Payette | Cuddy Mountain | 016 | | X | | X | | X |
| Payette | French Creek | 026 | | X | X | X | | X |
| Payette | Hells Canyon/7 Devils Scenic | 001 | | X | | | | X |
| Payette | Horse Heaven | 925 | | | X | | | |
| Payette | Indian Creek | 019 | | X | | | | |
| Payette | Meadow Creek | 913 | | | X | | | |
| Payette | Needles | 911 | X | X | X | | | X |
| Payette | Patrick Butte | 002 | | X | X | | | X |
| Payette | Placer Creek | 008 | | X | X | | | X |
| Payette | Poison Creek | 042 | | | X | | | |
| Payette | Rapid River | 922 | X | | | | | X |
| Payette | Secesh | 010 | X | X | X | | | X |
| Payette | Sheep Gulch | 017 | | | X | | | |
| Payette | Smith Creek | 007 | | X | | | | |
| Payette | Snowbank | 924 | | X | | | | |
| Payette | Sugar Mountain | 014 | | | X | | | |
| Salmon | Agency Creek | 512 | | | X | X | | |
| Salmon | Allan Mountain | 946 | | | X | | | X |
| Salmon | Anderson Mountain | 942 | | | X | | | |
| Salmon | Blue Joint Mountain | 941 | | X | | | | |
| Salmon | Camas Creek | 901 | | | X | | | |
| Salmon | Deep Creek | 509 | | | | X | | |
| Salmon | Duck Peak | 518 | | | X | | | X |
| Salmon | Goat Mountain | 944 | | | X | | | |
| Salmon | Goldbug Ridge | 903 | | | X | | | |
| Salmon | Haystack Mountain | 507 | | | X | X | | |
| Salmon | Italian Peak | 945 | | | X | | | |
| Salmon | Jesse Creek | 510 | | | X | | | |
| Salmon | Jureano | 506 | | | X | X | | |
| Salmon | Lemhi Range | 903 | | | X | | | X |
| Salmon | Little Horse | 514 | | | X | | | |
| Salmon | Long Tom | 521 | | | X | | | X |
| Salmon | McEleny | 505 | | | X | | | |
| Salmon | Musgrove | 517 | | | X | X | | |
| Salmon | Napias | 515 | | | | X | | |
| Salmon | Napoleon Ridge | 501 | | | X | X | | X |
| Salmon | Oreana | 516 | | | X | | | |
| Salmon | Perreau Creek | 511 | | | | X | | |
| Salmon | Phelan | 508 | | | | X | | |
| Salmon | Sal Mountain | 513 | | | X | | | |
| Salmon | Sheepeater | 520 | | | X | X | | X |
| Salmon | South Deep Creek | 509 | | | X | X | | |
| Salmon | South Panther | 504 | | | X | | | |
| Salmon | Taylor Mountain | 902 | | | X | | | |
| Salmon | West Big Hole | 943 | | X | X | X | | X |
| Salmon | West Panther Creek | 504 | | | X | | | |
| Sawtooth | Black Pine | 003 | | | X | | | X |

| Forest | Idaho roadless area | # | WLR | Primitive | BCR | GFRG | SAHTS | FPSA |
|---|---|---|---|---|---|---|---|---|
| Sawtooth | Blackhorse Creek | 039 | | X | | | | |
| Sawtooth | Boulder-White Clouds | 920 | X | X | X | | | X |
| Sawtooth | Buttercup Mountain | 038 | | X | | | | X |
| Sawtooth | Cache Peak | 007 | | | X | X | | |
| Sawtooth | Cottonwood | 010 | | | X | | | |
| Sawtooth | Elk Ridge | 019 | | X | | | | |
| Sawtooth | Fifth Fork Rock Creek | 023 | | X | | X | | |
| Sawtooth | Hanson Lakes | 915 | X | X | X | | | X |
| Sawtooth | Huckleberry | 016 | | | X | | | X |
| Sawtooth | Liberal Mountain | 040 | | X | | X | | |
| Sawtooth | Lime Creek | 937 | | X | | | | X |
| Sawtooth | Lone Cedar | 011 | | | | X | | |
| Sawtooth | Loon Creek | 908 | | | X | | | |
| Sawtooth | Mahogany Butte | 012 | | | | X | | |
| Sawtooth | Mount Harrison | 006 | | X | X | X | | X |
| Sawtooth | Pettit | 017 | | | X | | | X |
| Sawtooth | Pioneer Mountains | 921 | X | X | X | | | X |
| Sawtooth | Railroad Ridge | 922 | | | X | | | X |
| Sawtooth | Smoky Mountains | 914 | | X | X | | | X |
| Sawtooth | Sublett | 005 | | X | | | | |
| Sawtooth | Third Fork Rock Creek | 009 | | X | | X | | |
| Sawtooth | Thorobred | 013 | | | X | | | |
| Targhee | Bald Mountain | 614 | | | X | X | | |
| Targhee | Bear Creek | 615 | | | X | X | | X |
| Targhee | Caribou City | 161 | | | X | X | | |
| Targhee | Diamond Peak | 601 | X | X | X | X | | X |
| Targhee | Garfield Mountain | 961 | | X | X | X | | X |
| Targhee | Garns Mountain | 611 | | | X | X | | X |
| Targhee | Italian Peak | 945 | X | | X | | | X |
| Targhee | Lionhead | 963 | X | | X | | | X |
| Targhee | Mt. Jefferson | 962 | | X | X | X | | X |
| Targhee | Palisades | 613 | X | | X | | | X |
| Targhee | Poker Peak | 616 | | X | | | | X |
| Targhee | Pole Creek | 160 | | | X | | | |
| Targhee | Raynolds Pass | 603 | | | X | | | |
| Targhee | Two Top | 604 | | X | | | | |
| Targhee | West Slope Tetons | 610 | | | X | | | X |
| Targhee | Winegar Hole | 347 | | X | X | | | X |
| Wallowa-Whitman | Big Canyon Id | 853 | | | X | | | |
| Wallowa-Whitman | Klopton Creek—Corral Creek Id | 854 | | | X | | | |

Dated: October 7, 2008.

**Mark Rey,**

*Under Secretary, Natural Resources and Environment.*

[FR Doc. E8–24285 Filed 10–8–08; 4:15 pm]

**BILLING CODE 3410–11–P**

Federal Register

Thursday,
October 16, 2008

## Part III

# Department of Justice

### Antitrust Division

**United States v. The Manitowoc Company, Inc., et al. Proposed Final Judgment and Competitive Impact Statement; Notice**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. The Manitowoc Company, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *The Manitowoc Company, Inc., et al.*, Civil Action No. 1:08–cv–01704. On October 6, 2008, the United States filed a Complaint alleging that the proposed acquisition by The Manitowoc Company, Inc. (''Manitowoc'') of Enodis plc would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in the United States in the manufacture, development, distribution, and sale of commercial cube ice machines. The proposed Final Judgment, filed the same day as the Complaint, requires Manitowoc to divest Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States.

Copies of the Complaint, proposed Final Judgment, Stipulation, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202 514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, Department of Justice, Washington, DC 20530, (telephone: 202–307–0924).

J. Robert Kramer, II

*Director of Operations.*

**United States District Court for the District of Columbia**

*United States of America, Department of Justice, Antitrust Division, 1401 H Street, NW., Suite 3000, Washington, D.C. 20530, Plaintiff, v. The Manitowoc Company, Inc., 2400 South 44th Street, Manitowoc, Wisconsin 54221; ENODIS PLC, 175 High Holborn, London, England WCIV 7AA; and Enodis Corporation, 2227 Welbilt Boulevard, New Port Richey, Florida, 34655, Defendants*

*Case No.: Deck Type: Antitrust Case: 1:08-cv-01704, Assigned to: Kennedy, Henry H., Assign. Date: 10/6/2008, Description: Antitrust*

**Complaint**

The United States of America (''United States''), acting under the direction of the Attorney General of the United States, brings this civil antitrust action against defendants The Manitowoc Company, Inc. (''Manitowoc''), Enodis plc, and Enodis Corporation (Enodis plc and Enodis Corporation will hereinafter be collectively referred to as ''Enodis'') to enjoin Manitowoc's proposed acquisition of Enodis plc and to obtain other relief. The United States complains and alleges as follows:

**I. Nature of the Action**

1. On June 30, 2008, Manitowoc offered to acquire Enodis plc for 328 pence in cash per share, in a transaction valued at 27 billion (including assumed debt). The acquisition is structured as a Scheme of Arrangement under the laws of the United Kingdom. The directors of Enodis plc unanimously recommended that its shareholders vote in favor of accepting Manitowoc's offer, and a majority of the shareholders did so.

2. Manitowoc manufactures and sells commercial ice machines in the United States under the Manitowoc brand, and its ice machines are the most widely sold in the United States. Enodis manufactures and sells commercial ice machines under two brands in the United States, Scotsman and Ice-O-Matic (collectively, the ''Enodis brands''); Scotsman and Ice-O-Matic machines are the second and fourth most widely sold, respectively.

3. In the United States, Manitowoc's proposed acquisition of Enodis would reduce the number of manufacturers that sell commercial ice machines producing cubed ice from three to two and would create a company with approximately 70 percent of the U.S. sales of commercial cube ice machines. Unless the proposed acquisition is enjoined, competition for commercial cube ice machines will be substantially reduced. The proposed acquisition likely would result in higher prices, lower quality, and less innovation in the commercial cube ice machine market.

4. The United States brings this action to prevent the proposed acquisition of Enodis by Manitowoc because that acquisition would substantially lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

**II. Parties to the Proposed Transaction**

5. Defendant Manitowoc is a Wisconsin corporation with its principal place of business in Manitowoc, Wisconsin. It is a global industrial equipment company that manufacturers commercial ice machines and related equipment, refrigeration equipment, cranes, and ships and other water vessels.

6. In 2007, Manitowoc reported total sales of approximately $4 billion. Manitowoc's sales of commercial ice machines and related equipment in the United States were approximately $152 million in 2007. Sales of commercial ice machines making cube ice accounted for over 70 percent of this total.

7. Enodis is a corporation registered in the United Kingdom and Wales with its principal place of business in London, England. Enodis Corporation, a wholly owned subsidiary of Enodis plc, is a Delaware corporation with its headquarters in New Port Richey, Florida. Through its global food service equipment group, Enodis designs, manufactures, and sells cooking, food storage and preparation equipment, and ice machines and related equipment.

8. Enodis plc's revenues for its 2007 fiscal year were $1.6 billion. North American sales accounted for approximately 70 percent of Enodis plc's total revenue. In its fiscal year 2007, Enodis plc's sales of commercial ice machines and related equipment in the United States were approximately $153 million. Sales of commercial ice machines making cube ice accounted for about 60 percent of this total.

**III. Jurisdiction and Venue**

9. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

10. Defendants develop, produce, distribute, and sell commercial ice machines and other products in the flow of interstate commerce. Defendants' activities in the development, production, distribution, and sale of these products substantially affect interstate commerce. This Court has

subject matter jurisdiction over this action pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1331, 1337(a), and 1345.

11. Defendants sell commercial ice machines and other products, and have consented to venue and personal jurisdiction, in this judicial district. Venue is proper under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

**IV. Trade and Commerce**

*A. The Relevant Product Market*

12. Restaurants, convenience stores, hotels, and other businesses need significant volumes of ice. These businesses usually meet their needs by using commercial ice-making machines located at their places of business. These machines make ice by a continuous cycle of condensation and expansion of a refrigerant through a network of tubing. As the refrigerant converts from a compressed liquid state to become a gas, heat is drawn from a component called an evaporator. Water running over the evaporator surface freezes to form ice that is then harvested by processes specific to the type of ice produced by the machine.

13. The type of ice machine purchased by a customer depends on the type and volume of ice needed. Commercial ice machines are designed to produce either hard ice or soft ice. Hard ice melts slowly and has a higher density and less surface area than soft ice. Hard ice is most often shaped as cubes or dice, half-cubes or half-dice, octagons, or crescent cubes, and is commonly referred to as cube ice. Most customers that serve ice in beverages prefer cube ice because it melts slowly and thus minimizes deterioration in the flavor of the beverage. Soft ice refers to small nuggets or flakes of ice that have a lower density and more surface area than cube ice and, therefore, melt more quickly than cube ice. Soft ice is used in hospitals, which demand a safe, chewable ice for their patients, by grocery stores or other establishments to display seafood produce, and other perishable food, and for industrial cooling applications. The prices of commercial ice machines producing soft ice are often 15 to 20 percent higher than prices of ice machines that produce comparable quantities of cube ice per day.

14. In response to a small but significant post-acquisition increase in the price of commercial machines producing cube ice, customers would not switch to machines that make soft ice in sufficient numbers so as to make such a price increase unprofitable.

15. Customers vary greatly with respect to their daily needs of cubed ice, and they require machines having an appropriate range of capacity to meet those needs. A significant and distinct segment of cube ice machine customers, including sit-down and fast-food restaurants, bars, and convenience stores, purchase commercial machines capable of producing between approximately 300 pounds to 2,000 pounds of cube ice per day (hereinafter, ''commercial cube ice machines'').

16. Although customers can purchase units that produce between approximately 50 and 300 pounds of ice per day, these machines are not able to meet the needs of the large majority of commercial cube ice machine customers. Few customers are likely to meet their needs by purchasing two or more smaller machines because it would be cost-prohibitive to do so. Similarly, large units that produce over 2,000 pounds of ice per day are not substitutes for commercial cube ice machines and are used by customers that need extremely large volumes of ice, such as convention centers, sports arenas, or bagged-ice producers. Because of the attributes of commercial cube ice machines, a small but significant post-acquisition increase in the prices of commercial cube ice machines would not cause customers to switch to other ice machines in sufficient numbers so as to make such a price increase unprofitable.

17. Accordingly, the development, production, distribution, and sale of commercial cube ice machines is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

*B. The Relevant Geographic Market*

18. Commercial ice machines are complex and break down more frequently than other types of food service equipment, and customers often need quick access to replacement machines, parts, and service. Sales of commercial cube ice machines in the United States by manufacturers are primarily made to distributors that supply equipment dealers and repair companies who sell to end-users. In addition, these distributors typically train service representatives regarding repair and maintenance of the commercial ice machines, as well as manage warranty claims. In order to be a competitive supplier of commercial cube ice machines within the United States, manufacturers must have an established network of local distribution, service, and support.

19. A small but significant increase in the prices of commercial cube-ice machines would not cause a sufficient number of customers in the United States to turn to manufacturers of commercial cube ice machines that do not have an established a network of local distribution, service, and support in the United States. As a result, such manufacturers would not be able to constrain such an increase.

20. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

*C. Competitive Effects*

1. Concentration

21. The market for commercial cube ice machines is highly concentrated. Manitowoc and Enodis are the two largest manufacturers of commercial cube ice machines in the United States. Only one other company has demonstrated the ability to produce commercial cube ice machines of the same quality and with similar features as the Manitowoc and Enodis machines and has an established a network of local distribution, service, and support in the United States.

22. Manitowoc accounts for approximately 40 percent of the sales of commercial cube ice machines in the United States. Enodis accounts for approximately 30 percent of the sales of commercial cube ice machines in the United States.

23. The market for commercial cube ice machines would become substantially more concentrated if Manitowoc were to acquire Enodis. Combined, Manitowoc and Enodis would account for approximately 70 percent of the sales of commercial cube ice machines in the United States. Using a measure of market concentration called the Herfindahl-Hirschman Index (''HHP'), which is explained in Appendix A, the proposed transaction would increase the HHI in the market for commercial cube ice machines by approximately 2,400 points to a post-acquisition level of approximately 5,800. This is well in excess of levels that raise significant antitrust concerns.

2. The Proposed Transaction Would Harm Competition in the Market for Commercial Cube Ice Machines.

24. The vigorous and aggressive competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines has benefitted customers. Manitowoc and Enodis compete directly on price, quality, and innovation. Although commercial cube ice machine offerings are differentiated, many commercial cube ice machine customers view the Manitowoc and

Scotsman brands as close substitutes for one another.

25. The proposed acquisition would eliminate the competition between Manitowoc and Enodis and reduce the number of significant manufacturers of commercial cube ice machines in the United States from three to two. Post-merger, Manitowoc would profit by unilaterally raising the price (or reducing quality and innovation) of one or more of the brands it would own. Although Manitowoc could lose some sales in that brand or brands as a result of such a price increase (or decline in quality and innovation), many sales would be diverted to one of the other brands under its ownership. Capturing such diverted sales would make a post-merger price increase (or reduction in quality and innovation) profitable, when it would not have been profitable before the merger.

26. The response of other commercial cube ice machines manufacturers in the United States would not be sufficient to constrain a unilateral exercise of market power by Manitowoc after the acquisition because, they do not have the incentive or the ability, individually or collectively, to do so.

27. Therefore, the proposed acquisition would enable Manitowoc to exercise market power unilaterally, lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States, and lead to higher prices, lower quality, and less innovation for the ultimate consumers of commercial cube ice machines, in violation of Section 7 of the Clayton Act.

**V. Entry**

28. Successful entry or expansion into the development, production, distribution, and sale of commercial cube ice machines would be difficult, time-consuming, and costly. Firms attempting to enter or expand into the commercial cube ice machine market face a combination of distribution, reputation, and technology-related barriers to entry.

29. Customers need quick access to replacement ice machines and parts, and, as a result, the three significant commercial cube ice machine competitors each have a nationwide network of local distributors. These distributors maintain sizeable inventories at locations across the United States so as to meet individual customer demands.

30. Developing a nationwide distribution network would be difficult and time consuming. Finding good distributors would be difficult because each of the current three commercial cube ice machine competitors has contracted exclusively with a large majority of the sizeable and reputable distributors across the United States, and an existing or potential distributor likely would not agree to distribute a commercial ice machine unless it could be assured of a sufficient volume of sales of machines and parts to make a profit on the inventory and other investments it must make. Further, distributors must build relationships with the food service equipment dealers, air-conditioning and refrigeration repair companies, and others that sell commercial ice machines to end-users. Building such relationships would take a significant amount of time and effort.

31. Reputation or brand recognition is another barrier to entry. Because commercial cube ice machines are so important to customers' operations, customers are reluctant to purchase machines from a company that has not established a reputation for making high-quality, durable machines. Establishing a track record of reliable performance takes years.

32. The technology involved in developing and manufacturing a commercial cube ice machine is a third significant entry barrier. The three current competitors produce—and customers expect and demand—commercial cube ice machines that last seven to ten years, that consistently produce ice that is clear and pure under conditions of varying water chemistries and air and water temperatures, and that meet federal and state energy regulations. Designing and manufacturing commercial cube ice machines that have these characteristics and are comparable in quality to the machines of the three current competitors would take years, even for firms that already produce other types of ice machines.

33. Therefore, entry or expansion by any other firm into the commercial cube ice machine market would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Manitowoc acquires Enodis.

**VI. Violations Alleged**

34. The proposed acquisition of Enodis by Manitowoc would substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

35. Unless restrained, the transaction will have the following anticompetitive effects, among others:

a. Actual and potential competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines in the United States will be eliminated;

b. Competition generally in the development, production, distribution, and sale of commercial cube ice machines in the United States will be substantially lessened; and

c. Prices for commercial cube ice machines in the United States likely will increase, the quality of commercial cube ice machines in the United States likely will decline, and innovation relating to commercial cube ice machines in the United States likely will decline.

**VII. Request for Relief**

36. Plaintiff requests that:

a. Manitowoc's proposed acquisition of Enodis be adjudged and decreed to be unlawful and in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Defendants and all persons acting on their behalf be permanently enjoined and restrained from consummating the proposed acquisition or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Manitowoc with the operations of Enodis;

c. Plaintiff be awarded its costs for this action; and

d. Plaintiff receive such other and further relief as the Court deems just and proper.

Respectfully submitted,

For Plaintiff United States of America:

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Dated: October 6, 2008.

**Appendix A—Herfindahl-Hirschman Index Calculations**

''HHI'' means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting

numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 (302 + 302 + 202 + 202 = 2,600). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,000 and 1,800 points are considered to be moderately concentrated and those in which the HHI is in excess of 1,800 points are considered to be highly concentrated. Transactions that increase the HHI by more than 100 points in highly concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the U.S. Department of Justice and the Federal Trade Commission. *See Horizontal Merger Guidelines* § 1.51.

**United States District Court for the District of Columbia**

*United States of America, Plaintiff, v. the Manitowoc Company, Inc., Enodis Plc, and Enodis Corporation, Defendants*

Civil Action No.:

Description: Antitrust

Judge:

Date Stamp:

**Proposed Final Judgment**

Whereas, Plaintiff, the United States of America, filed its Complaint on October 6, 2008, the United States and defendants, The Manitowoc Company, Inc., Enodis plc, and Enodis Corporation, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of law or fact;

And whereas, defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the essence of this Final Judgment is the prompt and certain divestiture of certain rights and assets by the defendants to assure that competition is not substantially lessened;

And whereas, the United States requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to the United States that the divestitures required below can and will be made, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is hereby ordered, adjudged, and decreed:

**I. Jurisdiction**

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against the defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

**II. Definitions**

As used in this Final Judgment:

A. ''Acquirer'' means the entity to whom defendants divest the Divestiture Business.

B. ''Enodis'' means defendant Enodis plc, a corporation registered in England and Wales with its headquarters in London, England, and Enodis Corporation, a Delaware corporation with its headquarters in New Port Richey, Florida, and their successors, assigns, parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

C. ''Manitowoc'' means defendant The Manitowoc Company, Inc., a Wisconsin corporation headquartered in Manitowoc, Wisconsin, its successors, assigns, parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and all of their directors, officers, managers, agents, and employees.

D. ''Closing Date'' means the date on which the transfer of the Divestiture Assets from the defendants to the Acquirer has been completed

E. ''Divestiture Business'' means Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment (such as ice bins, ice dispensers, and water filtration systems) in the United States, including, but not limited to:

(1) Enodis's facility located in Fairfax, South Carolina, which is owned by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(2) Enodis's facility located in Vernon Hills, Illinois, which is leased by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(3) Enodis's facility located in Denver, Colorado, which is owned by Welbilt Corporation (now known as Enodis Corporation);

(4) Enodis's facility located in Pomona, California, which is leased by Scotsman Group, Inc. (now known as Scotsman Group L.L.C.);

(5) All tangible assets used in the Divestiture Business, including, but not limited to, all research and development activities; all manufacturing equipment, tooling and fixed assets, personal property, inventory, office furniture, materials, supplies, and other tangible property (including replacement hardware for the Vernon Hills, Illinois facility that defendants are required to purchase pursuant to Section II, Paragraph E below); all licenses, permits and authorizations issued by any governmental organization relating to the Divestiture Business; all contracts, teaming alTangements, agreements, leases, commitments, certifications, and understandings relating to the Divestiture Business, including, but not limited to, supply and distribution agreements; all customer lists, accounts, and credit records; all repair and performance records and all other records; and

(6) All intangible assets used in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment, including, but not limited to, all contractual rights (to the extent assignable), except for contracts that are not primarily for products or services used by the Divestiture Business; all rights under licenses, permits and authorizations issued by any governmental organization relating to the Divestiture Business; patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names (including any use of the name Scotsman or Ice-O-Matic in the United States), service marks, service names, technical information, computer software and related documentation (including replacement software and related documentation that defendants are required to purchase, and applications and data that defendants are required to transfer to hardware, for the Vernon Hills, Illinois facility pursuant to Section II, Paragraph E below), know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information defendants provide to their own

employees, customers, suppliers, agents or licensees; and all research data concerning historic and current research and development efforts (up to the Closing Date of the divestiture required by section IV or section V), including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments; except that the Divestiture Business shall not include the servers, applications, and related documentation located at the Vernon Hills, Illinois facility that are not used primarily in the operation of the Divestiture Business, provided that within 45 days after the filing of the Complaint in this matter, defendants take all steps necessary (including the purchase of replacement hardware, the purchase, licensing, or provision of software and related documentation, and the transfer of applications and data) to ensure that all information technology operations used by the Divestiture Business are maintained at levels of functionality equivalent or superior to the levels of functionality that exist as of the filing of the Complaint in this matter. Defendants shall also take all steps necessary to purge any data related to the Divestiture Business from hardware and backup media at Vernon Hills that will not be divested under this provision. The Divestiture Business shall not include the tangible or intangible assets comprising the Enodis facility in New Port Richey, Florida, with the exception of the following: (1) Any software, electronically stored information, or documents arising from research and development activities related to the ice machine business; (2) any assets used primarily in the operation of the ice machine business, or (3) any assets necessary for operation of the ice machine business.

F. ''Frimont Business'' means Enodis plc's Frimont S.p.A. business, which produces commercial ice machines for the European market and which the European Commission has required to be divested.

**III. Applicability**

A. This Final Judgment applies to Manitowoc and Enodis, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with section IV and V of this Final Judgment, defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Business, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

**IV. Divestitures**

A. Defendants are ordered and directed, within 150 calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Business in a manner consistent with this Final Judgment to a single Acquirer acceptable to the United States, in its sole discretion after consultation with the European Commission. The United States, in its sole discretion, may agree to one or more extensions of this tune period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Business as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, defendants promptly shall make known, by usual and customary means, the availability of the Divestiture Business. Defendants shall inform any person making inquiry regarding a possible purchase of the Divestiture Business that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Business customarily provided in a due diligence process except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

C. Defendants shall provide the Acquirer and the United States information relating to all personnel involved in development, production, distribution, and sales related to the Divestiture Business to enable the Acquirer to make offers of employment Defendants will not interfere with any negotiations by the Acquirer to employ any employee whose primary responsibility is development, production, distribution, and sales related to the Divestiture Business, and will not interfere with negotiations by the Acquirer to employ the following three Enodis employees who work at the Vernon Hills, Illinois facility: (1) The Senior Business Analyst and Developer; (2) the Unix Administrator and Network Manager; and (3) the Computer Operator and Systems Specialist.

D. Defendants shall permit prospective Acquirers of the Divestiture Business to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Business; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

E. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

F. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Business. Defendants shall not exercise any contractual right to prevent, or otherwise attempt in any way to impede, sales or service representatives that represent Enodis in connection with the Divestiture Business from representing the Acquirer in the sale or servicing of products sold by the Divestiture Business.

G. Enodis shall warrant to the Acquirer that there are no material defects, and Manitowoc shall warrant that it is not aware of any material defects, in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Business, defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Business

H. Notwithstanding anything to the contrary in this Final Judgment, at the option of the Acquirer, defendants shall enter into a transition services agreement for a limited period, with respect to information technology and other support services that are reasonably necessary to operate the Divestiture Business, with the scope, terms and conditions of such agreement being subject to the approval of the United States in its sole discretion.

I. At the option of the Acquirer, defendants shall use their best efforts to procure the assignment of contractual rights referenced in section II, Paragraph E(6) before the Closing Date of the divestiture required by section IV or section V.

J. Defendants shall not interfere with any effort by the Acquirer to negotiate a contract with any supplier of any product purchased by the Divestiture Business as of the filing of the

Complaint in this matter. If requested by the Acquirer:

(1) Defendants shall provide information or documentation relating to controllers, compressors, condensers, valves, and copper strips, or any other product customized for the Divestiture Business by any supplier, that are purchased by the Divestiture Business under contracts as to which the defendants are unable to secure effective assignment to the Acquirer or under contracts that are not primarily for products or services used by the Divestiture Business; and

(2) If the Acquirer is unable, prior to the Closing Date of the divestiture required by section IV or section V, to negotiate and enter into a contract, on commercially reasonable terms with a qualified and reliable supplier, providing for the Acquirer's supply of copper strips, or any other product for which an alternative supplier is not available as of the Closing Date, that have the same characteristics (or, so long as the product allows continuation of the Divestiture Business without disruption, having substantially the same characteristics) and are of the same, or superior, quality as those purchased by the Divestiture Business as of the filing of the Complaint in this matter, defendants shall purchase any such product on behalf of the Acquirer and resell it to the Acquirer at the price specified in defendants' supply contract as of the date of the purchase of the product for the Divestiture Business. This obligation shall expire upon the earlier of (1) the Acquirer or Divestiture Business having negotiated a contract of purchase of any such product meeting the criteria set forth above, (2) the Acquirer notifying defendants in writing that the Divestiture Business no longer intends to purchase any such product under this provision, (3) the expiration of the supply contract in accordance with the terms of that contract as they existed as of the date of the filing of the Complaint in this matter, or (4) one year after the date of the divestiture required under section IV or section V Defendants shall not discuss, provide, disclose, or otherwise make available, directly or indirectly, any information related to such purchases and resales to any defendant personnel involved in production, marketing, distribution, or sales of ice machines.

K. Unless the United States otherwise consents in writing, the divestiture pursuant to section IV, or by trustee appointed pursuant to section V, of this Final Judgment, shall include the entire Divestiture Business, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Business can and will be used by the Acquirer as part of a viable, ongoing business engaged in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States. The divestitures, whether pursuant to section IV or section V of this Final Judgment, (1) shall be made to the acquirer of the Frimont Business; (2) shall be made to an Acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States; and

(3) Shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between the Acquirer and defendants give defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively in the development, production, distribution, and sale of commercial cube ice machines, ice machine parts, and related equipment in the United States.

**V. Appointment of Trustee**

A. If defendants have not divested the Divestiture Business within the time period specified in section IV, Paragraph A, defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States, in consultation with the European Commission to enable selection of a trustee acceptable to both the United States and the European Commission, and approved by the Court to effect the divestiture of the Divestiture Business.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Business. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to section V, Paragraph D of this Final Judgment, the trustee may hire at the cost and expense of defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendants shall not object to a sale by the trustee on any ground other than the trustee's malfeasance or that the Acquirer has not been approved by the European Commission. Any objection by defendants on the ground of the trustee's malfeasance must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under section VI; any objection by defendants based on lack of approval from the European Commission must be conveyed in writing to the United States and the trustee within two (2) business days after the European Commission notifies defendants that it does not approve of the proposed Acquirer.

D. The trustee shall serve at the cost and expense of defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Business and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports

contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Business, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Business.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

**VI. Notice of Proposed Divestiture**

A. Within two (2) business days following execution of a definitive divestiture agreement, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or V of this Final Judgment. If the trustee is responsible, it shall similarly notify defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Business, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V, Paragraph C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under section IV or section V shall not be consummated. Upon objection by defendants under section V, Paragraph C, a divestiture proposed under section V shall not be consummated unless approved by the Court.

**VII. Financing**

Defendants shall not finance all or any part of any purchase made pursuant to section IV or V of this Final Judgment.

**VIII. Hold Separate**

Until the divestiture required by this Final Judgment has been accomplished, defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

**IX. Affidavits**

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under section IV or V, defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Business, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts defendants have taken to solicit buyers for the Divestiture Business, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Business until one year after such divestiture has been completed.

**X. Compliance Inspection**

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division (''DOJ''), including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

(1) Access during defendants' office hours to inspect and copy, or at the option of the United States, to require defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, defendants' officers, employees, or agents, who may have their individual counsel present,

regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by defendants to the United States, defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and defendants mark each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

**XI. No Reaction**

Defendants may not reacquire any part of the Divestiture Business during the term of this Final Judgment.

**XII. Retention of Jurisdiction**

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

**XIII. Expiration of Final Judgment**

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

**XIV. Public Interest Determination**

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date:

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

**United States District Court for the District of Columbia**

*United States of America, Plaintiff, v. The Manitowoc Company, Inc., Enodis PLC, and Enodis Corporation, Defendants*

Civil Action No.:
Description: Antitrust
Judge:
Case: 1:08–cv–01 704
Assigned to: Kennedy, Henry H.
Assign. Date: 10/6/2008
Description: Antitrust

**Competitive Impact Statement**

Plaintiff United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. Nature and Purpose of the Proceeding**

Defendant The Manitowoc Company, Inc. (''Manitowoc'') and Defendant Enodis plc entered into an agreement, dated April 14, 2008, and amended May 27, 2008, pursuant to which Manitowoc agreed to acquire the entire issued and to be issued ordinary share capital of Enodis plc. Manitowoc's final revised offer price was determined on June 30, 2008, when Manitowoc outbid a competing offer or during an auction process implemented by the Panel on Takeovers and Mergers of the United Kingdom.

The United States filed a civil antitrust Complaint on October 6, 2008, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the development, production, distribution, and sale of commercial cube ice machines in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices, lower quality, and less innovation in the commercial cube ice machine market.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (''Hold Separate'') and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants Manitowoc, Enodis plc, and Enodis Corporation (Enodis plc and Enodis Corporation will hereinafter be collectively referred to as ''Enodis'') are required to divest Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States (hereafter, the ''Divestiture Business''). Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Business is operated as a competitively independent, economically viable and ongoing business that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture. The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

**II. Description of the Events Giving Rise to the Alleged Violation**

*A. The Defendants and the Proposed Transaction*

Defendant Manitowoc is a Wisconsin corporation with its principal place of business in Manitowoc, Wisconsin. It is a global industrial equipment company that manufacturers commercial ice machines and related equipment, refrigeration equipment, cranes, and ships and other water vessels. In 2007, Manitowoc reported total sales of approximately $4 billion. Manitowoc's sales of commercial ice machines and related equipment in the United States were approximately $152 million in 2007.

Enodis plc is a corporation registered in the United Kingdom and Wales with its principal place of business in London, England. Enodis Corporation, a wholly owned subsidiary of Enodis plc, is a Delaware corporation with its

headquarters in New Port Richey, Florida. Through its global food service equipment group, Enodis designs, manufactures, and sells cooking, food storage and preparation equipment, and ice machines and related equipment. Enodis plc's revenues for its 2007 fiscal year were $1.6 billion. In its fiscal year 2007, Enodis plc's sales of commercial ice machines and related equipment in the United States were approximately $153 million.

On June 30, 2008, Manitowoc offered to acquire Enodis plc for 328 pence in cash per share, in a transaction valued at $2.7 billion (including assumed debt). The proposed transaction, as initially agreed to by defendants, would substantially lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on October 6, 2008.

*B. The Competitive Effects of the Transaction*

1. Commercial Ice Machines Generally

Restaurants, convenience stores, hotels, and other businesses need significant volumes of ice. These businesses usually meet their needs by using commercial ice-making machines located at their places of business. These machines make ice by a continuous cycle of condensation and expansion of a refrigerant through a network of tubing. As the refrigerant converts from a compressed liquid state to become a gas, heat is drawn from a component called an evaporator. Water running over the evaporator surface freezes to form ice that is then harvested by processes specific to the type of ice produced by the machine.

2. Relevant Product Market

The type of ice machine purchased by a customer depends on the type and volume of ice needed. Commercial ice machines are designed to produce either hard ice or soft ice. Hard ice melts slowly and has a higher density and less surface area than soft ice. Hard ice is most often shaped as cubes or dice, half-cubes or half-dice, octagons, or crescent cubes, and is commonly referred to as cube ice. Most customers that serve ice in beverages prefer cube ice because it melts slowly and thus minimizes deterioration in the flavor of the beverage.

Soft ice refers to small nuggets or flakes of ice that have a lower density and more surface area than cube ice and, therefore, melt more quickly than cube ice. Soft ice is used in hospitals, which demand a safe, chewable ice for their patients, by grocery stores or other establishments to display seafood, produce, and other perishable food, and for industrial cooling applications. The prices of commercial ice machines producing soft ice are often 15 to 20 percent higher than prices of ice machines that produce comparable quantities of cube ice per day.

The Complaint alleges that in response to a small but significant post-acquisition increase in the price of commercial machines producing cube ice, customers would not switch to machines that make soft ice in sufficient numbers so as to make such a price increase unprofitable.

Customers vary greatly with respect to their daily needs of cubed ice, and they require machines having an appropriate range of capacity to meet those needs. A significant and distinct segment of cube ice machine customers, including sit-down and fast-food restaurants, bars, and convenience stores, purchase commercial machines capable of producing between approximately 300 pounds to 2,000 pounds of cube ice per day (hereinafter, ''commercial cube ice machines''). Although customers can purchase units that produce between approximately 50 and 300 pounds of ice per day, these machines are not able to meet the needs of the large majority of commercial cube ice machine customers. Few customers are likely to meet their needs by purchasing two or more smaller machines because it would be cost-prohibitive to do so. Similarly, large units that produce over 2,000 pounds of ice per day are not substitutes for commercial cube ice machines and are used by customers that need extremely large volumes of ice, such as convention centers, sports arenas, or bagged-ice producers.

The Complaint alleges that because of the attributes of commercial cube ice machines, a small but significant post-acquisition increase in the prices of commercial cube ice machines would not cause customers to switch to other ice machines in sufficient numbers so as to make such a price increase unprofitable, and, accordingly, the development, production, distribution, and sale of commercial cube ice machines is a line of commerce and a relevant product market:

3. Relevant Geographic Market

Commercial ice machines are complex and break down more frequently than other types of food service equipment, and customers often need quick access to replacement machines, parts, and service. Sales of commercial cube ice machines in the United States by manufacturers are primarily made to distributors that supply equipment dealers and repair companies who sell to end-users. In addition, these distributors typically train service representatives regarding repair and maintenance of the commercial ice machines, as well as manage warranty claims. In order to be a competitive supplier of commercial cube ice machines within the United States, manufacturers must have an established network of local distribution, service, and support.

The Complaint alleges that a small but significant increase in the prices of commercial cube ice machines would not cause a sufficient number of customers in the United States to turn to manufacturers of commercial cube ice machines that do not have an established a network of local distribution, service, and support in the United States. As a result, such manufacturers would not be able to constrain such an increase. Accordingly, the United States is a relevant geographic market.

4. Competitive Effects

The market for commercial cube ice machines is highly concentrated, and would become substantially more so if Manitowoc were to acquire Enodis. Manitowoc and Enodis are the two largest manufacturers of commercial cube ice machines in the United States. Manitowoc accounts for approximately 40 percent of the sales of commercial cube ice machines in the United States, and Enodis accounts for approximately 30 percent of such sales. Only one other company has demonstrated the ability to produce commercial cube ice machines of the same quality and with similar features as the Manitowoc and Enodis machines and has an established network of local distribution, service, and support in the United States.

Combined, Manitowoc and Enodis would account for approximately 70 percent of the sales of commercial cube ice machines in the United States. Using a measure of market concentration called the Herfindahl-Hirscbman Index (''HHI''), the proposed transaction would increase the HHI in the market for commercial cube ice machines by approximately 2,400 points to a post-acquisition level of approximately 5,500. This is well in excess of levels that raise significant antitrust concerns.

The vigorous and aggressive competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines has benefited customers. Manitowoc and Enodis

compete directly on price, quality, and innovation. Although commercial cube ice machine offerings are differentiated, many commercial cube ice machine customers view the Manitowoc and Scotsman brands as close substitutes for one another.

The proposed acquisition would eliminate the competition between Manitowoc and Enodis and reduce the number of significant manufacturers of commercial cube ice machines in the United States from three to two. The Complaint alleges that post-merger, Manitowoc would profit by unilaterally raising the price (or reducing quality and innovation) of one or more of the brands it would own. Although Manitowoc could lose some sales in that brand or brands as a result of such a price increase (or decline in quality and innovation), many sales would be diverted to one of the other brands under its ownership. Capturing such diverted sales would make a post-merger price increase (or reduction in quality and innovation) profitable, when it would not have been profitable before the merger. The response of other commercial cube ice machines manufacturers in the United States would not be sufficient to constrain a unilateral exercise of market power by Manitowoc after the acquisition because they do not have the incentive or the ability, individually or collectively, to do so. Therefore, the Complaint alleges, the proposed acquisition would enable Manitowoc to exercise market power unilaterally, lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States, and lead to higher prices, lower quality, and less innovation for the ultimate consumers of commercial cube ice machines.

Further, successful entry or expansion into the development, production, distribution, and sale of commercial cube ice machines would be difficult, time-consuming, and costly. Firms attempting to enter or expand into the commercial cube ice machine market face a combination of distribution, reputation, and technology-related barriers to entry.

As noted above, customers need quick access to replacement ice machines and parts, and, as a result, the three significant commercial cube ice machine competitors each have a nationwide network of local distributors. These distributors maintain sizeable inventories at locations across the United States so as meet individual customer demands. The Complaint alleges that developing a nationwide distribution network would be difficult and time consuming. Finding good distributors would be difficult because each of the current three commercial cube ice machine competitors has contracted exclusively with a large majority of the sizeable and reputable distributors across the United States, and an existing or potential distributor likely would not agree to distribute a commercial ice machine unless it could be assured of a sufficient volume of sales of machines and parts to make a profit on the inventory and other investments it must make. Further, distributors must build relationships with the food service equipment dealers, air-conditioning and refrigeration repair companies, and others that sell commercial ice machines to end-users. Building such relationships would take a significant amount of time and effort.

The Complaint alleges that reputation or brand recognition is another barrier to entry. Because commercial cube ice machines are so important to customers' operations, customers are reluctant to purchase machines from a company that has not established a reputation for making high-quality, durable machines. Establishing a track record of reliable performance takes years.

The Complaint alleges that the technology involved in developing and manufacturing a commercial cube ice machine is a third significant entry barrier. The three current competitors produce—and customers expect and demand—commercial cube ice machines that last seven to ten years, that consistently produce ice that is clear and pure under conditions of varying water chemistries and air and water temperatures, and that meet federal and state energy regulations. Designing and manufacturing commercial cube ice machines that have these characteristics and are comparable in quality to the machines of the three current competitors would take years, even for firms that already produce other types of ice machines.

The Complaint alleges that as a result of these barriers to entry, entry or expansion by any other firm into the commercial cube ice machine market would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Manitowoc acquires Enodis.

## III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires defendants, within 150 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business, the Divestiture Business, which comprises Enodis's entire business engaged in the development, production, distribution, and sale of ice machines ice machine parts, and related equipment in the United States. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can arid will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court. which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Described below are select provisions that have been included in the proposed Final Judgment to address special circumstances that exist in this case. Some provisions address complications arising from certain overlaps in divestitures required by the United States and the European Commission. Others address the fact that certain parts of the Divestiture Business must be severed from Enodis's other operations.

### *Selected Provisions of the Proposed Final Judgment*

Enodis has information technology assets located at a data center within its Vernon Hills, Illinois facility that

supports various Enodis businesses, including the Divestiture Business. Definition II(D) of the proposed Final Judgment addresses the need to sever these joint information technology assets, excluding from the list of assets that form the Divestiture Business all hardware, software, and related documentation (''IT assets'') at this data center that is shared between the Divestiture Business and the other Enodis businesses. Defendants are required to divest IT assets used only by the Divestiture Business, and to purchase replacement IT assets for installation at Vernon Hills so that all information technology operations used by the Divestiture Business will be maintained at levels of functionality equivalent or superior to those which exist as of the filing of the Complaint. Definition II(D) also requires that any data or information related to the Divestiture Business will be purged from hardware and backup media that will not be divested. Section IV, Paragraph C of the proposed Final Judgment addresses the Acquirer's right to offer employment to three Enodis employees who provide information technology services and support to various Enodis businesses (including the Divestiture Business) from the Vernon Hills data center, but whose responsibilities do not relate primarily to the Divestiture Business as of the filing of the Complaint. These three employees are qualified to provide services and support that will enable the Acquirer to successfully operate the Vernon Hills data center post-divestiture.

The European Commission has required defendants to divest most of Enodis's worldwide ice machine assets, including the Divestiture Business. As a result of the practical difficulties of splitting between two acquirers rights to certain intellectual property shared by the Divestiture Business and Enodis plc's European Frimont Business, section IV, paragraph K of the proposed Final Judgment requires defendants to sell the Divestiture Business to the acquirer of the Frimont Business. Because the United States and the European Commission must approve the same acquirer, section IV, paragraph A of the proposed Final Judgment provides that the United States will consult with the European Commission in exercising its review of defendants' sale of the Divestiture Business in a manner consistent with the proposed Final Judgment, to an acquirer acceptable to the United States in its sole discretion. As noted above, if the defendants do not divest the Divestiture Business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the European Commission also requires selection of a trustee if the divestiture is not completed within a certain time, section V, paragraph A of the proposed Final Judgment provides that the United States shall select a trustee after consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission.

The United States has agreed to a longer-than-usual divestiture period also because of the overlapping divestitures required by the European Commission. Not only must an Acquirer be approved by the Division and the European Commission, but any potential Acquirer likely must file notices with, and obtain antitrust clearances from, multiple European Union member countries (or file an application seeking the jurisdiction of the European Commission) in connection with the Acquirer's purchase of the Divestiture Business and other Enodis ice machine business assets worldwide. section IV, paragraph A of the proposed Final Judgment thus requires defendants to divest the Divestiture Business within 150 calendar days after the filing of the Complaint, or five (5) calendar days after notice of the entry of the final judgment by the court, whichever is later.[1]

Although contracts used in the Divestiture Business generally must be divested, certain contracts that are unassignable or are not primarily used by the Divestiture Businesses are not required to be divested. Section P1, paragraph J of the proposed Final Judgment addresses the Acquirer's need to find a source for certain input components typically purchased under such contracts. Subsection (1) requires that defendants provide the Acquirer information or documents relating to any product that is customized for the Divestiture Business and purchased under any such contract so the Acquirer has the information it may need to negotiate its own supply contract. Subsection (2) addresses the possibility that the Acquirer may be unable to negotiate its own contracts to purchase at commercially reasonable terms certain products for which alternative suppliers are not available as of the time of the divestiture. Subsection (2) requires defendants for a prescribed period to purchase and resell any such product to the Acquirer at the price specified in defendants' current supply contract. To prevent the sharing of information that could foster coordination, defendants are prohibited from disclosing, directly or indirectly, information concerning such purchases and resales to defendant personnel involved in production, marketing, distribution, or sales of commercial cube ice machines. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States.

[1] Quick divestitures have the clear benefits of restoring premerger competition to the marketplace as soon as possible, and of mitigating the potential dissipation of asset value associated with a lengthy divestiture process. Achieving these benefits are of as much importance in this matter as in any other, and section IV, paragraph A of the proposed Final Judgment requires defendants to use their best efforts to divest the Divestiture Business as expeditiously as possible. In this matter, and in most other matters, the United States. in its sole discretion, may agree to one or more extensions of the divestiture period not to exceed 60 calendar days in total.

## IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

## V. Procedures Available for Modification of the Proposed Final Judgment

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this

Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 1401 H St., NW., Suite 3000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Manitowoc's acquisition of Enodis plc. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the development, production, distribution, and sale of commercial cube ice machines in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint, while allowing the non-problematic aspects of the transaction to go forward.

## VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e)(l). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States* v. *SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, *56 F.3d at 1458–62.* With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Microsoft*, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.*, 152 F. Supp. 2d 37,40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States*, 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for

[2] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[3] Cf *BNS*, 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft*, 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in SBC Communications, courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). The language written into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[T]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' *119 Cong. Rec. 24,598* (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns*, 489 F. Supp.2d at 11.[4]

[4] See *United States* v. *Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.*, 1977–1 Trade Cas. (CCH) § 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

## VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: October 6, 2008.

Respectfully submitted,

Helena M. Gardner, Esquire,
Christine Hill, Esquire
*(D.C. Bar #461048), United States Department of Justice, Antitrust Division, Litigation II Section, 1401 H Street, NW., Suite 3000, Washington, DC 20530, (202) 514–8518.*

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# Part IV

# Department of Transportation

## Federal Railroad Administration

**49 CFR Part 232**

**Electronically Controlled Pneumatic Brake Systems; Final Rule**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 232**

**[Docket No. FRA–2006–26175, Notice No. 4]**

**RIN 2130–AB84**

## Electronically Controlled Pneumatic Brake Systems

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** FRA is issuing revisions to the regulations governing freight power brakes and equipment by adding a new subpart addressing electronically controlled pneumatic (ECP) brake systems. The revisions are designed to provide for and encourage the safe implementation and use of ECP brake system technologies. These revisions contains specific requirements relating to design, interoperability, training, inspection, testing, handling defective equipment, and periodic maintenance related to ECP brake systems. The final rule also identifies provisions of the existing regulations and statutes where FRA is proposing to provide flexibility to facilitate the voluntary adoption of this advanced brake system technology.

**DATES:** This final rule is effective December 15, 2008. Petitions for reconsideration must be received on or before December 15, 2008. Petitions received after that date will be considered to the extent possible without incurring additional expenses or delays. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of December 15, 2008.

**ADDRESSES:** *Petitions for reconsideration:* Any petitions for reconsideration related to Docket No. FRA–2006–26175, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* 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.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all petitions received will be posted without change to *http://www.regulations.gov* including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted petitions, comments, or materials.

*Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or to 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.

**FOR FURTHER INFORMATION CONTACT:** James Wilson, Office of Safety Assurance and Compliance, Motive Power and Equipment Division, RRS–14, Mail Stop 25, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone 202–493–6259); or Jason Schlosberg, Trial Attorney, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone 202–493–6032).

**SUPPLEMENTARY INFORMATION:**

### I. Background

Since the inception of automatic air brakes by George Westinghouse in the 1870s, brake signal propagation has been limited by the nature of air and the speed of sound. Other adjustments have sought to alleviate this deficiency, but have left the basic system unaltered. As early as 1990, the Association of American Railroads (AAR) began investigating more advanced braking concepts for freight railroads, including ECP brake systems, which promise to radically improve brake propagation by using electrical transmissions of the braking signal through the train while still using air pressure in the brake cylinder to apply the force of the brake shoe against the wheel. During the past 15 years, ECP brake technology has progressed rapidly and has been field tested and used on trains operating in revenue service by various railroads.

FRA has been an active and consistent advocate of ECP brake system implementation. In 1997, FRA participated in an AAR initiative to develop ECP brake standards and in 1999, FRA funded, through Transportation Technology Center, Inc., a Failure Modes, Effects, and Criticality Analysis (FMECA) of ECP brake systems based on the AAR standards. FRA also took part in programs to develop and enhance advanced components for ECP brake systems.

To further assess the benefits and costs of ECP brakes for the U.S. rail freight industry, FRA contracted Booz Allen Hamilton (BAH) in 2005 to conduct a study. BAH engaged an expert panel consisting of principle stakeholders in ECP brake technology conversion to participate in the study. The expert panel made various conclusions relating to technological standards, safety, and efficiency. In addition, the final BAH report provided a comprehensive analysis and comparison of ECP and conventional air brake systems. On August 17, 2006, FRA announced in a press release its intention to issue a notice of proposed rulemaking to revise the federal brake safety standards to encourage railroads to invest in and deploy ECP brake technology. In the press release, FRA encouraged railroads to submit ECP brake implementation plans before the proposed rule changes were completed.

In a petition dated November 15, 2006, and filed November 21, 2006, two railroads—the BNSF Railway Company (BNSF) and the Norfolk Southern Corporation (NS)—jointly requested that FRA waive various sections in parts 229 and 232 as it relates to those railroads' operation of ECP brake pilot trains. *See* Docket No. FRA–2006–26435. FRA held a public fact-finding hearing on this matter on January 16, 2007, featuring testimony from representatives of the petitioners, air brake manufacturers, and labor unions and granted a conditional waiver on March 21, 2007. *See id.*

On September 4, 2007, FRA published a Notice of Proposed Rulemaking (NPRM) containing proposed revisions to the power brake regulation. *See* 72 FR 50820. In the NPRM, FRA proposed revisions to the regulations governing freight power brakes and equipment by adding a new subpart addressing ECP brake systems. The proposed revisions were designed to provide for and encourage the safe implementation and use of ECP brake system technologies. The proposed revisions contained specific requirements relating to design, interoperability, training, inspection, testing, handling defective equipment, and periodic maintenance related to ECP brake systems. The proposed rule also identified provisions of the existing regulations and statutes where FRA believed flexibility to facilitate the introduction of this advanced brake system technology was necessary.

Following publication of the NPRM in the **Federal Register**, FRA held a public

hearing in Washington, DC on October 4, 2007, and a public hearing in conjunction with a public technical roundtable in the Chicago, IL area on October 19, 2007. The purpose of the hearings was to receive oral comments regarding the specific provisions contained in the proposed rule and to receive evidence and to develop findings to determine whether FRA should invoke its discretionary authority under 49 U.S.C. 20306 to provide a limited exemption from § 20303 for freight trains and freight cars operating with ECP brake systems. Section 20303 requires operators to transport rail vehicles with defective or insecure equipment ''from the place at which the defect or insecurity was first discovered to the nearest available place at which the repairs can be made'' to avoid incurring civil penalties related to such movement.

The hearings were attended by numerous railroads, organizations representing railroads, labor organizations, and brake manufacturers. Although the comment period officially closed November 5, 2007, FRA continued to receive comments on the NPRM into January 2008. FRA received substantial oral and written testimony at the hearings and written comments to the NPRM from the following organizations, railroads, and brake manufacturers, listed in alphabetical order:

- American Association for Justice (AAJ).
- Association of American Railroads (AAR).
- Brotherhood of Locomotive Engineers and Trainmen (BLET).
- Brotherhood Railway Carmen Division, Transportation-Communications International Union (BRC).
- General Electric Transportation and General Rail Services (collectively, GE).
- New York Airbrake (NYAB).
- Norfolk Southern Corporation (NS).
- Transport Workers Union of America, AFL–CIO (TWU).
- Union Pacific Railroad Company (UP).
- United Transportation Union (UTU).
- Wabtec Railway Electronics (Wabtec).

UTU supports and incorporates by reference the comments submitted by BLET, TCU, TWU, and its other labor representatives.

FRA carefully considered all the information, data and proposals submitted in relation to Docket No. FRA–2006–26175 when developing this final rule. In addition to the preceding information, FRA's knowledge and experience with enforcing the existing power brake regulations were also relied upon when developing this final rule. FRA will address and summarize all comments in the section-by-section analysis below and elsewhere as appropriate or necessary.

Based on the oral and written comments submitted at the hearing and in the docket to this proceeding, FRA makes the following findings: (1) Safety is not compromised by allowing a train operating with ECP brakes and having a minimal number of ineffective or inoperative defective brakes to travel to its destination, not to exceed 3,500 miles, without any additional intermediate brake inspections; (2) the safety hazards caused by placing cars equipped with ECP brakes into a train with an incompatible brake system are no different than the hazards caused by placing a car equipped with conventional brakes with ineffective or inoperative brakes into a train operated with conventional brakes; (3) safety is not compromised by allowing a train operated with ECP brakes with at least 85 percent effective and operative brakes to haul a car with defective non-brake safety appliances to the nearest or nearest forward repair location; and (4) requiring strict compliance with the movement for repair provision contained in 49 U.S.C. 20303 would constitute a significant disincentive to the implementation and use of ECP brake technologies. Based on these findings, FRA has elected to utilize its discretionary authority provided under 49 U.S.C. 20306 to provide a limited exemption for freight trains and freight cars operating with ECP brake systems from the requirements contained in 49 U.S.C. 20303.

Subsequent to the close of the comment period in this proceeding, AAR modified two of its existing ECP brake standards, S–4200 and S–4210, and continued to develop standards regarding hardware and software configuration management issues for ECP brake systems. AAR sought comments from its members concerning a proposed standard S–4270 addressing the configuration management issues. As FRA is interested in incorporating by reference the most current standards into the final rule, FRA reopened the comment period on April 18, 2008, for an additional fifteen (15) days for the limited purpose of receiving comments on revised standards S–4200 and S–4210 and newly developed draft S–4270. FRA continues to believe that reopening the comment period was the most efficient method of ensuring that the most current industry standards were included in this final rule.

The NPRM and this subsequent notice indicated that FRA intended to include S–4270 in the final rule if it was finalized by AAR with sufficient time for inclusion and if its final version remained substantially similar to the draft standard reference in the notice reopening the comment periods. Ultimately, AAR adopted S–4270 without any changes.

## II. Conventional Brake Operations

While the basic operational concept of the automatic air brake system, originally conceived by George Westinghouse in the 1870s, remains the same, it has seen continuous improvement in practice. An air compressor in the locomotive charges a main reservoir to about 140 pounds per square inch (psi). With controls located in the locomotive, the locomotive engineer uses the main reservoir to charge the brake pipe—a 1¼ inch diameter pipe—that runs the length of the train and is connected between cars with hoses. The brake pipe's compressed air—used as the communication medium to signal brake operations and the power source for braking action—then charges each car's two-compartment reservoir to a pressure of 90 psi. Braking occurs through a reduction of air pressure in the brake pipe, which signals the valves on each car to direct compressed air from the reservoir on each car to its respective brake cylinder for an application of brakes. When air pressure is supplied to the brake cylinder—which is connected to a series of rods and levers that apply and release the brakes—the resulting force presses the brake shoes against the wheel, retarding the car's speed.

While brake applications were initially directed by George Westinghouse's triple valve, modern applications use a control valve, which directs air from the brake pipe into the air reservoir when air pressure is rising in the brake pipe in order to charge the auxiliary and emergency reservoir and be ready for a brake application. To perform a brake application, the locomotive automatic brake valve reduces air pressure in the brake pipe by exhausting air, causing the car's control valve to direct air from the auxiliary reservoir into the brake cylinder. The increase in air pressure to the brake cylinder is approximately 2½ times the drop in brake pipe pressure. A 26 psi reduction in brake pipe pressure is equal to a full service brake application on a fully charged brake pipe, and should result in a brake cylinder pressure adequate to achieve a full service braking effort (brake force). While the control valve is directing air

into the brake cylinder, or holding air in the brake cylinder, it is unable to recharge the auxiliary reservoir on each car. The engineer can apply the brakes in increments, of a few psi at a time, go directly to a full service application, or initiate an emergency application of the brakes.

Unlike a brake application, the incremental release of brakes on a typical freight train operating in direct release cannot be accomplished. Brakes can only be fully released, called a direct release, and only with the brakes released can the auxiliary reservoirs then begin to recharge. Brake applications are possible, but are more complicated, from undercharged brake pipe and air reservoirs. Recharging takes more time for a longer train, because the air has to be sent down the length of the train's brake pipe—which can be up to a mile and a half. In addition, on extremely long trains, it is often difficult to fully charge the brake pipe due to small air leaks throughout the brake pipe and cold weather.

Brake pipe pressure can be measured by an end-of-train (EOT) device, which is pneumatically connected to the rear of a train equipped with conventional pneumatic brakes and sends signals (EOT Beacon) via radio indicating the brake pipe pressure to the lead locomotive. Current Federal regulations specify the design and performance standards for both one-way and two-way EOT devices. *See* Part 232, subpart E. Both EOT device designs comprise of a rear unit pneumatically connected to the rear of the train's last car that transmits an EOT Beacon to a an EOT Head End Unit—a device located in the cab of the lead locomotive displaying the brake pipe pressure of the rear car to the locomotive engineer. The two-way EOT device also has the capability to transmit an electronic signal from the locomotive to the rear end unit to initiate an emergency brake application by venting brake pipe pressure to atmosphere at the rear end unit.

An emergency brake application can be initiated in several ways. The locomotive engineer can initiate the application by moving the brake handle to the emergency position, which depletes brake pipe pressure to zero at a faster rate than the service application by exhausting brake pipe air pressure at the locomotive. Emergency brake applications can also be initiated by opening the conductor's valve, located in the cab of the locomotive, or by a break-in-two, where the train separates between cars and the brake pipe hoses separate, thereby venting brake pipe pressure to zero. While performing an emergency brake application from the locomotive, a locomotive engineer can also use the two-way EOT device to initiate an emergency brake application at the rear of the train. This permits the emergency application to be simultaneously initiated from both the front and rear of the trains and ensures that the brakes on the cars at the rear of the train apply in the event a brake pipe blockage occurs.

**III. ECP Brake Operations**

As early as 1990, AAR began investigating a more advanced braking concept for freight railroads, the ECP brake system. The ECP brake system radically improves the operation of the automatic air brake by using electrical transmissions to signal the application and release of brakes on each car in a train while still using compressed air to supply the air reservoirs on each car, which will be used to pressurize the brake cylinders to apply the force of the brake shoes against the wheels. ECP brakes also greatly simplify the brake system by eliminating multiple pneumatic valves used by conventional brakes and replacing them with printed circuit boards, each with a microprocessor, one electrically activated application valve, and one electrically activated release valve, with feedback on brake cylinder pressure for uniform control.

ECP brake technology requires equipping locomotives and cars with special valves and electronic equipment that are unique to the operation of ECP brakes. While this system still requires a brake pipe to supply compressed air from the locomotive to each car's reservoir in a train, there are currently two known methods to send the electronic signal for ECP brake operations from the locomotive to each car in the train. These methods include using a hard wire electrical cable running the length of the train or a radio-based technology requiring a transmitter and a receiver installed on the cars and locomotives. At this time, it appears that the railroad industry has chosen to use a cable-based system for ECP brake operation.

ECP brake systems still employ the automatic air brake system's basic concept where the locomotive supplies compressed air to each car's reservoir via the conventional brake pipe. Each car's brake valve reacts to a signal to apply the brakes by directing compressed air from the car's reservoir to the brake cylinder or to release the brakes by releasing air from the brake cylinder. The similarities between the conventional pneumatic and ECP brake systems end here. Instead of utilizing reductions and increases of the brake pipe pressure to convey application and release signals to each car in the train, ECP brake technology uses electronic signals, resulting in an almost instantaneous application and release of brakes on each car in the entire train. Since the brake pipe pressure no longer serves as the communication medium in ECP braked trains, the brake pipe is constantly being supplied or charged with compressed air from the locomotive regardless of whether the brakes are applied or released. In addition, ECP brake-equipped trains offer graduated release, where a partial brake release command provides a partial, proportional brake release.

The basic ECP brake system is controlled from the Head End Unit (HEU) and each car is equipped with a Car Control Device (CCD), an electronic control device that replaces the function of the conventional pneumatic control valve. The CCD acknowledges and interprets the electronic signals from the HEU and controls the car's service and emergency braking functions. The CCD controls charging the car's air reservoir and also has diagnostic capabilities to send a warning signal to the locomotive in the event any component fails to appropriately respond to a braking command. Each CCD has a unique electronic address located in the Car ID Module, which is keyed to a car's reporting mark and number.

Each car connects to the locomotive via special connectors and junction boxes. More specifically, an ECP brake-equipped train's train line cable—a two-conductor electric cable (#8 A–WG and a shield)—connects the locomotive and cars and carries train line power to operate all CCDs and the ECP brake system's end-of-train (ECP–EOT) device and communicates network signals via the power voltage. A Power Supply Controller (PSC)—mounted within the locomotive and providing 230 VDC of electricity—interfaces with the train line cable's communication network, provides power to all connected CCDs and ECP–EOT devices, and controls the train line power supply as commanded by the HEU. Under the AAR standards, a single power supply shall be capable of supplying power to an ECP brake-equipped train consisting of at least 160 CCDs and an ECP–EOT device.

Under the existing regulations, the conventional pneumatic brake system's EOT device can lose communication for 16 minutes and 30 seconds before the locomotive engineer is alerted. *See* 49 CFR 232.407(g). After the message is displayed, the engineer must restrict the speed of the train to 30 mph or stop the train if a defined heavy grade is involved. Per the regulations, railroads

must calibrate each conventional two-way EOT device every 365 days and incur additional maintenance and cost expenses while replacing its batteries.

By contrast, an ECP–EOT device uniquely monitors both brake pipe pressure and operating voltages and sends an EOT Beacon every second from its rear unit to its HEU on the controlling locomotive. The HEU will initiate a full service brake application should brake pipe pressure fall below 50 psi or initiate an emergency brake application should a communication loss occur for five consecutive seconds or if there is a break in the train line electrical cable. An ECP–EOT device does not require calibration and its battery, only a back-up for the computer, is charged by the train line cable and is much lighter in weight than the conventional EOT device battery. Physically the last network node in the train, the ECP–EOT device also contains an electronic train line cable circuit—a 50 ohm resistor in series with 0.47 micro-farad capacitor—and must be connected to the network and transmit status messages to the HEU before the train line cable can be initially powered.

ECP brake systems have the great advantage of real-time monitoring of the brake system's health. In normal operation, the HEU transmits a message/status down the train line cable to each car. If an individual car's brakes do not respond properly to the HEU's brake command, or if air pressures are not within the specified limits for operation, a message indicating the problem and the applicable car number is sent back to the HEU, which in turn notifies the locomotive engineer of the problem. The ECP brake system can identify various faults, including, but not limited to: low brake pipe pressure; low reservoir pressure; low train line cable voltage; low battery charge; incorrect brake cylinder pressure; and offline or inoperative CCDs.

Emergency or full service brake applications automatically occur when the ECP brake system's software detects certain faults. For instance, if the HEU detects that the percentage of operative brakes falls below 85 percent, a full service brake application will automatically occur. In addition, the brakes will automatically apply when the following occurs: (1) Two CCD's or the ECP–EOT report a ''Critical Loss'' within 5 seconds; (2) the train line cable indicates low voltage with less than 90 percent operative brakes; (3) the ECP–EOT reports a low battery charge; (4) the train moves during set-up; (5) the train line cable becomes disconnected; or (6) the train exceeds 20 mph in Switch Mode. Under the AAR standards, the ECP brake system shall also have a pneumatic back-up system on each car for an emergency brake application in the event of a vented brake pipe or a train separation. These features preserve and exceed the fail safe features of conventional pneumatic brake systems.

## IV. Interoperability

Due to control methodology differences, ECP brake systems are not functionally compatible with conventional pneumatic air brake systems. For instance, while conventional pneumatic air brake systems command a brake application by reducing the air pressure in the brake pipe, ECP brake systems command a brake application through a digital communications link transmitted on the electrical train line cable.

Manufacturers have developed application strategies to address issues relating to car and locomotive fleet interchangeability. In particular, they have proposed three major schemes of ECP brake design: stand-alone systems using only ECP brakes; overlay (dual mode) systems capable of operating in either conventional or ECP brake mode; and emulation systems, also capable of operating in either conventional or ECP brake mode.

Since cars with stand-alone ECP brake systems do not include a fully pneumatic brake control valve, they are incompatible with conventionally braked cars and must be operated in train sets depending solely upon ECP brakes. Cars using stand-alone ECP brake systems cannot intermix in the same train with cars using conventional pneumatic brakes unless (1) the train uses ECP brakes and those cars using conventional pneumatic brakes are transported as cars with inoperative brakes or (2) the train uses conventional pneumatic brakes and the cars using ECP brakes are transported as cars with inoperative brakes. While the stand-alone ECP brake system is the least expensive alternative of the three design types, its incompatibility with conventional pneumatic brake systems requires train segregation, potentially posing significant operational problems until the entire car fleet is converted to ECP brakes.

Overlay configurations—cars equipped with both ECP CCDs and conventional pneumatic control valve portions—allow cars to operate with either ECP or conventional pneumatic brakes. To operate in ECP brake mode, compatible ECP equipment must be installed on the locomotive as well as on the freight car. While an overlay system's dual mode capability provides significant flexibility, railroad operators must purchase, install, and maintain equipment to support both types of brake systems for as long as dual mode capability is required.

Emulation configurations use a CCD capable of operating in either ECP or conventional mode without requiring conventional pneumatic controls. One manufacturer has provided an emulation ECP brake valve that monitors both the digital communications cable and the brake pipe for a brake command. If an electrical signal is present, the ECP brake valve operates in ECP brake mode. If the electrical brake command signal is not present, then the valve will monitor the changes in the brake pipe pressure like a conventional pneumatic control valve and the CCD will use a software program to emulate the function and response of a conventional pneumatic valve. An emulation ECP brake system can be operated in any train with any mix of emulation ECP and conventional brake systems. In a mixed train, the emulation ECP brake system will monitor the brake pipe for pressure changes and set up brake cylinder pressure like a conventional pneumatic valve.

In the NPRM, FRA did not propose any rules uniquely regulating trains or cars equipped with emulation ECP brake systems, but sought comments on whether or how it should regulate such systems differently than what was proposed. According to NYAB and Wabtec (collectively, the brake manufacturers), the current AAR standards do not require a pneumatic emulation mode, and this function should not be subject to FRA regulation. In the event future releases of the S–4200 specifications add pneumatic emulation as a requirement, the brake manufacturers suggest that the need for FRA regulation can be addressed at that time. FRA concurs and the final rule does not include regulations uniquely affecting emulation ECP brake systems.

Manufacturers have also addressed ECP brake compatibility with locomotives equipped with conventional pneumatic brakes, which must be equipped with an HEU unit to operate the brakes on cars equipped with ECP brakes. For instance, one manufacturer has developed a portable unit that will allow a locomotive lacking an ECP brake HEU to operate a train equipped with ECP brakes by converting the air pressure changes in the brake pipe to digital command signals that are transmitted to the freight cars through the electrical train line cable. The locomotive engineer operates the brakes with the conventional automatic brake valve in the control cab. The brakes,

however, will respond instantaneously and provide all of the benefits of an ECP brake system. While FRA recognizes that the technology for such a portable unit is in development and may provide a possible solution to the technological transition, it is not addressed or authorized by this final rule and the incorporated AAR standards.

**V. Advantages of ECP Brakes Over Conventional Pneumatic Brakes**

ECP brake technology overcomes many of the physical limitations inherent in conventional pneumatic brake technology. Field testing of AAR compliant ECP brake systems over the past decade has not revealed any indication of a catastrophic event that could be caused by an ECP brake system malfunctioning. With a high level of confidence, the ECP brake stake holders support the implementation of ECP brake systems on the Nation's railroads. FRA concludes that the advantages of ECP brake technology will significantly improve the safety and the performance of train operations. Examples of such benefits include better train handling through simultaneous brake applications, continuous brake pipe charging, and graduated brake operation. Derailments are expected to decline significantly. ECP brake benefits also include electronic train management, improved performance, and real time diagnostics of the train's brake system.

*A. Simultaneous Brake Application*

The conventional pneumatic brake system uses compressed air as the source for braking power and as the medium for communicating brake application and release commands and communicates the brake commands by changing brake pipe pressure through the use of the locomotive's automatic brake valve. These commands begin at the front of the train and propagate to the rear of the train at the speed of the air pressure moving from car to car. This slow propagation of the brake command contributes to uneven braking, excessive in-train and run-in forces, train handling challenges, longer stopping distances, safety risks of prematurely depleting air brake reservoirs, and a corresponding low brake rate until all cars in the train receive and fully respond to the brake command. FRA recognizes that the slow application and release of brakes in a train, causes excessive in-train forces, which have the potential to cause derailments when they occur in curves, cross-overs, or when heavier cars are placed at the rear of the train or after empty cars. When the brakes on the rear of the train release much more slowly than the brakes on the front of the train, the potential for a ''string-line'' derailment—where the train stretches out until one or more wheels are lifted off the inside rail of a curve—increases.

The ECP brake system reduces these problems by enabling cars to brake simultaneously at the command of an electronic signal. The electronic signal's speed ensures an instantaneous, simultaneous, and even activation of each car's brake valves, significantly reducing braking distances—40 to 60 percent for the longest trains—and minimizing the consequences of collisions or derailments by reducing the collision speed and slowing the non-derailed portion of the train.

*B. Continuous Brake Pipe Charging*

Propagating a brake command signal through the reduction or increase of air pressure in the brake pipe represents a significant limitation of conventional pneumatic brakes. The same brake pipe air used to propagate brake commands also charges reservoirs on each freight car. As a result, the brake pipe must be fully charged to restore full braking capacity to depleted reservoirs. Partially depleted air from the brake pipe, which occurs during the initial stage of braking, prohibits repeat applications of brakes until the brake pipe can be recharged. A brake pipe can only be recharged once the brakes have been fully released. This characteristic of conventional pneumatic brakes contributes to the risk of run-away trains caused by prematurely depleted brake pipe pressure, particularly on steep grades.

The ECP brake system reduces this risk by continuously charging the brake pipe. Since ECP brakes do not use the brake pipe as a brake command medium, the brake pipe is constantly being charged, allowing the locomotive engineer to operate the brake system more aggressively. With ECP brake systems, it is unnecessary to apply hand brakes on steep grades to recharge the brake pipe after the train stops on the grade.

*C. Graduated Brake Application and Release*

The conventional pneumatic brake system's inability to operate freight trains in graduated release has long hampered train operations and has increased fuel consumption. The conventional pneumatic brake system can only operate in direct release, preventing locomotive engineers from reducing the braking effort without completely releasing and resetting the brakes. In other words, after a direct release brake application with a conventional pneumatic brake system, braking effort can be increased but not decreased without fully releasing the brakes. In many cases, direct release leads to unnecessary train stops or insufficient initial brake applications. ECP brake systems overcome this deficiency by operating in graduated release, which enables the operator to reduce braking effort to a lower level after making a brake application without fully releasing the brakes. As a result, the operator can accurately adjust the braking level as each situation requires, eliminating the stops required to recharge and reset the brakes after excessive brake applications and prior to negotiating hills and valleys.

*D. Train Management*

The use of a train line cable allows real-time self-diagnostic functions to be incorporated in the brake system. The initial check of brake system conditions on each car and continuous monitoring of each car's braking functions provides immediate communication to the locomotive engineer of certain brake failures. The continuous monitoring of each car's braking functions and real-time diagnostics of the train's brake system is a significant advantage to the locomotive engineer for the operation of the train. These technical benefits also justify elimination of some of the currently required physical inspections of the train's brake system and support regulatory change to operate cars with non-functioning brakes out of the initial terminal. When the ECP brake system diagnostics detect a serious problem, including when the brake pipe pressure falls below 50 psi, the ECP brake system will automatically command a penalty brake application. ECP brake systems also eliminate the conventional pneumatic brake system's inability to apply all brakes in the train when there is a blockage in the brake pipe, which is handled through the use of a two-way EOT telemetry device not required by all trains. This failure will not affect brake applications in ECP brake systems, because each car is provided a braking command through a train line cable, not solely through the reduction of brake pipe pressure, which would not be propagated through the consist if the brake pipe is blocked. Therefore, ECP brake systems incorporate features that make them inherently safer than conventional pneumatic brakes. Using sensor-based technology to maintain a continuous feedback loop on train condition for the crew and any centralized monitoring, the electrical communication cable network can also serve as a platform for the gradual

addition of other train performance monitoring and management controls, including distributed power locomotive control, hand brake on/off detection system, automatic activation and release of hand brakes, hot bearing detection, and truck oscillation and vibration. These and other train management features will increase the reliability and overall safety of train operations.

*E. Improved Performance*

Ultimately, ECP brake technology also provides improved performance, which will contribute to safer train operations and significant cost savings over time. Since trains operated with ECP brakes can operate in graduated release, instead of direct release, fuel will not be wasted while pulling trains against a heavy brake application. Further, because all of the cars' ECP brakes release simultaneously, fuel will not be wasted on initial start-ups and power-ups after a brake release.

Operations utilizing ECP brake systems also promise increased average train speeds and decreased trip times. ECP brake systems allow the locomotive engineer to modulate the brake applications in territories with descending grades, thus increasing overall trip average speeds and reaching destinations sooner. While the slow release of the rear cars' brakes on conventional pneumatic braked trains cause drag, the brakes on ECP brake-equipped trains release simultaneously, improving start-up and acceleration times. Further, due to their shorter stopping distances, trains equipped solely with ECP brake systems may potentially permit higher train speeds within existing signal spacing, which will increase average system velocity, or permit use of shorter ''blocks'' between signals, facilitating greater system capacity.

The instantaneous application and release of ECP brakes will result in more uniform braking, thus improving wheel wear and increasing brake shoe life. In a conventional pneumatically braked train, the brake pipe gradient and slower response time causes the first third of the train's cars to provide the majority of the braking action, thus applying additional pressure and heat on those cars' wheels. Since ECP brake systems provide instantaneous braking on all cars, such pressure will be more uniformly distributed along the train, thus eliminating the uneven braking force on the wheels of those leading cars. The ECP brake system also self-monitors each car's brake cylinder pressure and maintains the prescribed pressure, thus reducing the potential for creating shelling and flat spots on wheels.

Due to minimized wheel defects, and their accompanying vibrations, freight cars and brake components will enjoy increased life. Further, instantaneous braking will also prevent draft gear assemblies from receiving the constant pressure caused by trains equipped with conventional pneumatic brake systems and will reduce lading damage by eliminating slack action and in-train forces caused by uneven braking. ECP brake systems will also reduce the number of brake parts and rubber diaphragms required by conventional pneumatic brake systems.

## VI. Standards, Approval, and Testing

During the past 18 years, FRA has monitored the progression of ECP brake technology and has observed field testing on various revenue trains, both freight and passenger. In 1997, FRA participated in an AAR initiative to develop ECP brake standards and in 1999, FRA funded, through the Transportation Technology Center, Inc., a FMECA of the ECP brake system based on AAR's *Standards and Recommended Practices,* S–4200 Series. FRA also participated in programs to develop and enhance advanced components for ECP brake systems. After all of these efforts, FRA has determined that the AAR S–4200 Series of standards are appropriate substantively and legally for incorporation by reference in this rule and that the AAR Air Brake Systems Committee is an appropriate vehicle to rely upon in the implementation of ECP brake technology for this rule. FRA acknowledges that ECP brakes are an attractive, viable, and enabling technology with the potential to substantially improve the operational efficiency of trains and that by complying with AAR Standard S–4200, ECP braked trains offer significant safety and efficiency benefits in freight train handling, car maintenance, fuel savings, network capacity, self-monitoring, and fail-safe operation.

AAR administers the existing industry ECP brake standards through its Air Brake Systems Committee—consisting of representatives from the major railroads, brake manufacturers, and FRA—which requires demonstrated proof of compatibility, safety, and reliability of air brake systems to receive AAR approval. FRA is satisfied that the existing AAR S–4200 Series specifications, AAR approval procedures, and continuing oversight by the AAR Air Brake Systems Committee will best ensure the safety and reliability of ECP brake systems. An ECP brake monitoring system complying with AAR Standard S–4200 Series increases safety by communicating information on the location and quantity of defective equipment and by providing for the safe movement of equipment over longer distances and periods of time.

*A. AAR Standards and Approval Process*

In order to assure the safety and the interoperability of ECP brake system designs, AAR developed the S–4200 Series of standards. The first five standards (S–4200, S–4210, S–4220, S–4230, and S–4250)—issued in 1999 and updated in 2002, 2004, 2006, and 2007—specify the functional, operational, and interface requirements for cable-based ECP brake systems. AAR issued two additional standards in January 2007, specifying ECP brake equipment approval procedures (S–4240) and interoperability testing requirements (S–4260). In April 2008, AAR issued a standard for hardware and software configuration management plans (S–4270). At this time, AAR has not completed specifications for radio-based ECP brakes, which it considers technically immature and unsuitable. The purposes of the standards are to ensure that AAR-approved electronic brake systems are interoperable between different manufacturers and meet high standards of safety and reliability. The analysis of the S–4200 Series of standards indicates that the performance specifications for the cable-based ECP brake concept are complete.

The AAR Manual of Standards and Recommended Practices (MSRP) contain the following standards for cable-based ECP brake systems:

- S–4200, ECP Cable-Based Brake Systems—Performance requirements;
- S–4210, ECP Cable-Based Brake System Cable, Connectors, and Junctions Boxes—Performance Specifications;
- S–4220, ECP Cable-Based Brake DC Power Supply—Performance Specification;
- S–4230, Intratrain Communication Specification for Cable-Based Freight Train Control System;
- S–4240, ECP Brake Equipment—Approval Procedure;
- S–4250, Performance Requirements for ITC Controlled Cable-Based Distributed Power Systems;
- S–4260, ECP Brake and Wire Distributed Power Interoperability Test Procedures; and
- S–4270, ECP Brake System Configuration Management.

Standard S–4200 ensures that the functionality and performance of freight ECP brake systems are uniform and

consistent among equipment from different manufacturers, that cars equipped with AAR-approved ECP brake systems from different manufacturers are interoperable, and that AAR-approved electronic brake systems meet a high standard of safety and reliability. This standard defines ECP brake system elements, specifies their functionality in different implementation schemes—such as stand-alone, overlays, and emulators—and sets the requirements for all system functions. It covers all primary functions of ECP brakes, including graduated brake application and releases, continuous reservoir charging, adjustment of braking level to car load, continuous fault detection, equipment status monitoring, and pneumatic backup. It also specifies requirements for all modes of train operation and provides an extensive description of fault response and recovery functions for all possible faults of the system components. The standard also establishes environmental requirements for the designed systems, in-service testing, and rigorous approval procedures for the certification process of new ECP brake equipment.

Other standards in the AAR S–4200 Series contain requirements for critical ECP brake system components and communication protocols. Standard S–4210 contains the performance specifications and qualification test procedures for ECP brake system cables, connectors, and end-of-car junction boxes. The required testing verifies that the designed components have high reliability, will withstand harsh environmental conditions, and will have at least an 8-year operating life.

Standard S–4220 contains performance specifications for the DC power supply system through the hard-wired train line cable for ECP brake controllers and other electronic freight car components. Since a DC power supply conductor will also send communication control commands between a locomotive and its attached cars, the standard requires reliable separation and absence of interference between the DC power supply and the communication circuits.

Standard S–4230 contains the requirements related to intra-train communication systems on freight equipment used in revenue interchange service. The standard facilitates interoperability between freight cars and locomotives without limiting the proprietary design approaches used by individual suppliers. The communication protocol was developed for control of ECP brakes and multiple remote units, including distributed power locomotives, and for safety reporting of various car and locomotive components.

Standard S–4250 contains the methodology and communication flow requirements for controlling the operation of multiple locomotives in a freight consist through the intra-train communication network that is shared with ECP brake system. The locomotive control through the intra-train communication line is an alternative method of locomotive control, which was not available before the introduction of ECP brake system technology. The controlled locomotives can either trail a lead locomotive or be distributed (i.e., separated by cars) in a train. The standard establishes protocols for different types of locomotive controls through the intra-train line cable, depending on the location of the consist's multiple locomotives. While the current means of controlling ''distributed power'' is performed through radio control—which is susceptible to a loss of communication and is not ''fail safe'' in operation—locomotives operated with ECP brake systems can be relied upon to function as commanded in real time and automatically apply the brakes in the event of a communication loss.

Standard S–4260 contains the test procedures that must be completed by ECP brake manufacturers to establish interoperability baselines among ECP brake and wire distributed power (WDP) systems in compliance with the S–4200 standards series. The test procedures validate the functional interoperability of ECP brake and WDP systems developed by different manufacturers.

Standard S–4270 defines the procedures for managing the software and hardware configuration for AAR-approved ECP brake systems.

The AAR approval process and the work of the Air Brake Systems Committee has been the primary method of ensuring the safety and reliability of railroad brake systems and components for decades. Through its participation on the Air Brake Systems Committee, FRA can monitor any safety or reliability issues that may develop with ECP brake systems. In the event of a serious safety issue with a supplier's ECP brake system, FRA can appropriately respond by invoking its authority to intervene with additional rulemaking or an emergency order. FRA does not expect to use this authority, because the AAR Air Brake Systems Committee already has the authority to rescind AAR approval for brake systems that do not perform safely or reliably.

Standard S–4240 contains the acceptance procedure for seeking AAR approval of ECP brake equipment. The standard requires a manufacturer to apply for approval by submitting certain information under Administrative Standard S–060. Following review and approval of the initial application data and test plan by the AAR Air Brake Systems Committee, a manufacturer maintains the burden of establishing compliance with Standards S–4200, S–4210, S–4220, S–4230, S–4250, S–4260, and S–4270 to obtain conditional approval.

For laboratory testing, an AAR representative will select 150 CCDs from a lot of 200 and will select HEUs, train power supplying units (TPSs), and ECP–EOTs from lots of four each. The testing will be performed on a 150-car test rack configured in accordance with AAR specifications. The manufacturer will provide for AAR evaluation of the test results, which shall include a requirements traceability and compliance matrix for each AAR standard and all necessary test reports, and then conduct interoperability laboratory testing between new ECP brake equipment and AAR-approved ECP brake equipment in accordance with standard S–4260.

Upon satisfactory completion of the aforementioned laboratory tests, AAR will consider conditional approval for field testing of ECP brake equipment. If conditional approval is granted, 150 ECP brake CCDs shall be selected from a production lot of 200 test-approved CCDs, and 100 of those selected, plus at least two ECP brake-equipped locomotives and one ECP–EOT device, must be placed in railroad service for 24 months. Under conditional approval, at least 1,000 cars must be allotted for use. Within those 24 months, all in-service tests must be conducted. After those 24 months, the Air Brake Systems Committee continues to monitor the product for reliability and safety concerns. If a problem with any brake component is discovered, the Committee will discuss the issue and may either demand further tests or withdraw AAR approval.

Full AAR approval shall be provided after 4 years if during that time a manufacturer furnishes AAR at specified intervals various service reports, which must include accurate ECP brake equipment malfunction records. FRA agrees with AAR's assessment that 4 years are needed to collect a history of reliable data with minimum failures. In addition, the manufacturer must provide to AAR a semiannual report containing any repair material for the test ECP brake equipment. Under the standard, AAR reserves the right to withdraw

conditional test approval if it determines that safety is impaired, reliability degrades, or incompatibility of ECP brake operation develops, and may require any additional testing or performance evaluations it deems necessary. Standard S–4240 also contains specific procedures that must be followed when a manufacturer intends to change certain ECP brake equipment physical characteristics, software, or electronics.

FRA supports this effort as a timely measure for AAR to strengthen the regulatory package for ECP brake systems. Overall, FRA considers AAR approval a valuable step to ensure the reliability and safety of ECP brake systems and a minimum requirement for initial application of ECP brake systems on the Nation's railroads. However, FRA fully intends to monitor the application and safety of ECP and may, at its discretion, require additional safety analysis to be performed to confirm the safety of ECP brake systems installed and operating in revenue service. FRA reserves the right to witness the AAR approval testing of the product.

*B. FMECA*

AAR Standard S–4200 Series was developed to support the design of a safer, more reliable ECP braking system when compared with conventional air brakes. Once the standard was created, the railroad industry identified the need to perform a safety and reliability assessment of an ECP brake system built in accordance with this standard. Since actual S–4200 Series compliant ECP brake systems did not yet exist, the industry decided to conduct a FMECA for a hypothetical ECP brake system that satisfied all the requirements of the standard. At FRA's insistence, the FMECA on AAR Standard S–4200 was performed in 1999 by DEL Engineering with participation of AAR, FRA and a number of experts with significant experience in the development and application of ECP brake systems.

The FMECA team began the analysis by identifying all major ECP brake system components and their intended functions. The analysis examined each component and function and identified associated failure modes and effects. The failure modes were analyzed to determine severity, frequency of occurrence, and effectiveness of detection. The FMECA team created a numeric ranking criterion and determined and prioritized the level of risk posed by each failure mode. High-risk failure modes were identified and appropriate mitigation strategies were developed to decrease the risk.

The FMECA team analyzed the failure modes of all ECP brake components, including: CCDs with the battery; HEUs on the head locomotive; ECP–EOT devices; train line cables, communication and power supplies; power supply controllers; head end line terminators; car ID modules; locomotive ID modules; and operative brakes. The analysis included different types of ECP brake systems, including stand alone, overlay (dual mode), and emulator and all system functional requirements and operating modes, including Initialization, Switch, Run, and Cut-out. The FMECA failure log contained about 1,500 failure modes. For each high-risk failure mode, the FMECA team identified action items and offered recommendations on how to mitigate the consequences of component failures or system functional failures. The team primarily examined single-point failures but also identified and evaluated some cases of combined failures that had significant safety consequences.

The FMECA results confirmed that the ECP brake concept offers the potential for improved performance, reliability, and safety over that of conventional pneumatic brake systems. The FMECA concluded that no failure mode of an AAR-compliant ECP brake system exists that can cause a catastrophic accident due to single-point failure of the system itself. The AAR standards, as written, eliminate or mitigate critical outcomes of single-point failure of ECP brake systems.

The FMECA team encouraged manufacturers to pursue ECP brake technology, because the potential safety and efficiency benefits will far outweigh any disadvantages. If designed and maintained properly, ECP brakes will be substantially safer and more reliable than the conventional pneumatic brake system they are intended to replace. AAR and the brake manufacturers indicated that they were completely satisfied that ECP brake systems are significantly safer than conventional pneumatic systems. They accepted the results of the FMECA and concluded that no modifications were necessary to the AAR standards related to ECP brake systems.

## VII. Market Maturity and Implementation

The U.S. market for ECP brake systems is mature enough to begin implementation of ECP brake technology. The equipment manufacturers have made a significant investment in the technology and have completed the preliminary design work and field testing of ECP brakes. For instance, they have provided technical solutions for different ECP brake implementation strategies, enabling non-ECP and ECP brake-equipped cars to run in combined trains and, in some cases, allowing ECP brake-equipped freight cars to run in ECP brake mode using locomotives with conventional pneumatic brake systems. In addition, they are ready to supply fully operational stand-alone ECP brake systems, overlays, and emulators for the U.S. market, easing the industry's migration process. A commitment by the railroad industry to change over to ECP brakes is necessary to inspire additional technological initiatives by the manufacturers.

ECP brake systems from the main U.S. manufacturers—all in different stages of AAR approval and testing in revenue service—have been built with the intention of complying with the AAR S–4200 Series of standards, proven safe through field testing, designed using fail-safe principles, and accommodated the industry's need for different implementation schemes. The AAR S–4200 Series standards are intended to assure the necessary level of safety, reliability, interoperability, and ultimately the applicability of this equipment in the U.S. market. The equipment of existing ECP brake manufacturers incorporates the conventional pneumatic emergency brake system as a backup in case of failure of the ECP brake control. In most cases, ECP brake systems will support enhanced safety even if the electronics fail, because continuous recharging of the brake pipe will ensure availability of an emergency application. Therefore, the ECP brake system reduces the risk caused by depleted air in the case of an emergency. There is no instance or record of a malfunctioning ECP brake system that resulted in a catastrophic or critical event.

To assess the benefits and costs of ECP brakes for the U.S. rail freight industry, FRA contracted with BAH in 2005 to conduct a study. An ECP brake expert panel of principal stakeholders in the conversion of the U.S. freight car fleet to ECP brake technology, including suppliers, railroads, private car owners, AAR, and FRA was assembled to participate in the study. The expert panel supported the conclusion that the AAR standards are sufficient for the ECP brake system designer to achieve a system safety level adequate for a safety-critical system. In particular, an AAR-compliant system, while providing a significant increase in safety and efficiency, does not introduce extra risks associated with single-point failure of the ECP system itself.

The final BAH report provided a comprehensive analysis and comparison of ECP and conventional air brake systems. BAH acknowledged that while trains with ECP brake systems have been operated in North America, South Africa, and Australia, U.S. implementation has been stalled due to the absence of an acceptable implementation plan for conversion and hard data to support a sound economic analysis, limited interoperability with traditionally braked trains, and insufficient capital investment required for conversion. It concluded that although the barriers to implementation are formidable, ECP brake systems are economically and technically ripe for adoption and should be implemented in phases. BAH suggests that implementing ECP brakes on 2,800 locomotives and 80,000 cars in the Powder River Basin (PRB) would cost the industry approximately $432 million. However, according to BAH, the annual $157 million in anticipated benefits—resulting from saved fuel, improved wheel and brake shoe life, and a reduction in necessary brake inspections—will allow railroads to recover those costs in less than three years. To justify the investment, the BAH report says, conversion must be focused first on the high-mileage, unit-train-type services that would most benefit from its use.

FRA acknowledges that BAH's fuel cost estimates are underestimated due to subsequently rising prices. It is notable that BAH did not attempt to quantify potential savings relating to capacity increases or emissions decreases due to the difficulty in arriving at acceptable values. Accordingly, the report's estimated internal rate of return should be viewed as conservative.

## VIII. Related Proceeding

In a petition dated November 15, 2006, and filed November 21, 2006, BNSF and NS jointly requested that FRA waive various sections in parts 229 and 232 as it relates to those railroads' operation of ECP brake pilot trains. *See* Docket No. FRA–2006–26435. The FRA Safety Board held a fact-finding hearing on this matter on January 16, 2007, featuring testimony from representatives of the petitioners, air brake manufacturers, and labor unions. On March 21, 2007, the Safety Board granted the petitioners' request, in part, subject to various conditions designed to ensure that ECP brake equipped trains subject to the waiver will be as safe as trains equipped with conventional brakes and operated under the existing rules. *See id.*

## IX. Legal Impediments and Proposed Relief

ECP brake operation provides for continuous electronic monitoring of the condition of air brake system components and brake pipe pressure, potentially limiting the need for certain physical brake inspections currently required under part 232. Accordingly, this final rule modifies, relaxes, and removes certain requirements, including intermediate terminal inspections (§§ 232.207, 232.209, and 232.211), single-car air brake tests (§ 232.305), and the required percent of operable brakes at initial terminal departure (§ 232.103(d)), as they apply to trains operating in ECP brake mode. The rail industry's implementation of ECP brakes is frustrated by such inapplicable and inefficient statutory and regulatory requirements. Without a large-scale proliferation and implementation of ECP brake technologies, the industry will not be able to enjoy economies of scale and to overcome the industry-wide limits caused by interoperability problems. FRA seeks to improve market efficiency by providing reliable and suitable standards and procedures that will support investments in ECP brake technology.

The current statutory and regulatory requirements, however—including those concerning brake inspections and the operation of trains with defective equipment—may reduce or eliminate incentives for railroads to implement new ECP brake technology and take advantage of its operational and safety benefits. For example, 49 U.S.C. 20303 presents an obstacle to cost-saving, safe, and efficient long hauls promised by ECP brakes. To avoid incurring civil penalties, operators are required under 49 U.S.C. 20303 to transport rail vehicles with defective or insecure equipment ''from the place at which the defect or insecurity was first discovered to the nearest available place at which the repairs can be made.''

The design and operation of ECP brakes renders strict application of the existing statutory movement for repair provision unnecessary as it will reduce efficiencies and may actually reduce the safety of such operations. When the defective equipment is an ECP brake, stopping for immediate repairs is not necessary. If more than 15 percent of the train's AAR approved ECP brakes become inoperable, the train automatically stops. It should be noted that a train with 85 percent operative ECP brakes will still have shorter stopping distances than a train equipped with conventional pneumatic brakes that are 100 percent operative. Considering the technology's continuous self-monitoring and constant communication with the engineer, it is highly unlikely that a train equipped with ECP brakes will ever reach such a level of inoperability. Further, FRA continues to believe that a freight train operated with ECP brakes may travel non-stop to its destination, not to exceed 3,500 miles, without intermediate brake inspections, because foundation brake rigging and brake shoes will safely operate this distance and redundant intermediate brake inspections within that distance do not increase ECP brake system safety. As an added benefit, the increased mileage allowance would provide for coast-to-coast travel. In the related proceeding, Docket No. FRA–2006–26435, FRA's Safety Board granted the request of BNSF and NS to allow the non-stop movement of an ECP brake operated train to its destination, each not to exceed 3,500 miles.

Nevertheless, 49 U.S.C. 20303 requires trains with defective safety appliances, including brakes, to travel to the nearest location where the necessary repairs can be made. If the nearest available location is in a direction other than that in which the train is traveling, the train with defective equipment may be required to switch the defective car out of the train and add it to another train traveling in the direction of the nearest repair location, referred to as a ''backhaul.'' ECP brake implementation has been complicated by the ECP brakes system's technological incompatibility with conventional pneumatic brake systems. To switch a car equipped with ECP brakes into a technologically incompatible train operating with conventional pneumatic brakes will create additional safety concerns for that train.

The potential risks involved in combining cars with incompatible braking systems coupled with the hazards normally associated in switching cars in the field, outweigh the potential harm of keeping the defective car in its existing ECP braked train and traveling to a repair location that is significantly further away. In circumstances where the defective safety appliance is a non-brake defect, it will often be safer and is certainly more efficient to allow ECP brake-equipped trains with non-brake defective equipment to travel to the nearest forward repair station. Moreover, due to the ability of ECP brake systems to continuously monitor the brakes on each car in a train and to provide specific information to the locomotive engineer regarding the location of any car with inoperative brakes and the

design of such systems to prohibit operation with less than 85 percent operative brakes in certain situations, the need to immediately set-out and handle cars with defective brakes for repair is unnecessary. There is also no safety need to require a railroad to incur the expense and delay involved with cutting the defective car out of the train or to run the safety risk of doing so. Currently, freight cars with defective mechanical conditions are permitted to be hauled long distances for repair. *See* 49 CFR 215.9. In light of the technological advances provided by ECP brake systems, it appears logical and necessary to permit more flexibility in moving equipment with defective brakes when equipped with ECP brakes and hauled in a train operating in ECP brake mode. However, the language of 49 U.S.C. 20303 prevents FRA from providing this flexibility.

When drafting the proposed rule in this proceeding, FRA recognized that the aforementioned statutory requirements governing conventional pneumatic braked trains may offset the increased safety and efficiency benefits afforded by ECP brakes, thus eliminating the incentives for rail operators to implement ECP brake technologies. To encourage implementation without hindering safety, FRA proposed to invoke its discretionary authority under 49 U.S.C. 20306 to exempt ECP brake-equipped trains from the specific statutory requirements contained in 49 U.S.C. 20303. The requirements for moving defective equipment were created over a century ago, during the infancy of pneumatic brakes and before all cars were equipped with power brakes. With many more reasons to stop train operation along tracks with frequent repair shops and exponentially more employees, the legislative drafters of that time could not have envisioned the type of safer and more efficient technologies available today.

Recognizing the importance of upgrading rail technologies, Congress in 1980 passed the Rock Island Railroad Transition and Employee Assistance Act (the ''Rock Island Act''), which, *inter alia,* provides statutory relief for the implementation of new technologies. More specifically, when certain statutory requirements preclude the development or implementation of more efficient railroad transportation equipment or other transportation innovations, the applicable section of the Rock Island Act, currently codified at 49 U.S.C. 20306, provides the Secretary of Transportation with the authority to grant an exemption to those requirements based on evidence received and findings developed at a hearing.

According to Senate Report No. 96–614, ''This section fosters rail technological improvements by giving the Federal Railroad Administration *discretionary* authority to grant exemptions from the Safety Appliance Acts' mandatory requirements *when those requirements preclude the development or implementation of new rail technology*.'' Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 96–614, at 8–9 (Mar. 4, 1980) (emphases added). The House version of the bill includes no similar provision, but the Conference substitute adds that the authority granted FRA in this section must be exercised after a hearing, absent an agreement between labor representatives and the developers or operators of the new equipment or technology. Joint Explanatory Statement of the Committee of Conference, H. Conf. Rep. No. 96–1041, § 117, at 30 (May 20, 1980).

Under 49 CFR 1.49(v), the Federal Railroad Administrator is delegated authority to carry out the functions vested in the Secretary by the Rock Island Act. Under this authority, FRA held two public oral hearings in Washington, DC on October 4, 2007, and near Chicago, IL, on October 19, 2007, to receive evidence and develop findings to determine whether FRA should invoke 49 U.S.C. 20306. While FRA solicited any information that would bear on this decision, it also asked a series of questions in the NPRM and at the hearing designed to invoke discussion and gather information regarding the safety of moving defective equipment as proposed and to determine whether existing statutory provisions impede the implementation of the technology.

At the hearing, the labor unions commented on the limitations of the ECP brake system's self-monitoring capabilities. According to the labor unions, since the technology cannot monitor a variety of brake defects, it should not be relied upon to allow a train to operate 3,500 miles without any intermediate brake inspections. On the other hand, the railroads support the increase in the allowable distance of 3,500 miles between brake inspections, believing the safety level of trains operating with ECP brakes that distance should equal or exceed the safety level of trains operating with conventional brakes over 1,000 miles. For the same reasons, some railroads even suggested that ECP brake operated trains be allowed to move 5,000 miles between Class I brake inspections.

The labor unions and railroads agree that a conventional freight car with the brakes cut out is no different than an ECP brake-equipped car with the brakes cut out and that switching a defective ECP brake-equipped car into a conventionally braked train will not increase current safety concerns. However, the railroads and the labor unions disagree when the defect is a non-brake safety appliance on a car equipped with ECP brakes. According to the labor unions, if a non-brake defect requires the car to be set out, there is no difference between a train operated with conventional brakes and a train operated with ECP brakes; the car should be set out for repair on site or moved under special circumstances to the nearest repair point. The railroads believe that such cars should be left in the train operated with ECP brakes for forward movement to a location where ECP brake repairs can be made instead of being switched out and hauled in a different direction. Any switching, says the railroads, causes the switching and pick-up crews more risk exposure.

The labor unions assert that the regulations proposed in this proceeding provide sufficient incentives for the implementation of ECP brake systems and that the restrictions within 49 U.S.C. 20303 do not provide a disincentive for such implementation. The railroads, on the other hand, assert that strict application of 49 U.S.C. 20303 provides a disincentive for the implementation and use of ECP brake technologies. According to the railroads, they are required under section 20303 to handle cars with defective equipment more times than necessary, resulting in lost time and revenue. The resulting undue and unreasonable financial burden and significantly negative financial impact on rail operations, say the railroads, provides no relief from the added expense of equipping rail cars with ECP brakes and is a strong disincentive for ECP brake system implementation. The railroads claim that eliminating the requirements under 49 U.S.C. 20303 would provide a necessary and significant economic incentive to the widespread adoption of ECP braking technology in the U.S.

Based on the comments and information submitted at those hearings, FRA has decided to invoke its discretionary authority under 49 U.S.C. 20306 to exempt application of 49 U.S.C. 20303 as it applies to the operation of ECP brake operated freight trains and freight cars. FRA believes that application of section 20303 will clearly provide a disincentive towards the implementation of ECP brake systems, a

technology that promises safer operation of trains throughout the U.S.

FRA is confident that this initiative is consistent with improving railroad safety. As further discussed below, through oversight of present train operations, including extended haul operations, FRA has observed that properly inspected trains can proceed for extended distances without loss of braking effort due to wear or damage to foundation brake rigging. FRA further notes that hauling of cars with defective safety appliances to the next forward point where repairs can be accomplished poses virtually no incremental risk to employees, particularly if defects have been identified and communicated to the crew of the train. In the great majority of cases, damaged or insecure safety appliances pose a risk only during switching operations, not during line haul movements. Indeed, back hauling of safety appliances introduces additional risk, as the car is first removed from one road train and then added to another for the reverse movement.

## X. Additional Issues

### *A. Part 229*

In the ECP brake waiver proceeding, Docket No. FRA–2006–26435, BNSF and NS sought relief from various provisions of parts 229 and 232. In relation to part 229, BNSF and NS sought relief from the requirements relating to daily locomotive inspections and electronic record keeping. FRA sought comments and information whether this final rule should include any exceptions to part 229 for operations using ECP brake systems.

No commenting party supported or suggested any exceptions to part 229. On the contrary, UTU and BLET agreed with the FRA's proposal not to modify part 229 in this rulemaking. According to BLET, there is no basis for relief from the daily inspection or recordkeeping requirements of Part 229. FRA continues to believe that there is insufficient information available to consider any exceptions to part 229 for operations using ECP brake systems. Thus, under this rulemaking, part 229 remains unaffected.

In its comments, Wabtec lists a number of minimum requirements that it proposes should be added to existing event recorder parameters, applicable to the lead locomotive when in ECP brake operation. BLET filed a supplemental response in which it responded to this particular filing, stating that it ''cannot serve as a basis for FRA requirements pertaining to event recording of ECP data because of [an] omission [relating to the 'ECP train brake source' parameter described in UP's comments].'' The scope of this proceeding does not include information relating to event recorder data. The NPRM did not discuss or seek comments on this issue. Accordingly, FRA will not include in this final rule any modifications to the regulations governing event recorders, since many parties interested in event recorders would not have been put on notice that the issue was being raised. FRA believes that these issues would best be resolved in a separate proceeding concerning part 229.

### *B. Dynamic Brake Requirements*

At the public hearing conducted in relation to the waiver proceeding, BNSF requested relief from some of the dynamic brake requirements contained in 49 CFR part 232. On this issue, FRA only received comments from BLET, which indicated that relief relating to dynamic brake requirement is not necessary as it applies to ECP brake systems. According to BLET, it would be unwise and unsafe to further erode braking capacity by diluting the existing dynamic brake requirements.

FRA remains unsure of what specific relief BNSF requested regarding dynamic brakes. Section 232.109 provides for the continued operation of a locomotive found with inoperative dynamic brakes for a period of up to 30 calendar days. It appears that railroads will continue to require locomotive engineers to rely on extended range dynamic brakes where they sufficiently control the braking effort without introducing excessive buff forces. Locomotive engineers will need to know what level of braking effort is available, particularly in extreme cases operating over territory with significantly descending grades. Otherwise, an engineer may lose control of the train due to brake fade when the speed precludes a timely application of the automatic brake due to insufficient dynamic brake capacity. FRA recognizes that this scenario is much less likely to occur with availability of ECP braking, but that does not mean it could not occur. FRA continues to believe that more flexibility in this area is not necessary and declines to make any such modifications in this final rule.

### *C. Single Car Air Brake Test Approval Procedures and Single Car Air Brake Tests*

The NPRM included a provision requiring the submission and approval of single car air brake test procedures for cars with ECP brake systems in accordance with the special approval procedures in § 232.17. FRA also reserved the right to modify § 232.17 to make clear the applicability of proposed subpart G, including, but not limited to, adding cross-references.

Section 232.305(a) provides that a single car air brake test may be performed partially in accordance with ''Section 4.0, 'Special Tests,' of the Association of American Railroads Standard S–486–01, 'Code of Air Brake System Tests for Freight Equipment,' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (January 1, 2001).'' That standard has since been amended and FRA has approved the use of the new Standard S–486–04 as the procedure to use when performing a single car air brake test. Accordingly, FRA proposed to amend § 232.305(a) by replacing the directly preceding quoted text with the following: ''Section 4.0, 'Special Tests,' of the Association of American Railroads Standard S–486–04, 'Code of Air Brake System Tests for Freight Equipment,' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (January 1, 2004).''

BLET submitted comments supporting FRA's proposed amendments to sections 232.17 and 232.305(a). No other comments were filed on these issues. Consequently, the final rule amends §§ 232.17 and 232.305(a).

### *D. Train Handling Information*

Section 232.111 requires railroads to adopt and comply with written procedures ensuring that railroad train crews receiving trains are provided accurate information concerning each train's condition. The continuous monitoring capabilities of ECP brake systems provide information regarding the location of equipment with inoperative or cut out brakes. BLET commented that none of the information provided by the ECP brake system appears to satisfy the requirements of 232.111(b) and that it agrees with FRA that there is no reason for excepting any portion of or provision contained in § 232.111.

FRA continues to see no reason to excepting any portion of or provision contained in § 232.111. FRA continues to believe that, if anything, ECP brake systems' continuous monitoring capabilities will assist railroads in complying with the train handling information rules in § 232.111 by monitoring defects and potentially allowing for the manual input of defects not monitored electronically and then

electronically providing such information to subsequent train crews.

*E. Piston Travel Limits*

For cars equipped with 8½-inch or 10-inch diameter brake cylinders receiving either a Class I brake test or a periodic inspection while on a shop or repair track, §§ 232.205(c)(5) and 232.303(c) currently limit piston travel to 7 to 9 inches. An industry-wide waiver currently in effect, however, permits piston travel limits to range from 6 to 9 inches on these types of cylinders. In the NPRM, FRA proposed the incorporation of that waiver into the rules by amending §§ 232.205(c)(5) and 232.303(c) accordingly.

BLET, Wabtec, and NYAB concur with FRA's proposal to incorporate the current, industry-wide waiver permitting piston travel limits to range from 6 to 9 inches by amending sections 232.205(c)(5) and 232.303(c). Similarly, AAR states that there is no reason to refrain from incorporating the industry-wide waiver in the regulations. Consequently, this final rule amends sections 232.205(c)(5) and 232.303(c) by revising the piston travel range limit of 7 to 9 inches to a range limit of 6 to 9 inches.

*F. Extended Haul Trains*

Section 232.213(a)(6) requires inbound inspections for extended haul trains and states that, ''After April 1, 2007, the inbound inspection described in this paragraph shall not be required unless FRA provides notification to the industry extending the requirement to perform inbound inspections on extended haul trains.'' Section 232.213(a)(7) requires railroads to maintain a record of all defective, inoperative, or ineffective brakes and all conditions not in compliance with parts 215 and 231 discovered during train movement. In addition, that section says that, ''After April 1, 2007, the records described in this paragraph need not be maintained unless FRA provides the notification required in paragraph (a)(6) of this section extending the requirement to conduct inbound inspections on extended haul trains.''

In the NPRM, FRA proposed to amend Part 232 by deleting §§ 232.213(a)(6) and (a)(7) from the regulations. These regulations ''sunsetted'' on April 1, 2007, without further FRA action. Since this proposal remains uncontested and the ''sunsetted'' provisions serve no purpose by remaining in the CFR, the final rule deletes § 232.213(a)(6) and (a)(7).

*G. Part 238*

Amtrak informally expressed interest in potentially using ECP brake system technology for its Auto Train that runs from Lorton, Virginia to Sanford, Florida. Amtrak previously employed overlay ECP braking on that train, and presumably would benefit from some additional flexibility with respect to the conduct of intermediate inspections. However, since FRA does not currently have sufficient information regarding the use of ECP brake systems on passenger trains and passenger equipment, FRA did not propose any amendment to 49 CFR part 238. FRA continues to believe that the functions of freight and passenger trains and cars, evidenced by the varied rules applicable to each, are too disparate to provide a one-size-fits-all solution for ECP brake integration and use.

In the NPRM, FRA stated that it may consider Part 238's applicability to ECP brake systems in another rulemaking or in other proceedings and would consider requests for waivers relating to the regulation of freight trains and freight cars equipped with ECP brake systems for passenger trains on a case-by-case basis. BLET agrees that the issue of ECP brakes and Part 238 should be addressed in a separate rulemaking. For this reason, BLET does not believe that it is appropriate for FRA to regulate ECP brakes on passenger trains via the waiver process or on a case-by-case basis.

FRA continues to believe that any regulations affecting the implementation and use of ECP brake systems on passenger trains are better left for a separate rulemaking proceeding relating to Part 238. FRA will also consider requests for waivers for such implementation and use on passenger trains. Although BLET expresses its opinion that a rulemaking would be a better venue for permitting the implementation and use of ECP brake systems on passenger trains, it provides no reasons why it would not be prudent to allow for the use of waivers to achieve similar goals.

## XI. Section-by-Section Analysis

*49 CFR Part 232*

Unless otherwise noted, all section references below refer to sections in title 49 of the Code of Federal Regulations (CFR). FRA sought comments on all proposals made in the NPRM to this proceeding.

Subpart A—General

This subpart contains amendments to the definitions listed in subpart A of part 232.

*Section 232.5 Definitions*

In the NPRM, FRA proposed the amendment of section 232.5 by adding an extensive set of definitions to introduce the regulatory relief and regulations applicable to ECP brake systems. FRA worded these definitions to mirror, to the extent possible, the definitions provided in existing AAR standards. FRA intends these definitions to clarify the meaning of important terms that are used in the text of the proposed rule. The definitions are carefully worded in an attempt to minimize the potential for misinterpretation of the rule. Some of the definitions introduce new concepts or new technologies.

These new definitions acknowledge the two general types of ECP brake systems—dual mode and stand-alone. The definition of a dual mode ECP brake system, which means a brake system that can work either as a conventional pneumatic brake system or an ECP brake system, intends to cover both an overlay ECP brake system and an ECP brake system equipped with an emulator CCD. The definition of CCD is intended to describe an important and necessary part of ECP brake system technology.

FRA did not receive any comments on the proposed definitions. Consequently, except for reasons set forth below, the final rule retains the definitions as proposed.

Subpart G—Electronically Controlled Pneumatic (ECP) Braking Systems

FRA is adding a new subpart G to part 232. The new subpart contains various design and operational requirements that provide both regulatory relief and regulatory modification to allow implementation of ECP brake systems on the Nation's railroads and to ensure the safety of such operations.

*Section 232.601 Scope*

This section contains a formal statement of the final rule's purpose and scope. The final rule contains specific requirements relating to the operation of freight trains and freight cars equipped with ECP brake systems and operating in ECP brake mode. The final rule also provides specific exceptions from various requirements contained in part 232 for ECP brake-equipped freight trains and freight cars.

*Section 232.602 Applicability*

As a general matter, this section makes clear that these rules apply to all railroads that operate freight trains or freight cars equipped with ECP brakes on track which is part of the general railroad system of transportation. The final rule applies to freight trains

operating in ECP brake mode, freight cars equipped with ECP brake systems, and conventionally braked freight trains and freight cars when operated in conjunction with ECP brake equipment.

The regulatory relief provided in the final rule and the need to ensure the safe operation of trains and vehicles equipped with this advanced technology requires that exception of certain existing part 232 provisions be afforded. Many of the provisions that the final rule excepts either apply awkwardly or should otherwise not apply to ECP brake systems due to the new technology's design or additional safety benefits. Similarly, the addition of various requirements directly related to ECP brake systems is necessary to ensure that the equipment is properly designed, inspected, tested, maintained, and safe to operate.

To fulfill these goals and to avoid an excess of confusing cross-references, this final rule excepts specific provisions and an entire subpart of part 232 from application to ECP brake systems. Each section of subpart G contains specific exceptions from various provisions contained in other portions of part 232 or contain appropriately rewritten provisions directly applicable to ECP brake systems. Those portions and sections of part 232 not specifically excepted by this final rule remain applicable to ECP brake-equipped freight trains and freight cars.

*Section 232.603 Design, Interoperability, and Configuration Management Requirements*

In order to ensure the safety and interoperability of ECP brake systems, this section incorporates by reference the existing AAR standards and approval procedures for ECP brake systems. The AAR, its member railroads, and various brake manufacturers have invested considerable time and effort in developing the identified industry standards addressing the design, performance, and interoperability of ECP brake systems. FRA has reviewed the industry standards it intended to incorporate by reference in this final rule and has determined that the standards effectively address and ensure the safe and proper operation of the brake system technology. As noted previously in this preamble, FRA funded a FMECA, which validated the safety and applicability of AAR's ECP brake system standards for freight railroads.

FRA believes that compliance with the AAR standards identified in paragraph (a) will ensure the safety and efficiency of freight trains and freight cars equipped with ECP brakes. Implementation of ECP braking systems complying with these standards will bring benefits and efficiencies encompassing train handling, car maintenance, fuel savings, network capacity, self-monitoring, fail-safe operation, accurate and instantaneous brake commands throughout the train, and continuous, real-time self-diagnostics. Paragraph (a) requires all manufacturers to meet existing AAR standards when developing and installing ECP brake systems.

Paragraph (a) incorporates the most recent AAR standards related to ECP brake systems. FRA recognizes that ECP brake systems are a growing technology and realizes that the existing AAR standards may need to change as the technology advances. Accordingly, this final rule includes two methods by which the incorporated industry standards may be changed. Paragraph (a) permits the submission of an alternate standard under the special approval procedures contained in § 232.17. In addition, paragraph (f) permits the AAR or other authorized representative of the railroad industry to seek modification of the approved industry standards through the modification procedures contained in § 232.307. Only the party that initially submits a standard approved by FRA pursuant to paragraph (a) may subsequently seek modification of that standard under paragraph (f). For instance, only AAR may seek modification of its own AAR S–4200 Series Standards already incorporated by reference into this final rule. If another authorized representative of the railroad industry submits an alternative standard under paragraph (a) and pursuant to § 232.17, then only that representative may seek modification of their alternate standard under paragraph (f).

The modification procedures in § 232.307 were developed to permit modification of the other incorporated AAR standards and FRA believes that the procedures are equally applicable to the regulations contained in this final rule. The industry has successfully utilized both these methods to change or modify industry standards incorporated in part 232 and FRA believes it is appropriate and necessary to provide this latitude for the standards related to ECP brake systems and components.

BLET filed comments supporting § 232.603(a) and (f) to utilize the alternate standards of § 232.17 and the modification procedures of § 232.307, respectively. GE requests that an exception be granted to certain stand-alone ECP brake systems in § 232.603(a)(1)–(6). We will address GE's comments below when providing analysis of § 232.603(e).

FRA recognizes that while most of the S–4200 Series apply technical standards concerning the mechanical attributes and capabilities of ECP brake systems, S–4240 and S–4270 delegate additional responsibilities to those manufacturing, implementing, and using ECP brakes and have been the subject of various comments filed in this proceeding. Thus, FRA believes they require further discussion.

FRA has reviewed the approval procedures contained in AAR Standard S–4240 and believes that they provide an appropriate review process to ensure the safe and proper operation of ECP brake systems. FRA believes that AAR is in the best position to approve those ECP brake systems that will be used by its member railroads and, over time, other non-member railroads interchanging traffic on the general rail system. FRA does not intend this section to necessarily preclude the introduction and acceptance of alterative standards subsequently approved in accordance with the rules.

FRA recognizes, however, that enforcement of S–4240 against the railroads would be difficult without additional regulatory language. Accordingly, paragraph (b) requires that all ECP brake systems developed under the AAR standards incorporated by reference in paragraph (a) receive conditional or final approval under AAR Standard S–4240 prior to use and that they maintain such approval while in use. In this paragraph, FRA prohibits the use of ECP brake systems developed under the AAR standards incorporated in paragraph (a) that do not receive conditional or final AAR approval or that cease to comply with the incorporated AAR standards relating to ECP brake systems.

BLET filed comments stating that it does not oppose paragraph (b). However, BLET believes that FRA's Railroad Safety Board should review petitions for conditional approval via the waiver process. FRA does not believe this level of scrutiny is necessary at this time. Under 232.103(l), all conventional brake systems must comply with AAR Standard S–469–47. Compliance with this standard is determined by the AAR brake committee, subject to FRA technical oversight. There are no more specific FRA requirements for these systems. For similar reasons, FRA is incorporating into the final rule the appropriate ECP brake standards. FRA has successfully relied on AAR for approving

conventional brake standards and there is nothing suggesting why FRA should perform a materially different approval process oversight role for the ECP brake standards. For the purposes of this rulemaking, FRA has closely reviewed and scrutinized the ECP brake design standards adopted by AAR. FRA also funded and participated in a FMECA analysis of the S–4200 series standards. We feel confident relying on AAR's approval process. Just like FRA enforces Standard S–469–47 after a system is introduced into service, FRA will equally enforce the S–4200 series standards on trains in service with ECP brake systems.

In paragraph (a), FRA also requires that all ECP brake systems meet the configuration management requirements contained in an industry recognized, FRA approved standard such as AAR Standard S–4270. FRA believes that configuration management of ECP brake system hardware and software components is an absolute requirement to ensure the interchangeability, interoperability, compatibility and continued proper and safe operation of ECP brake systems. Compatibility of ECP hardware and software will have a direct affect on the safety and reliability of ECP brake systems running on the Nation's railroads.

In the NPRM, FRA cautioned that the limited configuration management plan requirements in Sections 5.1 and 5.2 of AAR Standard S–4240 may not have been sufficiently robust to adequately control ECP brake system components. The more recently developed AAR Standard S–4270 eliminates this shortcoming by adequately addressing issues relating to configuration management, including a sufficient set of requirements that properly allocate the responsible party and necessary procedures to be followed by this party to assure proper management of ECP brake system software and hardware configurations.

The AAR approval process and Air Brake Systems Committee requires various procedures to ensure the interoperability and interchangeability of AAR-approved ECP brake systems and their components. These same requirements and procedures have been used for many years to successfully manage the configuration of conventional pneumatic AAR approved air brake valves. Therefore, FRA believes that responsibility for the configuration management of AAR-approved brake systems and their components should continue to reside with AAR and its Air Brake Systems Committee.

As discussed above, FRA has reviewed and approved AAR Standard S–4270 and has determined that the standard should be incorporated by reference into this final rule. In a notice issued on April 18, 2008, FRA sought comments and concerns on AAR Standard S–4270, which at that time was in draft form, and indicated that it would consider inclusion of the final draft if it was timely adopted with no substantial changes. 73 FR 21092, 94 (Apr. 18, 2008). AAR adopted and implemented Standard S–4270 on April 30, 2008, without any changes from the draft referenced in FRA's public notice dated April 18, 2008, and placed in the docket to this proceeding on April 21, 2008.

Since the NPRM was issued prior to the development of an acceptable configuration management plan standard, paragraph (c) as proposed included language delineating minimum requirements for acceptance of a subsequently submitted configuration management plan standard. Since paragraph (a) incorporates by reference AAR Standard S–4270 and provides for the submission of alternative standards under § 232.17, the extraneous text of proposed paragraph (c) has been removed from the final rule. However, FRA continues to believe that alternative configuration management plans must maintain the same minimum standards. More specifically, to receive approval in accordance with § 232.17, a configuration management plan must be structured in accordance with accepted configuration management standards and define all of the purposes, procedures, organizational responsibilities, and tools to be used for ECP brake system hardware and software configuration management including: The purpose and scope of the application; control activities to be performed; responsibilities and authorities for accomplishing the activities; implementation schedules; tools and resources for executing the plan; and periodic updating of the plan to maintain currency.

In the NPRM, FRA suggested that any submitted alternate configuration management plan be structured in accordance with accepted configuration management standards such as IEEE Std 28–1990, IEEE Standard for Software Configuration Management Plans, American National Standards Institute, 1990; or IEEE Std 1042–1987, IEEE Guide to Software Configuration Management, American National Standards Institute, 1987. The brake manufacturers, however, argue that these IEEE standards are not considered appropriate or necessary for achieving adequate configuration management control for ECP brake systems. Despite their promise to recommend alternatives, nothing on this issue was subsequently filed.

The NPRM's references to the various aforementioned IEEE standards were provided for use by the railroads in the event that AAR did not develop its own configuration management standard. As previously mentioned, AAR issued a configuration management standard, S–4270, subsequent to the initial comment period in this proceeding. FRA understands the brake manufacturers to mean that some items specified in the IEEE standards may not be applicable because they are superseded by the more restrictive standards and processes developed by the brake manufacturers. While FRA concedes that this may be true, it does not speak to the overall applicability of the IEEE standards to any alternate configuration management plan that might be submitted by any other party. FRA expects all configuration management plans to be tailored to the requirements of accepted IEEE standards or a more restrictive, proprietary, or industry-specific standard has been developed and implemented. FRA believes AAR Standard S–4270 complies with the latter expectation.

FRA continues to believe that any ECP brake configuration management plan should consider issues beyond initial approval. For instance, use of improper or out-of-date software versions for microprocessor controlled systems has been an issue in a variety of industries. Therefore, FRA continues to caution that any alternate configuration management plan should be sufficiently robust to adequately control ECP brake system components, especially as more manufacturers apply for AAR approval of ECP brake systems. Further, safety or reliability issues may dictate that hardware or software configurations be changed once ECP brake systems are put in service on a large scale in the U.S. FRA continues to encourage AAR, railroads, and manufacturers to ensure their ability to continually monitor and respond to hardware and software issues affecting ECP brake systems after initial approval.

FRA continues to believe that AAR is capable of setting appropriate configuration management standards and related approval procedures and FRA intends to rely on AAR to monitor ECP brake component approval, configuration and compatibility for systems designed and approved under its standards incorporated herein. However, FRA, in its federal oversight

role, will continue to monitor the activities of the Air Brake Systems Committee and the AAR ECP brake approval process to ensure that any safety or reliability issues that may emerge are addressed promptly and comprehensively. FRA will also issue additional configuration management requirements for the operation of ECP brake systems if, in the sole opinion of the FRA, the oversight of the AAR and the AAR Air Brake Systems Committee proves inadequate for the continued safe operation of ECP brake systems. In this case, FRA may take a variety of approaches including requiring railroads and car owners to develop their own configuration management plans for monitoring ECP brake system interchangeability, interoperability and compatibility.

In relation to the issue of ECP brake system configuration management plans, FRA received comments from BLET at the public hearing and written comments in response to FRA's notice seeking comment on AAR Standard S–4270. At the hearing, BLET stated that configuration management plans must conform to the requirements of part 236, subpart H. According to BLET, ''There is a strong likelihood that the majority of the routes over which ECP will be deployed also will see the implementation of positive train control ('PTC'). Given the manner in which PTC will enforce speeds and authorities, the ECP head-end unit and its associated appurtenances will become a core element of the PTC system.'' In its written comments, BLET added, ''We continue to believe that—to the extent ECP-equipped trains operate on routes where PTC has been or will be installed—the ECP technology is a processor-based train control system. Braking algorithms for speed and authority enforcement for ECP-equipped trains will differ significantly from those utilized for conventionally-braked trains.''

FRA understands BLET's contention to be that, if an ECP brake system ''is considered a core element of PTC system'' or ''is considered a train control system,'' then it must comply with the configuration management requirements contained in Part 236, Subpart H, 905(b)(4). While FRA acknowledges the importance of configuration management, it does not agree that ECP brake systems must conform to the requirements of part 236, subpart H. Although ECP brakes may have a significant impact on the safety case prepared under subpart H of part 236 for train control systems, FRA does not consider the brake system, standing alone, to constitute a train control system.

The current implementation of ECP brake technology and processor based train control technology are two independent industry initiatives. FRA recognizes the potential for the future use of both technologies onboard a single locomotive and FRA looks forward to such integration. Of course, operations that contemplate using both PTC and ECP brakes in a common operation must include the ECP brake system as an integral part of the Product Safety Plan for the train control system. While the ECP brake system itself is not subject to subpart H of part 236, ECP brakes may not be utilized with processor based train control systems until the impact on their use has been included in the required analysis of the train control system under subpart H of part 236 and that analysis has been approved by FRA. Given the superior characteristics of ECP brake systems, and assuming straightforward integration with new train control systems, the use of ECP braking should be helpful in the formulation of persuasive safety case documents.

FRA acknowledges BLET's concern that ''AAR's proposed S–4270 Standard is materially inferior to the other S–4200 standards,'' and their strong recommendation to FRA to insist on ''(1) the use of identified, scientifically-proven configuration management plans, and (2) the delineation of 'bright line' triggers governing the urgency with which hardware and/or software changes must be made.'' FRA further acknowledges BLET's concern regarding ''[delegation] to AAR's Air Brake System Committee oversight of [ECP brake] product approval, implementation, and operations.''

In the NPRM, FRA recommended the use of acceptable IEEE software configuration management standards such as IEEE–828 and IEEE–1042 for the development of ECP brake system configuration management plans. 72 FR 50820, 50831 (Sept. 4, 2007). As BLET notes, neither of these standards are referenced in the proposed AAR S–4270 standard, and the proposed standard passes the responsibility to develop and maintain the configuration management plan for the ECP brake product to the manufacturers. FRA, however, does not believe that such actions are inconsistent with either IEEE–828 or IEEE–1042, since both standards provide for and encourage tailoring appropriate to individual products and the system developers' operational needs. For example, IEEE–828 makes the following provisions:

> This standard permits significant flexibility in preparing an SCM Plan. A successful Plan reflects its project environment. It should be written in terms familiar to its users and should be consistent with the development and procurement processes of the project. To conform to the requirements set forth in other applicable standards or to accommodate local practices, a Plan may be tailored upward, to add information, or tailored to use a specified format. The Plan may also be tailored downward, omitting information required by this standard, when specific standard requirements are identified as not applicable to this project. * * * The information may be presented in the Plan in any sequence or presentation style deemed suitable for the Plans users.

Similarly, IEEE–1042 states:

> The application (and thus the planning) of SCM is very sensitive to the context of the project and the organization being served. If SCM is applied as a corporate policy, it must not be done blindly, but rather should be done in such a way that the details of a particular SCM application are reexamined for each project (or phase for very large projects). It must take into consideration the size, complexity, and criticality of the software system being managed, and the number of individuals, amount of personnel turnover, and organizational form and structure that have to interface during the life of the software system being managed.

The AAR S–4720 standard, particularly in § 3.3.2, outlines the main requirements to the ECP brake system configuration management plan that are common to the requirements of the IEEE and other standards referenced in the NPRM. Section 3.3.2 additionally requires that ''the manufacturer shall maintain a readily retrievable record of all software and hardware changes and make that record available to the AAR and FRA at any time.'' In any event, the NPRM merely stated that FRA expected any configuration management plan to conform to an accepted standard; the IEEE standards referenced were simply provided as acceptable examples.

FRA would also like to address BLET's concern regarding the ''delineation of 'triggers' governing the urgency of the software/hardware changes implementation.'' FRA has reviewed industry practice regarding software changes and has determined that the levels contained in AAR Standard S–4270 are consistent with the IEEE 1044 and 1044.1. These standards differentiate the urgency of software and hardware implementation schedules in order to assure gradual implementation without significantly affecting operations. FRA considers the use of the three levels of software and hardware implementation strategy given in § 3.6 of S–4270 as reasonable and practically justified.

To further assure and enforce compliance of the ECP brake manufacturers' configuration management plans with the final rule and appropriate standards, FRA makes vendor and railroad compliance with S–4270 a regulatory mandate subject to regulatory oversight in paragraph (c) of this section in the final rule. AAR Standard S–4270 places the responsibility for configuration management on the brake manufacturers. Paragraph (c) of this section, however, requires the railroads implementing and using ECP brake technology to ensure that the brake manufacturers' configuration management plans comply with the existing applicable standards. FRA believes that the users of rail technologies are ultimately responsible for their safe use.

Paragraph (c) also provides for regulatory oversight of configuration management plans, which could include a review of the manufacturer's commitment and adherence to the general requirements of accepted or scientifically proven configuration management plans. Based on the allowances for customization of the configuration management standards to support a specific vendor's mode of operation, and the inclusion of FRA regulatory oversight to ensure that vendor's standards are appropriate, FRA considers the content of S–4270 standard sufficient to be incorporated by reference in this final rule.

Paragraph (d), of this section excepts a freight car or freight train equipped with ECP brakes from certain existing provisions contained in part 232. FRA recognizes that part 232 requires compliance with other AAR standards not applicable to ECP brake systems. For instance, section 232.103(l) requires compliance with AAR Standard S–469–47 (''Performance Specification for Freight Brakes''), which specifies a train's air brakes must respond to the decrease and increase of brake pipe pressure. However, ECP brake systems respond to an electronic signal, not brake pipe pressure, rendering S–469–47 inapplicable to ECP brake systems. Accordingly, paragraph (d) excepts ECP brake systems from the requirements of AAR Standard S–469–47.

In addition, GE requests that an exception be granted to certain stand-alone ECP brake systems to the AAR standards referenced in § 232.603(a)(1)–(6), where a suitable justification is provided. To this end, GE supplied proposed language to be inserted in a new paragraph of the final rule. While FRA agrees that the rules should provide for alternative standards, such flexibility is already provided in the introductory text to paragraph (a) of this section. If GE or any other potential brake manufacturer seeks to enter the marketplace with ECP brakes relying on standards other than AAR's, then it may submit alternative standards for FRA approval pursuant to § 232.17. Accordingly, a new paragraph providing for exception from the incorporated AAR standards under suitable justification is unnecessary.

Moreover, paragraph (e), provides further flexibility for the introduction of new technologies by providing for the possible exceptions from the requirements of subpart F of this part. BLET objects to exempting railroad operators from the requirements of subpart F. According to BLET, the pre-revenue service acceptance testing plan requirements set forth in subpart F provide data and other information that is necessary in order to safely regulate the technology. BLET also asserts that ''FRA does not propose that an exception be granted if testing or demonstration is conducted pursuant to an AAR standard that has been incorporated by reference after being subject to public review and comment. Rather, FRA proposes a lower requirement, that the testing/demonstration standard only be FRA-recognized.'' (Emphasis removed.)

Subpart F of part 232 contains general requirements for introducing new brake system technologies. More specifically, it requires a pre-revenue acceptance testing plan. As FRA views existing ECP brake system technology to be a fully mature and well-tested technology, FRA disagrees with BLET on this issue and does not believe the provisions contained in subpart F are applicable to this existing technology. When subpart F was originally added to part 232, ECP brake technology was just beginning to gain prominence. Since that time, experience with the technology is far more developed and the technology is being used on many different trains around the world. Moreover, FRA believes that requiring ECP brake systems to initially and continually comply with a FRA approved standard and to be approved in accordance with AAR's approval procedures prior to being placed in service obviates the need for existing ECP brake system technology to comply with the requirements under subpart F. Accordingly, paragraph (d)(2) provides for an exception from the requirements contained in subpart F freight trains and freight cars equipped with existing ECP brake system technology that has been conditionally or finally approved by AAR in accordance with its approval procedures prior to the effective date of the final rule in this proceeding. FRA has limited the exception to ECP brake system technologies approved by AAR as of the effective date of a final rule to provide an incentive to the industry to move the introduction of the technology along in a timely fashion.

In anticipation of future ECP brake technologies not currently contemplated within the scope of the incorporated AAR standards or not approved by AAR prior to the effective date of a final rule in this proceeding, paragraph (e) provides a procedure for introducing such technologies without going through the pre-revenue testing procedures contained in subpart F. Paragraph (e) permits a party interested in using new ECP brake system technologies or using an ECP brake system technology not approved by AAR prior to the effective date of the final rule in this matter to file a written request with the FRA seeking an exception from subpart F. FRA would expect any such request to include a comprehensive narrative statement and any evidence or facts justifying the exception of the new ECP brake technology from the testing and demonstration requirements of subpart F. The material should fully explain the testing or demonstration that will be conducted pursuant to an FRA-recognized industry standard and ensure that FRA is able to monitor such testing or demonstration. FRA's Associate Administrator may revoke the exception in writing for any reason after providing an opportunity for the affected party or parties to respond.

GE supports the adoption of proposed § 232.603(e), but recommends that ''FRA clarify that 'new technology' does not include functionally equivalent replacement components, consistent with past practice.'' To this end, GE suggests adding a ''new technology'' definition to part 232, clarifying this interpretation in the preamble to the final rule, or including some additional clarifying language to paragraph (e), indicating that in lieu of an FRA recognized industry standard, testing or demonstration of new technologies should be performed in an environment with a safety equivalent to that in paragraph (a).

Subpart F, as indicated in § 232.501, already addresses the issue of new technology. FRA intends subpart F to continue to apply to the introduction of new ECP brake technologies. However, as previously mentioned, the purpose of paragraph (e) is to provide a more liberal alternative to subpart F for the demonstration and testing of new ECP brake technologies subject to the

discretion of the Associate Administrator on a case-by-case basis.

GE's suggestion that the final rule include language requiring some type of adherence to an FRA approved ECP brake design standard misses the mark, since demonstration and testing may occur before any determination on design standards. Chronologically speaking, new ECP brake technologies can be tested and demonstrated under paragraph (e) ''right out of the box.'' Then, if the testing or demonstration results in an ECP brake technology worthy of use in revenue service, the manufacturer of that technology may need to apply for FRA approval of that technology's new design standard under paragraph (a) or (f). It appears that GE may have mixed apples (testing and demonstration) with oranges (subsequently seeking FRA approval or new alternative design standards). During the testing and demonstration phase, design standards may not even be contemplated.

*Section 232.605 Training Requirements*

The general training requirements for railroad and contractor employees performing the inspection, testing, and maintenance on brake systems under this part are contained in § 232.203. Paragraph (a) of this section makes clear that all of the training requirements contained in § 232.203 are applicable to ECP brake system operations and requires that all railroads operating ECP brake-equipped trains update their training, qualification, and designation programs to include provisions for these operations. Accordingly, FRA expects that railroad and contract personnel responsible for performing brake system inspections, tests, and maintenance on ECP brake systems be trained, tested, and designated in accordance with the requirements contained in § 232.203 on the ECP brake systems they will be required to inspect, test, and maintain.

Section 232.203(c) contains general requirements or elements which must be part of any training and qualification plan adopted by a railroad or contractor. FRA continues to believe that the elements contained in this section are specific enough to ensure high-quality training and broad enough to permit a railroad or contractor to adopt a training plan that is best suited to its particular operation. FRA continues to believe that the required training must provide employees with the necessary knowledge, skills, and abilities to perform the tasks required for the various types of brake systems the individual employee will be required to inspect, test, or maintain. Since FRA expects only a limited number of employees will be involved initially with ECP brake operations, a railroad or contractor may tailor its training programs only for those individuals involved with ECP brake systems, based on the tasks that employee will be required to perform on those specific systems.

Section 232.203(e) contains recordkeeping requirements, the cornerstone for training requirements accountability. FRA continues to believe that such records should be kept for employees inspecting, testing, and maintaining ECP brake-equipped freight cars and freight trains. Such documentation will allow FRA to judge the effectiveness of the training provided and will provide FRA with the ability to independently assess whether the training provided to a specific individual adequately addresses the skills and knowledge required to perform the tasks that the person is deemed qualified to perform. Moreover, requiring these records will deter railroads and contractors from circumventing the training requirements and discourage them from attempting to utilize insufficiently trained personnel to perform the inspections and tests required by this rule. The required records may be maintained either electronically or on paper in the same manner as required under section 232.203.

Paragraph (a) of this section also requires ECP brake operations to comply with § 232.203(f), which requires that each railroad or contractor adopt and comply with a plan to periodically assess the effectiveness of its training program. To ensure that affected employees receive timely, effective training relating to ECP brake technology, UTU encourages FRA to audit the training functions that are required under § 232.605. BLET agrees with UTU that FRA should reserve the right to audit such training programs and also proposes that training programs should be submitted to FRA for approval. AAR argues that the regulations should not require FRA approval of railroad training programs, since it would delay any changes that railroads might want to make.

FRA currently performs audits on the training provided to railroad employees and contractors under § 232.203. These audits examine the course content, learning objectives, testing methods, refresher training, and methods for ensuring the effectiveness of the training. FRA intends to continue to audit these training programs, including those for transportation and mechanical employees working with ECP brake operations. FRA does not require submission of training programs relating to conventional brake operations for FRA approval and does not see a need to require a submission of training programs relating to ECP brake operations. Accordingly, paragraph (a) extends this requirement to employees and contractors utilizing ECP brake operations.

In addition, FRA continues to believe that railroads and contractors should periodically assess the effectiveness of their training programs that would include an assessment of the training related to ECP brake systems. FRA continues to believe that periodic assessments may be conducted through a number of different means and each railroad or contractor may have a need to conduct the assessment in a different manner. By referencing the requirements contained in § 232.203, paragraph (a) requires that a railroad or contractor institute a plan to periodically assess its training program regarding ECP brake systems and permits the use of efficiency tests or periodic review of employee performance as methods for conducting such review. While FRA continues to believe that many railroads are capable of assessing the quality of the training their employees receive by conducting periodic supervisory spot checks or efficiency tests of their employees' performance, FRA also believes that on larger railroads the periodic assessment of a training program should involve all segments of the workforce involved in the training.

Paragraph (b) of this section requires each railroad to appropriately amend or modify its operating rules to include safe train handling procedures when utilizing ECP braking systems. The developed operating rules should address the equipment and territory operated by the railroad. FRA insists that training on proper train handling procedures is essential to ensuring that locomotive engineers can properly handle their trains with or without ECP braking systems. FRA also continues to believe that it should not specify the specific knowledge, skill, and ability criteria that a railroad must adopt into its locomotive engineer training program. Given the considerable differences among railroads, FRA believes that each railroad is in the best position to determine what these criteria should be and what training is necessary to provide that knowledge, skill, and ability to its employees operating ECP brake-equipped trains. However, to ensure that the railroads and contractors provide and complete training, paragraph (c) of this section

requires each to adopt and comply with such criteria and training procedures and to incorporate them into its locomotive engineer certification program required by 49 CFR part 240. In the final rule, the text of paragraph (c) has been modified from the proposed text for clarification purposes.

*Section 232.607 Inspection and Testing Requirements*

Except for transfer trains, the existing part 232 regulations require that each train operating with conventional brake systems receive a Class I brake test at its initial terminal and when certain events occur en route, a Class IA brake test every 1,000 miles, and Class III brake tests when the train consist continuity is interrupted. When operating as an extended haul train, the existing regulations require that a Class I brake test be performed at the train's initial terminal and at the train's 1,500-mile location, if operating further than 1,500 miles. In addition, under certain circumstances, cars and solid blocks of cars are required to receive either a Class I or a Class II brake test when they are added to a train. Each of these inspections is expensive and time-consuming.

An ECP brake system's self-monitoring capabilities, fail-safe operation, and enhanced safety and performance provide railroads the ability to reduce the number of physical inspections on a train. In a letter dated January 26, 2007, filed in the related ECP brake waiver proceeding, BNSF and NS assert that ''[t]his performance-based technology supercedes [sic] the need for a scheduled inspection based on the amount of mileage that can be accumulated within the boundaries of the U.S. rail system.'' Docket No. FRA–2006–26435. Similarly, in the same docket, two ECP brake manufacturers, NYAB and Wabtec, state that when an ECP brake system enters ''Run'' mode, it provides diagnostics, continuous monitoring, and fault reporting to the locomotive display. According to the manufacturers, ECP brakes provide to the locomotive monitoring and feedback of the most important brake data and ''while it is not economically practical to monitor for all potential brake system failures, the increased level of monitoring and data reporting should allow safely extending the distance between inspection points, coupled with revised railroad procedures.'' Letter dated January 29, 2007, in Docket No. FRA–2006–26435.

FRA is convinced that if a train is properly and thoroughly inspected, with all of the defective conditions being eliminated, then the train is capable of traveling distances much greater than 1,000 miles between brake inspections. FRA's experience with extended haul trains over the last four years has established that trains with conventional pneumatic brake systems that are inspected by highly qualified individuals can safely operate up to 1,500 miles between brake inspections. FRA is not aware of any significant incident or derailment related to a brake or mechanical component failure on an extended haul train. Accordingly, in paragraph (h) of this section, FRA excepts trains operating exclusively in ECP brake mode from the Class IA and Class II brake inspections currently required under §§ 232.207 and 232.209. Paragraph (h) also excepts such trains from en route Class I inspections required under § 232.205(a) and (b). Various comments were submitted relating to these exceptions of en route brake inspections. Since the exceptions in paragraph (h) substantially relate to the other paragraphs of section 232.607, we will discuss them as appropriate below.

Paragraph (a) requires continued compliance with § 232.205(c)—which describes the tasks and requirements of a Class I brake test—for an ECP brake-equipped train at its initial terminal. To offset safety concerns regarding the exceptions to intermediate inspections, FRA requires that Class I brake tests performed at initial terminals on ECP brake-operated freight trains be performed by a qualified mechanical inspector (QMI). FRA continues to believe that a Class I brake test performed on a train at its initial terminal needs to be as in-depth and comprehensive as possible and, thus, should be performed by an individual possessing the knowledge not only to identify and detect a defective condition in all of the brake equipment required to be inspected, but also to recognize the interrelated workings of the equipment and the ability to trouble-shoot and repair the equipment. Similarly, FRA will require that all of the mechanical inspections required to be performed on a train at its initial terminal be conducted by an inspector designated pursuant to 49 CFR 215.11 in order to ensure that all mechanical components are in proper condition prior to the train's departure.

FRA believes that the regulatory relief provided by paragraph (h) of this section is justified by the increased level of safety provided by ECP brake technologies and the requirement under paragraph (a) that a Class I brake test of car equipped with ECP brakes be performed by a QMI at its initial terminal. The exceptions provided in paragraph (h), in conjunction with the requirements of paragraph (a), would allow most trains equipped and operated with ECP brakes to travel to their destinations without stopping for any required intermediate inspections. The regulatory relief provided by this elimination of intermediate brake tests will significantly reduce operating and train delay costs.

In its comments, UP argues that it is not necessary to utilize a QMI to perform a Class I brake inspection for movements up to 3,500 miles. UP instead proposes that a qualified person (QP) perform Class 1 inspections for movements up to 3,500 miles and that a QMI be required to perform inspections for longer movements. UP also notes that some trains operated with ECP brakes may originate at a point where a QMI is not present and where train crews containing a QP may perform the inspections. AAR also objects to the requirement in paragraph (a) that Class I inspections on ECP brake operated trains be performed by a QMI. AAR asserts that the QMI requirement is more stringent than the existing inspection requirements for trains equipped with conventional brakes. According to AAR, since a QMI is not present at all initial terminals, requiring a QMI to perform Class I brake inspections would discourage railroads from implementing ECP brake systems.

BRC supports paragraph (a), stating that a QMI will help ensure the proper condition of ECP brake systems prior to departure. According to BRC, the leeway requested by AAR and the carriers to designate any person as qualified is premature and should not be considered until data can be provided showing that inspections by a QMI are unnecessary. BLET wholeheartedly concurs that each Class I brake test at an initial terminal should be performed by a QMI. According to BLET, the industry's objection is without merit and its two-standard proposal will produce an oversight nightmare.

FRA agrees that, at this time, a two-tiered approach requiring a QMI for only some Class I inspections of ECP brake operations would result in significant monitoring and enforcement difficulties. In any event, as discussed in more detail below, the final rule will only allow freight trains and freight cars operated with ECP brakes to operate to their destination, not to exceed 3,500 miles, or up to 3,500 miles for unit or cycle trains, before receiving an additional Class I brake inspection. Accordingly, there will be no ''longer movements'' between Class I brake

inspections that would allow for such a two-tiered approach.

FRA also believes that the railroads' concerns relating to QMIs are without merit. FRA is not mandating the railroads to operate with ECP brake systems. Thus, if the railroads opt to implement such systems, they will need to adjust their operations accordingly. FRA already requires that a QMI perform Class I brake inspections on extended haul operations, which are limited to 1,500 miles between such inspections. By more than doubling the allowable distance, FRA insists that there is an even greater need to require that a QMI perform the Class I brake tests on operations traveling further than the currently allowed distances. Moreover, the railroads' concerns are further mitigated by the reduction of the number of Class I brake inspections required en route. Since a QMI is required for extended haul operations at only 1,500 miles, it is unclear why AAR asserts that requiring the use of a QMI for ECP brake operations at 3,500 miles would be more stringent.

In light of the significant benefits provided by the extension of allowable distance between Class I inspections to 3,500 miles, FRA does not believe that requiring a QMI to perform a Class I brake test on for an ECP brake operation would discourage implementation of this technology. The railroads have had little difficulty in ensuring QMI placement at facilities where Class I inspections are required on extended haul trains. Since the number of Class I inspections for an ECP brake operation will be less than those for a conventional brake operation in extended haul status, FRA does not foresee this requirement becoming sufficiently burdensome to effectively discourage the implementation of ECP brake system technology.

In paragraph (b), FRA permits a train operating in ECP brake mode to travel up to 3,500 miles or to its destination, whichever is less, without any additional brake inspections. FRA believes that 3,500 miles allows virtually all ECP brake operated trains to travel to their respective destinations and provides for coast-to-coast travel. FRA also bases this mileage amount on the fact that foundation brake rigging and brake shoes will safety operate this distance and redundant intermediate inspections will not necessarily increase ECP brake system safety. Because many unit or cycle trains operate in a continuous loop with multiple loading and unloading locations, FRA has not included the destination of the train as a limiting factor for them. FRA is specifically making this distinction in order to prevent misinterpretation of the final rule as it relates to unit or cycle trains. As these trains may have multiple destinations, a strict application of destination could result in Class I brake tests being performed more frequently than intended by this final rule. Thus, in paragraph (b)(2), FRA treats unit and cycle trains differently by only requiring them to receive Class I brake inspections by qualified mechanical inspectors at least once every 3,500 miles. To be clear, under the final rule, no freight car or freight train equipped with ECP brakes would be allowed to travel more than 3,500 miles without receiving an additional Class I brake inspection by a qualified mechanical inspector.

UTU encourages FRA to continue to consistently regulate the need for mechanical inspections and repairs. UTU asserts that the self-monitoring feature of ECP brake equipment will have no effect on monitoring the mechanical functions of the freight car involved. According to UTU, ECP brake equipment will not monitor the condition of draft gear, brake shoes and hangers, coupling devices, safety appliances and grab irons, sill steps, springs, hopper doors, and the multitude of items a normal mechanical inspection is designed to check. UTU also asserts that a well trained and qualified mechanical inspector must not be removed from the safety equation because of advanced brake equipment that is only designed to improve the braking functions.

BLET agrees, asserting that continuous monitoring capability is not quite as robust as FRA claims. According to AAR Standard S–4260, § 3.5.4.2, ''CCDs with a low or missing battery are counted as inoperable, but may not be displayed as inoperable until the total inoperable reaches less than 90% with trainline power OFF, or less than 85% with trainline power ON, at which time a penalty brake application will be commanded.''

TWU similarly argues that ECP braking does not have capabilities to perform the safety critical inspections indicated in FRA Technical Bulletin MP&E 98–59. In contrast, says TWU, ECP brake systems, as designed today, while having the ability to monitor certain aspects of the braking system, are not designed or equipped to monitor or detect defects on most equipment of a train braking system, in particular the complex brake rigging systems on the various types of equipment. According to TWU, 122 of the potential 127 brake-related defects (96%) are not detectable by ECP brake monitoring, making clear that the advantages of real-time monitoring are both overstated and misleading. BRC asserts that the ECP brake system technology cannot detect 65 defects. Moreover, TWU states that FRA accident data indicates that the highest percentage of accidents are caused by brake-related mechanical defects not monitored by ECP brake systems.

TWU further asserts that, in addition to a serious decrease in the level of safety based on brake system considerations, the reduction in inspection frequency will seriously decrease the level of safety as it relates to other mechanical systems and components. ''There should be no question that reducing the number of inspections will reduce opportunities to detect defective equipment. The reduction in frequency of inspections will also reduce opportunities for detecting bent, broken, loose, or missing safety appliances.'' TWU points out that FRA previously noted that ''railroads have not conducted the excellent initial terminal inspections that were contemplated in 1982, when FRA extended the 500-mile inspection interval to 1,000 miles.'' (Citing 66 FR 4113 (Jan. 17, 2001)). TWU also claims that from January 2005 to July 2007, FRA accident data includes 24 derailments, 2 collisions, and 3 other type of accidents resulting from mechanical defects, including ''Tiedowns, doors, etc.'' TWU asserts that a comprehensive mechanical inspection is critically important, citing FRA Technical Bulletin MP&E 98–57, which states, ''In order to conduct a proper Freight Car Safety Standards inspection, both sides of a car must be inspected.''

AAR counters by questioning the significance of the brake rigging issue. According to AAR, from 1990 to 2006, ''the industry averaged five mainline accidents attributable to brake rigging down and dragging,'' identified by FRA cause code E07C. In addition, says AAR, U.S. railroads have 2,415 dragging equipment detectors placed across the country, which provide immediate radio feedback to train crews.

FRA understands the concerns relating to the ECP brake system's self-monitoring limitations. FRA acknowledges that the ECP brake system developed under the applicable AAR design standards does not monitor a number of brake components. However, FRA believes that the labor unions' concerns, while relevant, do not take into account a number of factors. By requiring a QMI to perform a Class I brake inspection at initial terminal on an ECP brake operated freight train, FRA expects a reduction in all en route brake

defects. While performing a Class I brake inspection every 1,000 miles would provide more opportunities to detect defective equipment, FRA believes that such detection is limited to only obvious en route defects and that an inspection by a QMI at initial terminal will significantly reduce those defects. Based on its experience with extended haul operations, FRA feels that a good, quality inspection conducted by a QMI at the initial terminal will ensure that the items not monitored by the ECP brake system computer will safely travel a distance of 3,500 miles.

For instance, in FRA's experience, en route Class IA brake inspections performed subsequent to Class I brake inspections performed at initial terminals by QPs have significantly higher defect ratios than those found at en route Class I brake inspections performed on extended haul operations that received an earlier Class I brake inspection performed by a QMI. As indicated in Technical Bulletin MP&E 07–01, issued on April 3, 2007, in addition to the numerous regular inspections of extended haul operations, FRA performed several formal week-long audits at various locations to determine the railroads' compliance with the regulations and whether the quality of the inspections and tests would justify allowing the inbound inspections and record-keeping requirements to sunset in April of 2007. Most of the non-compliance identified during the audits included the railroads' inability to create, maintain, and produce the required records of defects found during the inbound inspections. It was also noted that the railroads occasionally failed to perform the necessary inspections on cars picked-up or set-out of extended haul trains on certain corridors. Actual defective conditions found at inbound inspections were minimal.

FRA further believes that any remaining concerns relating to en route defects are offset by the ECP brake system's other significant safety benefits, including increased train control, a reduction of in-train forces, shorter stopping distances, and its self-monitoring capabilities. Moreover, while some commenters provided data on what portion of brake parts remain unmonitored by the ECP brake system, they did not establish the relationship between those parts and the quantity and significance of defects found and derailments caused. FRA continues to believe that the ECP brake system monitors the more crucial aspects of the brake system.

FRA believes that TWU's references to freight car inspection standards and guidance are misplaced. Although freight car defects may be incidentally detected during a Class I brake inspection, part 232 does not govern such issues. Freight car defects should still be found when cars are added to a train en route and when they are otherwise required to receive a freight car inspection under part 215.

FRA also continues to believe that ECP brake system self-monitoring is sufficiently robust. BLET's citation of § 3.5.4.2 of AAR Standard S–4260 is misplaced. Section 3.5.4.2 sets the limit for the number of CCDs that report a low or missing battery. This does not reference or mean inoperable CCDs. All CCDs may remain operable when reporting low or missing batteries. The ECP brake system is powered by the train line and § 3.5.4.2 only indicates that a back-up battery is necessary to cover for a temporary loss of power. Accordingly, to have a battery malfunction is not critical to train brake system operation. The purpose of the limitation in § 3.5.4.2 is to eliminate the possibility of train line power disappearing when back-up battery power is unavailable.

FRA recognizes and appreciates the use of additional wayside detection equipment, which AAR claims should reduce concerns relating to brake rigging malfunctions. However, FRA has not had an opportunity to review that equipment with respect to key attributes such as network coverage, sensitivity, and availability, and does not require use of that equipment. Accordingly, FRA does not feel comfortable relying on such unreviewed technology, which can be removed or modified at any time. However, FRA does recognize that the combination of on-board and wayside monitoring does provide an additional layer of safety for all train operations and that the use of such technologies may offer opportunities for further liberalization of visual inspections requirements in the future, given proper safeguards.

UP believes that the allowable distance between brake inspections using ECP brake technology should be extended to 5,000 miles, instead of the 3,500 miles proposed by the FRA, in order to provide a significant incentive for the railroad industry to implement ECP braking in high-mileage services. For example, says UP, an intermodal train with ECP braking could be operated round-trip between Chicago and any of the west coast ports within such a 5,000 mile limit. According to UP, a 5,000 mile limit for ECP brake operated trains between Class I brake inspections with no intermediate inspections would enable the operation of sets of intermodal equipment in very high-mileage, high-utilization, rapid turnaround service.

To support its request, UP points to the success of a previous operation. In April 2004, UP operated a round-trip test train 4,400 miles at a maximum speed of 74 MPH between Chicago and East Los Angeles. Based on that test's findings, UP and CSX jointly operated one pair of high-speed trailer on flat car (''TOFC'') trains for UPS between Kearney, New Jersey and East Los Angeles, California, a trip that took 59 hours. While there was some economic penalty involved in this dedication of equipment, UP says that it proved that locomotives and cars could be selected, maintained and operated in high-speed, high-mileage transcontinental freight service. In addition to the Class I inspections performed at Kearney and East Los Angeles, three Class 1A inspections occurred en route. UP asserts that a 3,500 mile limit would have been extremely valid and useful. According to UP, the elimination of 3 intermediate brake inspections of 40 minutes each could have potentially reduced overall one-way transit time by 120 minutes or 2 hours. An ECP brake operated train resulting in the same running time as a conventional brake operated train would require a lower operating speed and would have reduced fuel consumption and exhaust emissions.

AAR also supports a higher limit of 5,000 miles between Class I inspections, asserting that it would be more consistent with FRA's objective in this proceeding to facilitate conversion to ECP brake technology and provide regulatory relief without adversely affecting safety. According to AAR, a 5,000 mile limit would facilitate the efficient operation of intermodal trains in high-mileage, rapid turn-around service. AAR claims that there is no technical justification for setting the limit at 3,500 miles instead of 5,000 miles given the capability of ECP systems to monitor the critical functions of the air brakes.

BRC supports paragraph (b), stating that the proposed distance of 3,500 miles is ''more than generous.'' According to BRC, AAR and the carriers have not provided real evidence that the safety benefits offered by ECP brake technologies will offset any of the numerous safety risks that the technologies cannot detect over long distances. BRC asserts that without such data, the railroads' request for a 5,000 mile allowable distance between Class I

brake inspections should not be considered at this time.

After consideration of all the comments provided and based upon existing information available to the agency, FRA is not convinced that the allowable distance for ECP brake operations should exceed 3,500 miles between Class I brake inspections. FRA believes that an extension of the allowable distance to 3,500 miles is justified by the increased safety promised by ECP brake technology and provides a suitable incentive for railroads to implement and use ECP brake technology. While FRA supports the railroads' interest in operational and fuel efficiency, FRA believes the extension to 3,500 miles provides such efficiency. Moreover, based on its experience and the lack of safety data supporting a 5,000 mile allowable distance between Class I brake inspections for ECP brake operations, FRA does not feel comfortable further extending the allowable distance limit at this time. The only example provided by UP was a 4,400 mile joint operation with CSX that received three Class 1A brake inspections while en route. Although such demonstrations, with proper documentation, are helpful, acquisition of further experience will be needed to achieve confidence in less restricted longer hauls.

AAR and UP also commented on FRA concerns relating to brake shoe wear. AAR claims that brake shoe wear should not be a concern in ECP brake operations moving with up to 5,000 miles between brake inspections. According to AAR, ECP brakes reduce brake shoe wear and the AAR condemning thickness of 3/8'' provides an ample safety margin over a 5,000 mile run. UP stated that it would consider establishing its own minimum brake shoe criteria to properly configure the train for the entire round trip.

FRA appreciates UP's offer to consider establishing its own minimum brake shoe criteria for trips involving more than 3,500 miles between Class I inspections. However, FRA cannot rely on that voluntary offer, which would apply only to one railroad and could be withdrawn at any time. In any event, FRA continues to find cars with brake shoes that are well past the brake shoe replacement condemning limits for trains equipped with conventional brakes. On some trains not permitted to travel beyond 1,500 miles between Class I brake inspections, brake shoes have been found worn into the backing plate. Accordingly, FRA does not feel comfortable at this time permitting trains to operate more than 3,500 miles between comprehensive brake inspections until more data can be obtained to support such an initiative.

Currently, no extended haul train is permitted to travel more than 1,500 miles without receiving another comprehensive brake inspection. For trains equipped with ECP brakes, FRA more than doubles the currently allowed distance to 3,500 miles. FRA acknowledges that in the related proceeding, Docket No. FRA–2006–26435, the Safety Board provided for the movement of trains equipped with ECP brakes up to 3,500 miles. During the pendency of this rulemaking, FRA closely monitored those trains' operations and collected information on the equipment operated in those trains. FRA reserved the right to make appropriate modifications in the final rule based on any further data then available. Since cars equipped with ECP brakes have only operated for a limited time since the recent issuance of the waiver under Docket FRA–2006–26435 and are not typical of those in the general fleet with respect to the age of components, FRA has not received any data convincing it to modify the rule as proposed in the NPRM. Accordingly, paragraph (b) provides for a train operated with ECP brakes to travel to its destination, not to exceed 3,500 miles, between brake inspections.

FRA acknowledges, however, that notwithstanding the proposed allowance of a train equipped and operated with ECP brakes to travel up to 3,500 miles without an additional brake inspection, instances exist where certain trains would require the performance of a Class I brake inspection en route. For instance, the regulations governing operations utilizing conventional brake systems require that certain tests be performed when a car is off a source of compressed air for more than 4 hours. FRA acknowledges that an ECP brake-equipped train's on board diagnostics reduce concerns relating to cars remaining off air for extended periods of time. Accordingly, in this proceeding's NPRM, FRA proposed to extend the allowable off-air period to 24 hours. For the purposes of organizational clarity, the final rule includes the off-air requirement in paragraph (b).

BLET opposes the 24-hour off-air limitation. According to BLET, the allowable off-air period should remain at 4 hours and the Class I brake inspections required on ECP brake operated trains after an off-air period exceeding 4 hours should be performed by a QMI, not a qualified person.

AAR, UP, NYAB, and Wabtec all assert that the allowable off-air period should be extended to 120 hours (five days). According to UP, providing for a 120 hour off-air period will be especially relevant for equipment such as grain hoppers and coal cars in unit train operations serving grain elevators or electrical generating plants, where intact train sets may be parked for several days awaiting either loading or unloading. UP further asserts that the self-diagnostic capability of ECP braking systems, with results displayed in the locomotive cab upon powering-up the ECP train line cable, will enable this to occur without compromising safety. Moreover, being off-air for up to 120 hours should not result in any measurable or visually identifiable deterioration of the non-ECP brake components in the braking system. The ECP brake manufacturers see no technical or safety issues with extending the allowable off-air period to 120 hours and state that, when the ECP brake system initializes, self testing will verify the car is ready for service, including the battery charge status.

FRA believes that an expansion of the time allowed off-air for ECP brake operations is justified based on the capabilities of ECP brake systems or the combination of those capabilities and protection against vandalism. Accordingly, FRA will require under paragraph (b) that an en route Class I brake inspection be performed by a qualified person if a train operating in ECP brake mode is off air for more than 24 hours. However, if such a train is located within an ''extended-off-air facility,'' as more fully described below, the time limit is extended to 80 hours. FRA continues to believe that dangers, although reduced, remain when an ECP brake-equipped train remains off air for too long. Thus, the final rule retains the proposed off-air time limit of 24 hours since cars moving in service generally have a dwell time of 24 hours or less and this limit provides sufficient flexibility while allowing the industry to move equipment without impacting timely inspections and maintaining an acceptable level of safety.

In light of the comments filed in this proceeding and upon further internal deliberation, FRA believes that extending the off air requirement to 80 hours for trains left in extended-off-air facilities effectively ensures the safe operation of ECP brake systems while providing suitable flexibility for certain operations. FRA recognizes that additional flexibility may be reasonable when a freight train or freight car operated with ECP brakes is left at a protected location controlled by the shipper or consignee and not accessible to the railroad or potential vandals. For instance, a train or car equipped with ECP brakes may be dropped off at a

consignee's plant on one morning and will be inaccessible to the railroad for several days, such as over the weekend or a holiday.

Since railroads may not be able to pick up the equipment from the extended-off-air facility immediately when it opens, FRA believes that some additional operational flexibility should be provided during this time. FRA also recognizes that providing a limited number of hours after the opening of the facility on a given day may result in enforcement issues when attempting to determine the actual number of hours the train may have been off air or in the facility.

Accordingly, the final rule provides for the retrieval of the equipment up until the close of business on the fourth day it is at the facility. Assuming the extended-off-air facility maintains an 8-hour work day, this would provide a time span of up to 80 hours in that facility. For instance, FRA believes that the 80-hour time differential between the facility opening on Friday morning and closing on the directly subsequent Monday provides suitable flexibility for such operations.

From a safety standpoint, FRA believes that an 80-hour off-air limitation is justified if the train is left in an extended-off-air facility. FRA previously expressed its belief that in certain circumstances the length of time that equipment is removed from a source of compressed air can impact the integrity and operation of the brake system on a vehicle or train. Particularly, FRA indicated that the potential for vandalism may be high due to the location where equipment is left standing. *See* 66 FR 4122 (Jan. 17, 2001). While a train remains off air for any period of time, it may be unattended, providing an opportunity for vandalism. FRA continues to believe that the potential for vandalism is one of various factors justifying an off-air limitation.

If steps are taken to substantially reduce the potential for vandalism, however, FRA believes additional flexibility is justified. Thus, if a freight train or freight car operated with ECP brakes is at an extended-off-air facility and is not accessible to the carrier or potential vandals, FRA believes an 80-hour off-air limitation is warranted. For the purposes of this final rule, an extended-off-air facility is a private location controlled and access-restricted by a sole shipper or consignee. The location must be suitably designed to effectively and significantly reduce the possibility of vandalism. For instance, a suitably fenced-in power plant with sufficient entry-prohibitive security would suffice.

Also for the purposes of this final rule, the times the equipment enters and departs the extended-off-air facility shall presumptively be when the off-air time period begins and ends, respectively. Otherwise, enforcement would be difficult, since FRA would be unable to ascertain when a train or car went off and on air within the restricted area. This presumption, however, may be rebutted with evidence showing when the equipment actually went off air and when it was reconnected to an air source.

For trains operating in ECP brake mode and off air for more than 24 hours, the Class I brake inspection may be performed by a qualified person. FRA acknowledges that while a qualified mechanical inspector must be stationed at each route's initial terminal, it is not reasonable or feasible at this time to require one at each location a train operating in ECP brake mode is off air for more than 24 hours, because many of those locations will be unpredictable. Requiring a qualified mechanical inspector at each point a train is off air for more than 24 hours would likely result in a significant disincentive for a railroad to equip its trains with ECP brake systems.

FRA also intends for these requirements to apply to trains operating in ECP brake mode, located at their initial terminals, and off air for more than 24 hours without the train consist being changed. In other words, under paragraph (b), if a qualified mechanical inspector performs a Class I brake test on a train operating in ECP brake mode at the train's initial terminal and that train then goes off air for more than 24 hours before departing from the initial terminal, another Class I brake test must be performed prior to departure. However, FRA believes that requiring a qualified mechanical inspector at an initial terminal to perform a Class I brake test twice on the same train with unmodified consist would be unnecessary and possibly too onerous. FRA does not expect this situation to occur often, since trains rarely sit off air for more than 24 hours after receiving a Class I brake test. The train will not have traveled at all, but if the same train spent 24 hours off air after traveling 500 miles, a Class I brake test by a qualified person would suffice. Thus, the second Class I brake test may be performed by a qualified person.

While FRA recognizes that additional experience with ECP brakes may show that brake tests are no longer needed after being off air, FRA does not believe the evidence suffices to prove that proposition today. FRA's intent in providing these narrow expansions of the existing 4 hour rule is not to alter the tenet that equipment should be retested when it is removed from a source of compressed air for any lengthy period of time. The 24 and 80 hour off-air requirements apply to any ECP brake operated train, regardless of whether it is a unit or cycle train, and replace the 4 hour off-air requirement under § 232.205(a), which is excepted under paragraph (h), as previously indicated. The 24 hour allowance gives railroads the flexibility to perform switching operations while ECP brake-equipped trains are en route and provide flexibility to efficiently move cars from one ECP brake-equipped train to another when necessary, yet retain the concept that such cars or trains be retested when left disconnected from a source of compressed air for longer periods of time. The 24 and 80 hour time frames are also consistent with the general dwell time that cars experience while en route and while in extended-off-air facilities. FRA further believes that a limitation on the amount of time that such equipment may be off air is necessary for ensuring that such equipment is inspected in a timely and predictable manner. If no time limit were imposed or if too much time was permitted, an ECP brake-equipped car could lawfully sit for days or weeks at various locations while en route to its destination and be switched in and out of numerous trains without ever being reinspected. Such an approach would drastically reduce the number of times that the brake systems on such equipment would ever be given a visual inspection from what is currently required and, in FRA's view, would seriously degrade the safety of the trains operating with such equipment in their consists.

Furthermore, if an ECP brake-equipped train was allowed to be off-air for an excessive amount of time, it would be virtually impossible for FRA to ensure that equipment is being properly retested as it would be extremely difficult for FRA to determine how long a particular piece of equipment was disconnected from a source of compressed air. In order to make such a determination, FRA would have to maintain observation of the equipment for days at a time. Consequently, a 24-hour limit on the amount of time equipment can be disconnected from a source of compressed air as it maintains current levels of safety and provides an enforceable and verifiable time limit that FRA believes provides the railroads some additional benefit over what is currently required both in terms of

operational efficiency and cost savings. An FRA inspector could monitor a 24 hour off-air period by merely returning to the same accessible location the very next day. FRA believes that a limited extension to 80 hours off air at extended-off-air locations provides for further flexibility where the safe custodianship of the equipment is ensured and where the amount of off-air hours can be easily determined.

In paragraph (c), the final rule retains the proposed requirement that a Class I brake test be performed by a qualified person on each ECP brake-equipped car added en route to a train operating in ECP brake mode. However, FRA believes that this requirement may not be necessary if other safety precautions are taken. Thus, the final rule will not require a Class I brake test on such cars when being added to a train operating in ECP brake mode if the car had previously received a timely and proper Class I brake test by a QMI, the train crew is provided documentation of that test, the car has not been off air for more than what is allowed under the final rule, and a proper visual inspection is performed prior to use or departure.

Accordingly, if an ECP brake-equipped car has received a Class I brake test by a qualified mechanical inspector within the last 3,500 miles, documentation of that test is provided to the train crew, the car has not been off air for more than the amount of time allowed by this final rule, and a proper visual inspection is conducted when the car is added to the train, FRA believes that it would be unnecessary to require an additional Class I brake test when that car is added to an en route train operating in ECP brake mode. However, to account for those cars that have not received a Class I brake test by a qualified mechanical inspector within the last 3,500 miles and that will be added to a train operating in ECP brake mode, paragraph (c) requires a new Class I brake test under those circumstances. Paragraph (c) is necessary in light of paragraph (h) excepting compliance with section 232.205(b). Unless a car operating in ECP brake mode is off air for more than the allowable time frame under this final rule, it would not require a Class I brake test when it is added to a new train, since the rules contemplate that the car would have already received a Class I brake test within the previous 3,500 miles or at its initial terminal. The documentation would be required to ensure that a Class I brake test by a qualified mechanical inspector will be performed every 3,500 miles. Under paragraph (c), any ECP brake-equipped car being added to a train operating in ECP brake mode would require a Class I brake test when the car has been off air for more than the allowable amount of time for the same reasons stated above concerning paragraph (c).

FRA believes that a visual inspection of the car's brake components is a suitable replacement for an additional Class I brake test when the car or cars added in these circumstances have received a Class I brake test by a qualified mechanical inspector within the last 3,500 miles. The visual inspection required by paragraph (c) could be performed while the car is off air and in conjunction with the mechanical inspection required under part 215 whenever a car is added to a train. Thus, FRA believes that the visual inspection required by paragraph (c) does not impose any significant burden on the railroads as they are already required to visually inspect the mechanical components on any car added to a train under part 215. FRA also acknowledges that the brake systems on cars not equipped with ECP brakes would be inoperative after being added to a train operating in ECP brake mode. To ensure the safe operation of such equipment and trains, paragraph (c)(2) of the final rule requires that cars equipped solely with conventional brake systems and placed into trains operating in ECP brake mode also be given a visual inspection to ensure their safe operation and to ensure compliance with § 232.15 when added to the train.

In the event that a car would be required to receive a Class I brake test when added to an en route train, the final rule requires that the Class I brake test be performed by a qualified person for the same reasons stated in the above analysis. To be clear, although any car added to a train en route may receive a Class I inspection by a qualified person, the entire train's travel distance is limited to its destination or the distance remaining until the train or any individual car picked up en route has traveled 3,500 miles since its last Class I brake inspection performed by a qualified mechanical inspector, whichever is less. A Class I brake inspection by a qualified person does not reset the mileage clock for the entire train.

FRA also sought comments on the application of a Class III brake test to an ECP brake system. NS expressed its concern that the specifications outlined under § 232.211(c) cannot be met. According to NS, that section relates to the increase and decrease of brake pipe pressure as indicated by a rear end gauge or electronic telemetry device. ECP braking systems provide for the constant charge of the brake pipe and this rear end value will not reflect the air pressure differential currently experienced with conventional braking systems. NS asserts that since those brake reductions will be made electronically rather than pneumatically from the locomotive, the end of train device will not display a change in brake pipe pressure to indicate a brake application.

A freight train operating with conventional brakes receives a Class III brake test at the location where its configuration is changed in order to ensure the integrity of the train line. Basically, a Class III brake test ensures that the train brake pipe is properly delivering air to the rear of the train. Upon further review and consideration of the comments, FRA recognizes that for an ECP brake system, a traditional Class III test may not be completely applicable.

Accordingly, paragraph (d) requires a Class III brake test for ECP brake operated trains with certain modifications. Paragraph (d)(1) includes the locations and events that require the performance of a Class III brake test on an ECP brake operated train. Accordingly, § 232.211(a) is being excepted under paragraph (h). Paragraph (d)(2) recognizes that the Class III brake test requirements relating to using EOT devices to observe brake pipe pressure changes at the rear of the train is not practical with ECP brake operations. The diagnostic capabilities of ECP brake systems will identify defective brake conditions on all of the train's cars, including the rear car. Under the applicable AAR standards, this information should automatically appear on the ECP brake system monitor.

Paragraph (e) includes requirements relating to the sequential initialization of ECP brake operated trains. The applicable AAR standards—as defined in § 4.2.3 and its subsections in AAR Standard S–4200 and in § 5.2 of AAR Standard S–4230—provide procedures for the initialization of the ECP brake system. The standards provide for the ECP brake system's initialization to occur by car either randomly or sequentially. FRA believes that the sequential initialization of an ECP brake system provides the train crew with the exact placement of the cars in the train, which can help satisfy the consist comparison requirements also under this paragraph. An electronic version of the train consist displayed on the locomotive cab's ECP brake system monitor can also help during emergencies and when identifying the exact location of cars with brake problems.

Due to the possibility of an ECP brake system not recognizing the inclusion of cars not equipped with ECP brake systems, paragraph (e) requires the train crew compare the total number of cars indicated by the train consist documentation with the total number of cars identified by the ECP brake system.

Under the existing regulations, tests and inspections include brake pipe service reductions and designate specific psi specifications. In the NPRM, FRA indicated that modifications to the brake pipe reduction standard are appropriate to reflect the technological differences between ECP brakes and conventional pneumatic brakes. Brake pipe pressure in ECP brake-equipped trains remains important, since these trains still employ a pneumatic emergency brake application for safety back-up purposes and rely on the pneumatic parts when used in an overlay system. Accordingly, for trains equipped with ECP brake systems, FRA proposed to replace the existing brake pipe service reductions and increases with an alternative requirement for an electronic signal that provides an equivalent application or release of the brakes. FRA indicated that any alternative test procedures must include, at a minimum, either the electronic equivalent to each existing test's brake pipe reduction requirements or the equivalent of a full service brake pipe reduction initiated by an electronic signal.

FRA sought comments on this proposal, including the appropriate type of alternative test. In light of how the brake pipe's use in an ECP brake train will be limited to charging brake air reservoirs, FRA sought comments on how the existing regulatory brake pipe leakage limits should be modified, if at all, for ECP brakes and whether changes in the leakage requirements will affect the pneumatic backup capability of the ECP brake system. In addition, FRA indicated that comments should address the need to include the specific electronic reduction that is to be made on ECP equipped trains during the required brake tests and what type of electronic signals would be suitable equivalents to the currently mandated 20-psi and 15-psi brake reductions.

NS asserts that compliance with the brake pipe service reduction requirements cannot be met with ECP brake operations. For instance, NS notes that § 232.211(c) relates to the increase and decrease of brake pipe pressure as indicated by a rear end gauge or electronic telemetry device. According to NS, ECP braking systems provide for the constant charge of brake pipe and this rear end valve will not reflect the air pressure differential currently experienced with conventional braking. Since those brake reductions will be made electronically rather than pneumatically from the locomotive, NS says that the ECP EOT device will not display a change in brake pipe pressure to indicate a brake application.

On the other hand, BLET believes that there is a need to include both the specific electronic reduction that is to be made on ECP brake-equipped trains during the required brake tests and a determination of what type of electronic signals would be suitable equivalents to 20-psi and 15-psi brake reductions mandated in part 232. BLET believes that the appropriate alternative would be one that correlates a particular psi reduction with its digital percentage equivalent. According to BLET, assuming that the train brake command scale is relatively linear, a 20 psi reduction represents approximately 77 percent of a full service reduction and a 15 psi reduction represents approximately 58 percent of a full service reduction. Regarding brake pipe leakage, BLET urges FRA to retain current regulatory limits, since overlay and emulator systems permit conventional pneumatic operations. Furthermore, AAR Standard S–4200, § 3.8, states that a ''pneumatic backup (PB) system shall be required on each car to apply emergency brake cylinder pressure in the event of a vented brake pipe.'' Establishing different brake pipe leakage limits, says BLET, is a prescription for confusion and unnecessary risk.

AAR supports retaining the existing brake pipe leakage limits. NYAB and Wabtec also commented, suggesting that, in order to maintain the same functionality as with conventional brakes, an ECP train brake command should be applied in the range of 80 to 85 percent to address both the 15 and 20 psi reduction. According to the brake manufacturers, the brake pipe continuity can be verified by a procedure that requires watching the end of train brake pipe pressure as reported to the locomotive.

FRA believes that an electronic or digital equivalent of the current brake pipe reduction test should apply during a Class I brake test on ECP brake operations. Since the brake manufacturers are in the best position to determine that equivalent metric, FRA will rely on the percentages proposed by NYAB and Wabtec. Accordingly, paragraph (f)(1) will remain as proposed with the understanding that the electronic equivalents of 80 percent and 85 percent ECP train brake command shall replace the 15 and 20 psi reductions, respectively, when conducting brake tests on ECP brake systems.

Further recognizing the disparity between the requirements of part 232 and the reality of ECP brake technology, paragraph (f) addresses piston travel requirements as they apply to ECP brake operations. Paragraph (f) modifies certain regulatory requirements related to piston travel limits and adjustments during applicable brake inspections under part 232. For instance, under § 232.205(c)(5) a person performing a Class I brake test must ensure that piston travel be adjusted to specific distances. Although FRA believes that ECP brake operations require specific piston travel limits, FRA recognizes that the piston travel limits contained in § 232.205(c)(5) may not be fully applicable to ECP brake systems. Since the ECP brake system precisely measures and maintains the amount of brake cylinder pressure for each specified brake application, piston travel tolerances for ECP brakes may not require the level of specificity as those for conventional pneumatic brake operations. Further, FRA acknowledges that a ''one-size-fits-all'' requirement for ECP brake system piston travel may not be ideal or applicable. AAR and BLET support paragraph (f)(1). BLET believes that paragraph (f) adequately addresses the subject of nominal piston travel and AAR believes that manufacturers should be permitted to establish alternative minimum piston travel ranges.

Accordingly, paragraph (f) provides flexibility for the piston travel limits in § 232.205(c)(5) as they apply to ECP brake systems. While FRA limited this flexibility in the proposed rule to minimum piston travel limits, the final rule provides this flexibility to all piston travel limits in part 232 as applicable to ECP brake operations. FRA anticipates that recommended piston travel limits for each ECP brake system will be determined by the car's design, weight, and engineered brake ratio.

The final rule requires that such limits be stenciled or marked on the car or badge plate in the same fashion FRA requires for systems and equipment subject to § 232.103(g). FRA believes that requiring the affixation of a legible decal, stencil, or sticker or the equipping of a badge plate displaying the permissible brake cylinder pistol travel ranges will effectively communicate the acceptable ranges to train crew members and will ensure the proper operation of a car's brakes after being inspected. FRA believes that this information is essential in order for a person to properly perform the required brake inspections. Ultimately, all

modifications provided under paragraph (f) apply to part 232 as it relates to ECP brake operations.

In the preamble to the NPRM, FRA anticipated that placing a car equipped with conventional pneumatic brakes into an ECP brake-equipped train may be awkward at best, requiring use of an electrical ''run around cable'' and manual inputs into the locomotive control system. In a letter dated February 5, 2007, which is part of the docket to this proceeding, AAR provided a list of recommended ''enhancements and modifications'' to Part 232 to facilitate the use of ECP brakes. In that communication, the AAR stated that railroads ''do not plan to commingle non-ECP equipment in stand-alone ECP trains.'' However, FRA expressed its belief that foreseeable—though rare—circumstances should be considered in this rulemaking to the extent possible. Accordingly, FRA sought comments and information on what requirements may be necessary to safely allow the addition of cars equipped with conventional pneumatic brakes into a train equipped with ECP brakes, including, but not limited to, the placement and securement of cables along cars equipped with conventional pneumatic brakes to preserve their continuity between non-consecutive cars equipped with ECP brakes and the appropriate placement in the consist of cars equipped with conventional pneumatic brakes.

AAR asserts that the railroads can wrap ECP brake cables around the conventionally braked cars. BLET urges FRA to adopt a standard similar to that set forth in § 229.89(a), which requires that jumpers and cable connections between locomotives shall be located and guarded to provide sufficient vertical clearance.

In response to the comments provided, FRA has added paragraph (g) to ensure the safe handling of train line cables for the same reasons § 229.89 addresses jumpers and cables. Considering the unique logistical and operational issues relating to train line cables—including their placement between and throughout cars and the potential need to somehow bypass cars equipped with only conventional brakes—FRA has added additional requirements. For instance, the final rule intends to ensure that the train line cable does not drag, catch, or snag and does not interfere with any human or train movements. Paragraph (g) also provides the same electrical related protections provided under § 229.89(a).

*Section 232.609 Handling of Defective Equipment With ECP Brake Systems*

In § 232.609, FRA modifies certain part 232 requirements as they apply to freight cars and freight trains equipped with ECP brake systems and hauling defective equipment. In particular, for such trains and cars, paragraph (k) excepts certain existing requirements and paragraphs (a) through (j) provide alternative requirements.

Under § 232.15 and 49 U.S.C. 20303, railroads may be immune to civil penalty liability if a car or train with certain inoperative or defective equipment is hauled under certain conditions. Section 232.15(a) contains various parameters that must exist in order for a railroad to be deemed to be hauling a piece of equipment with defective brakes for repairs without civil penalty liability. The vast majority of the requirements contained in § 232.15(a) are a codification of the existing statutory requirements contained in 49 U.S.C. 20303 and are based on the voluminous case law interpreting those provisions. The statutory provisions require hauling defective equipment only to the nearest place where necessary repairs can be made and require 100 percent operative brakes from any location where such repairs can be effectuated. Thus, because many locations where trains are initiated with any frequency are also locations where brake system repairs can be effectuated, the statutory provisions essentially require 100 percent operative brakes from a train's initial terminal. FRA continues to believe that the proposed requirements relating to the movement of equipment with defective ECP brakes are generally consistent with the statutory requirements, ensure the safe and proper movement of defective equipment, and clarify the duties imposed on a railroad when moving such equipment.

As indicated above, in light of the increased safety levels produced by ECP brake systems, FRA has decided to use its discretionary authority under 49 U.S.C. 20306 to provide an exception from the rigid statutory provisions and modify the regulations governing the movement of defective equipment concomitant to 49 U.S.C. 20303. Under certain circumstances, the statute and related regulations provide immunity from civil penalty when a train with defective equipment is hauled to the nearest location where the necessary repairs can be made, regardless of direction. Since a train equipped with an ECP brake system and operating in ECP brake mode with a minimum percentage of cars with defective ECP brakes is capable of traveling safely for long distances, the final rule permits the operation of such a train and any cars with defective ECP brakes to its destination, not to exceed 3,500 miles, for repair without incurring a civil penalty.

While FRA believes that a train operating in ECP brake mode with some ineffective or inoperative ECP brakes may continue to travel safely, concerns remain if such a train includes cars with defective non-brake or conventional pneumatic brake equipment. ECP brake systems do not monitor that equipment and do not otherwise reduce the danger of traveling with such defects. FRA is cognizant of the need for logistical flexibility to efficiently accomplish repairs during the transition from conventional pneumatic to ECP brake operations. Furthermore, requiring strict adherence to the statutory requirements related to moving defective equipment ignores the safety features provided by ECP brake system technology and could potentially stifle the industry's ability and desire to implement the technology. The final rule invokes this statutory and regulatory relief in paragraph (k) of this document, by excepting application of §§ 232.15(a)(2), (a)(5), (a)(6), (a)(7), (a)(8), and 232.103(d)–(e) as applied to ECP brake operated trains.

Under § 232.103(d), no train may depart a location where a Class I brake test is required to be performed on the entire train with any inoperative or ineffective brakes. FRA recognizes that some trains operated with ECP brakes may need to include cars equipped with conventional brakes, especially while a fleet makes the transition to ECP brake technology. Under such and similar circumstances, FRA believes that some leeway needs to be provided for trains operating in ECP brake mode. To provide for such flexibility, and in light of ECP brake operations' higher levels of safety, including shorter stopping distances and constant real-time monitoring of the brake system, FRA believes that a train operated with ECP brakes may depart its initial terminal with less than 100% operative brakes. However, FRA also acknowledges that allowing a car to depart an initial terminal with inoperative or ineffective brakes may permit such equipment to move indefinitely without receiving the proper repairs. For this and other reasons noted below, FRA believes there needs to be a limit on the types and number of cars that may depart in a train operating in ECP brake mode from a location where the train is required to receive a Class I brake test.

Per paragraph (k), a train operating in ECP brake mode is excepted from § 232.103(d), which requires that one-hundred percent of the brakes on a train shall be effective and operative prior to use or departure from any location where a Class I brake test is required to be performed on the train pursuant to § 232.205. For ECP brake-equipped trains, this requirement is replaced by the ninety-five percent effective and operative brake requirement contained in paragraph (a). FRA believes that this provides flexibility from the rules governing conventional pneumatic braking systems while rendering a sufficient brake failure buffer between departing an initial terminal with ninety-five percent effective and operative brakes and experiencing a penalty stop upon reaching eighty-five percent effective and operative brakes, as required under paragraph (d) of the final rule.

The one-hundred percent effective and operative brake requirement contained in § 232.103(d) is based on FRA's long-standing interpretation and application of AAR's inspection and testing standards as they existed in 1958 as well as the statutory provisions related to the use of power brakes and the movement of equipment with defective safety appliances. See 66 FR 4104, 4124, 4128 (Jan. 7, 2001). However, the design, operation, and safety benefits derived from the use of ECP brake systems dictate a need to modify this long-standing requirement. Under the AAR standards, if at any time the ECP brakes on a train become less than eighty-five percent operative, the train will automatically stop via a computer induced penalty brake application. In addition, it has been determined that a train with eighty-five percent operative ECP brakes will still have better stopping distances than a conventional pneumatic braked train with one-hundred percent operative brakes. Moreover, ECP brake system technology provides the ability to continuously monitor the real-time status of the braking system on each car in a train. This allows a locomotive engineer to always know the exact status of his train's braking system. In light of this increased level of safety, FRA believes that a partial reduction in the percentage of operative brakes is justified. Accordingly, for ECP brake operations, FRA hereby modifies the requirement to 95 percent effective and operative brakes, which it believes strikes a balance between the current regulation and the need to allow for in-transit failures that could compromise the operation of the train or otherwise automatically shut it down when it reaches 85 percent effective or operative brakes.

Under paragraph (a), a train can only leave its initial terminal if a Class I brake test is performed by a qualified mechanical inspector and all ECP braked cars that are known to have arrived at the location with ineffective or inoperative brakes are repaired or handled accordingly. The final rule intends to ensure that at least 95 percent of the cars equipped with ECP brakes have effective and operative brakes prior to departure from an initial terminal and that cars are repaired in a timely fashion. The purpose of the 95 percent threshold is to prevent the delay or disassembly of a train for the removal or repair of a very small percentage of cars that are discovered to be defective for the first time while the railroad is conducting its in-depth inspections required at a train's initial terminal. The 95 percent requirement also acknowledges that some initial terminals may not initially have the capabilities of repairing ineffective or inoperative ECP braking systems. Accordingly, paragraph (b) allows for the movement of cars with such defects known to exist upon arrival at its destination to be moved only to the nearest forward location where repairs may be performed and restricts the car from being loaded or unloaded while being so moved. However, to ensure the safe operation of trains operating in ECP brake mode, operators are reminded that, under the final rule, the inclusion of such defective cars cannot make the train have less than ninety-five percent effective or operative brakes.

TWU asserts that the widely recognized cornerstone of train brake system safety is a comprehensive train brake inspection and test at the initial terminal, which requires 100 percent effective brakes. According to TWU, there is no valid basis for extending inspection intervals to 3,500 miles and permitting trains to operate out of an initial terminal without 100 percent effective brakes. BLET is also strongly opposed to paragraph (a). According to BLET, AAR Standard S–4260, § 3.5.4.2, indicates that the exact status is not always known. Thus, says BLET, a HEU display of 95 percent operable brakes may not reflect all the brakes in the train that are inoperable, meaning that the locomotive engineer does not always know the exact status of the braking system. FRA notes that BLET's concern was based on a misunderstanding of ECP brake system design, as discussed previously during the analysis of § 232.607(b).

UTU contends that the overall braking capacity of each freight car has not changed with the introduction of ECP brake technology. According to UTU, when the number of operable brakes on an ECP brake-equipped train is reduced by 5 percent, the train has lost 5 percent of its total braking capacity. Thus, says UTU, an ECP brake operated train with only 95 percent operative brakes is less safe than a conventional brake operated train with 100 percent operable brakes. UTU also asserts that the issue of allowing ECP brake-equipped trains ''to operate in and out of terminals, from one Class IA brake test to another with only 95 percent of the brakes operable is also a significant degradation to safety.'' If these trains depart an initial terminal, says UTU, an additional brake failure en route may occur in potentially unsafe territory and not in a yard's controlled environment.

On the contrary, UP believes that FRA's proposed limitation to not allow less than 95 percent effective ECP brakes per train is too restrictive. The current regulations allow a conventionally braked train to depart after a Class I brake inspection with 100 percent operative brakes, with a cumulative failure of up to 15 percent of the brakes, equivalent to operating a train with 85 percent operative brakes. Therefore, says UP, there is no logical reason to establish a more stringent requirement on an ECP braked train. AAR agrees, adding that FRA has determined that a train can safely operate with 85 percent operative brakes and that an ECP brake operated train with fewer than 85% operative brakes will engage in a penalty brake application. According to AAR, no adverse safety consequences would flow from such an event. Since the train will automatically engage in a penalty brake application when it reaches that 85 percent threshold, the railroads assert the minimum amount of effective or operative brakes at departure should be a business or operational decision by the railroad.

BRC supports paragraph (a) and objects to the railroads' proposal, arguing that an 85 percent operating rule ''goes against all the claims of operating efficiency, convenience, and incentive for the railroad industry to employ ECP brakes.'' According to BRC, this is especially a concern for ECP equipped trains traveling long distances without intermediate inspections. If these trains are allowed to leave the initial terminal at 85 percent operating capacity, the likelihood that these trains will have to stop and make repairs or set outs at intermediate locations significantly increases. UTU adds that,

if these trains depart an initial terminal, an additional brake failure en route may occur in potentially unsafe territory and not in a yard's controlled environment.

FRA is not persuaded that it should modify paragraph (a) from that proposed in the NPRM. The purpose of paragraph (a) is to provide operators flexibility in an environment of technological change. Although FRA understands TWU's and UTU's concerns about ensuring 100 percent effective and operative brakes on trains departing from initial terminals, FRA believes that the ECP brake system's self-monitoring system and significant increase in braking capabilities provides a level of comfort to maintain such flexibility without compromising safety. That comfort level is also increased by requiring only limited movement of that train for the purpose of repair.

UTU also seems to misunderstand paragraph (a) when it asserts that the issue of allowing ECP brake-equipped trains ''to operate in and out of terminals, from one Class IA brake test to another with only 95% of the brakes operable is also a significant degradation to safety.'' The final rule does not require Class IA brake tests on trains operated with ECP brakes. In any event, paragraph (b), further discussed below, requires that each car equipped with ECP brakes, and known to have arrived at a location of a train's initial terminal or at a location where a Class I brake test is required, shall not depart that location with ineffective or inoperative brakes in a train operating in ECP brake mode, except when that initial terminal does not have facilities capable of repairing defective ECP brakes. Paragraph (b), however, also requires the entire train to stop at the nearest forward repair location, causing further delays. Thus, FRA expects paragraph (b) to provide an incentive for the operator to repair the defective brakes or set out those cars at the initial terminal. For these reasons, FRA expects the railroads to quickly ensure that all initial terminals and locations where Class I brake tests are otherwise performed are fully equipped with ECP brake repair facilities and that most repairs would be made at those locations so that trains will depart with 100 percent effective and operative ECP brakes.

FRA intends that the only exceptions are ECP brake-equipped cars whose brake defects were found after arrival at the initial terminal and conventional brake-equipped cars. For instance, if defects to a car's ECP brake system were found during a pre-departure Class I brake inspection, the ECP brake operated train may depart and travel to destination. While paragraph (a) and (b) imply this as a possibility, paragraph (e) makes it clear.

FRA believes that the railroads misinterpret the existing regulations under subpart C and this final rule's paragraph (a) as they relate to the minimum number of effective and operative brakes on a train departing from its initial terminal. Under §§ 232.103(d) and (f), trains operated with conventional brakes cannot move with any ineffective or inoperative brakes except under the safe harbor provisions provided under § 232.15. Even moving with the immunities afforded under § 232.15, however, § 232.103(e) absolutely prevents such trains from moving if the level of operative or effective brakes reaches 85 percent. Accordingly, FRA is not increasing the 85 percent limitation up to 95 percent, but is decreasing the 100 percent limitation to 95 percent.

In any event, FRA believes that the 95 percent limitation at initial terminals provides sufficient flexibility for the implementation of new technology and does not feel comfortable further reducing that amount at this time. While the railroads contend that the buffer between departure and the ECP brake system's potential penalty brake application (i.e., an automatic and immediate emergency or full brake application made by the ECP brake system in accordance with the current AAR standards) at 85 percent should be a market or operational decision since it is much safer than conventional brake operations at that level, FRA believes that the railroads fail to appreciate the aforementioned reasons for the 95 percent limitation and the effects no limitation may have. By further reducing or eliminating the limitation, the potential for an automatic application of the brakes at 85 percent effective and operative brakes increases. In such an event, the stopped train may delay other trains, potentially causing a serious domino effect of non-movement. Safety concerns also remain. FRA is certainly sensitive to UTU's concern that such an event may occur in unsafe territory, putting the train and its crew at risk. Accordingly, FRA does not think it reasonable to allow an ECP brake operated train to depart its initial terminal with as little as 85 percent effective and operative brakes.

Paragraph (b)(4) also requires that a car with ineffective or inoperative ECP brakes be tagged in accordance with § 232.15(b). FRA believes that § 232.15(b) should equally apply to trains operating in ECP brake mode and should be a prerequisite for the movement from the initial terminal of any car with defective brakes. Section 232.15(b) contains the specific requirements regarding the tagging of equipment found with defective brake components and recognizes that the industry may attempt to develop some type of automated tracking system capable of retaining the information required by that section and tracking defective equipment electronically. Thus, paragraph (b)(4), through § 232.15(b), proposes to permit the use of an automated tracking system in lieu of directly tagging the equipment if the automated system is approved for use by FRA. FRA continues to believe that these provisions are necessary to ensure the agency's ability to monitor such systems and potentially prohibit the use of the system if it is found deficient. The proposed rule makes clear that, by ensuring application of § 232.15(b) to ECP brake systems, an automated tracking system approved for use by FRA would be capable of being reviewed and monitored by FRA at any time. This paragraph also notifies the railroads that FRA reserves the right to prohibit the use of a previously approved automated tracking system if FRA subsequently finds it to be insecure, inaccessible, or inadequate. Such a determination would have to be in writing and include the basis for taking such action.

Paragraph (c) permits, with certain limitations, trains operating in ECP brake mode to move cars equipped with conventional pneumatic brakes. If a freight car equipped with only conventional pneumatic brakes would have effective and operable brakes in a train equipped with a ''stand-alone'' conventional pneumatic brake system, the final rule permits a freight train operating in ECP brake mode to move such a car. If a car has defective conventional pneumatic brakes—which would be ineffective or inoperative in a train with a ''stand-alone'' conventional pneumatic brake system—the final rule permits its movement by a freight train operating in ECP brake mode, but only if the movement is made in accordance with § 232.15. By referring to § 232.15, paragraph (c) intends to, amongst other things, include the exceptions delineated in paragraph (k) and limit the movement of such cars to the nearest location where repairs can be made. Paragraph (c) also reminds regulated parties to comply with the tagging requirements of § 232.15(b) for the same reasons as paragraph (b). FRA notes that the inclusion of cars with defective or non-defective conventional pneumatic brakes into a train operating in ECP brake mode shall not cause the train to

have less than ninety-five percent effective and operative brakes in accordance with paragraph (a). FRA believes that permitting a limited inclusion of cars equipped with conventional pneumatic brakes will provide some flexibility as operators transition their fleets from conventional pneumatic to ECP brake systems while ensuring a satisfactory level of safety.

BLET believes that § 232.15(e) should apply with respect to placement of cars equipped with conventional brakes in trains operated with ECP brakes. As previously stated, FRA expects that, except for the sections and paragraphs specifically excepted and the limitations modified by the final rule, subpart C continues to be fully applicable and enforceable for trains and cars equipped with ECP brakes. Since the final rule does not except or modify § 232.15(e), FRA intends its continued application and enforcement. While the final rule may remind the regulated parties that certain specific existing paragraphs in subpart C continue to apply (*e.g.*, paragraphs (b)(4) and (c) referencing § 232.15(b)), this does not imply that sections and paragraphs not referenced do not apply. References to more specific paragraphs may exist for the purposes of clarity. FRA recognizes that mixing technology may confuse application of the existing law. For instance, while it may be clear to most how § 232.15 may apply to conventionally braked cars even in trains operated with ECP brakes, FRA foresees confusion when applying § 232.15 to ECP braked cars in trains operated with conventional brakes. Thus, the final rule includes specific paragraph references when regulating the latter under paragraph (g).

Once an ECP brake system detects that the train has less than eighty-five percent operative brakes, AAR standard S–4200 requires an automatic and immediate full service brake application. Paragraph (d) mirrors S–4200 by requiring a train operating in ECP brake mode to cease moving once less than eighty-five percent of the train's cars have effective and operative brakes. In other words, under paragraph (d), no train shall move with more than fifteen percent of its brakes being defective or otherwise inoperative or ineffective until certain conditions are met. Recognizing, however, that foundation brake rigging defects may not be detected by the electronic system, and that calculation of the percentage may require an accurate manual entry of the total cars in the train by the train crew, FRA proposes paragraph (d) to continually ensure the safe operation of trains operating in ECP brake mode with ineffective or inoperative brakes.

Although there is no explicit statutory limit regarding the number of cars with inoperative brake equipment that may be hauled in a train, the fifteen percent limitation is a longstanding industry and agency interpretation of the hauling-for-repair provision currently codified at 49 U.S.C. 20303, and has withstood the test of time. This interpretation is extrapolated from another statutory requirement which permits a railroad to use a train only if ''at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in a train.'' 49 U.S.C. 20302(a)(5)(B). As originally enacted in 1903, section 20302, also granted the Interstate Commerce Commission (ICC) the authority to increase this percentage, and in 1910 the ICC issued an order increasing the minimum percentage to 85 percent. *See* 49 CFR 232.103(e), which codifies the ICC order. FRA believes that if the rule is read in its entirety, there should be no confusion as to the movement of defective equipment, and that this provision merely sets an outside limit on the percentage of cars that may be hauled in any train with inoperative brakes. Consequently, FRA will continue to require that equipment with inoperative air brakes make up no more than 15 percent of any train.

FRA acknowledges that § 232.103(e) already prevents a train's movement ''if less than 85 percent of the cars in that train have effective and operative brakes.'' However, FRA has also stated that § 232.103(e) ''contains a clear and absolute prohibition on train movement if more than 15 percent of the cars in a train have their brakes cut out or have otherwise inoperative brakes.'' Because ECP brake systems are designed to automatically stop the train whenever and wherever the brake system has less than 15 percent operative brakes, FRA recognizes that some flexibility is needed to ensure that such trains are not stranded on the main track. To provide flexibility in those rare instances where a train experiences a penalty brake application as a result of having less than 85 percent operative brakes, paragraph (d) includes requirements to ensure the safe movement of such trains. FRA recognizes the need for some trains operating in ECP brake mode to continue to an appropriate repair facility or nearest siding after experiencing a penalty brake application. Since ECP brake implementation is in its infant stages, FRA acknowledges that a railroad may not initially have a significant number of repair facilities beyond the initial terminals of ECP equipped cars. Accordingly, paragraph (d) permits limited movement of such trains for repair or consist modification purposes. In any event, in light of the Class I inspection required under § 232.607, the minimum number of ineffective or inoperative brakes allowed under § 232.609, and an ECP brake system's continuous monitoring and diagnostics functions, FRA believes that trains operating in ECP brake mode will rarely, if ever, reach fifteen percent inoperative or ineffective brakes. However, FRA believes that paragraph (d)—in an abundance of caution and in anticipation of such a possibility occurring—will ensure safe and efficient operations. In order to move a train operating in ECP brake mode that experiences a penalty brake application due to having less than 85 percent effective and operative brakes, paragraph (d) requires the train crew to perform a visual inspection of the entire train, ensure the safe operation of the train, and determine that it is safe to move the train.

Under the current regulations, visual inspections are generally performed when moving defective equipment since a ''qualified person'' must determine that the car is safe to move. It is FRA's understanding that most, if not all, railroads require a crew member to make a visual inspection of a car when a problem occurs en route. A proper visual inspection ensures that the brakes are cut out on a faulty car and eliminates the possibility of dragging or stuck brakes. A dragging or loose part or piece of equipment can find its way under a wheel, causing a derailment. A brake that will not release—due to bent or fouled brake rigging or a problematic control valve—will cause the wheel to slide. A sliding wheel will not properly traverse a switch or cross-over, setting up a potential derailment. A sliding wheel may also cause a severe flat spot to occur on the wheel, which can also lead to a derailment and stress on the rail. By requiring that the train crew ensure the safe operation of the train and determine that it is safe to move the train, FRA intends to make clear that it is the railroad's responsibility, through its crew, to do whatever is necessary to ensure safe train operation under the flexibility provided by paragraph (d). Any deviation from the requirements under paragraph (d) while moving a train with less than eighty-five percent

effective brakes would pose a significant safety hazard and violate the rule.

In addition, under paragraph (d), the train's subsequent movement must be made in a restricted ECP brake Switch Mode to the nearest or nearest forward location where necessary repairs or changes to the consist can be made. Under AAR Standard S–4200 § 4.2.6.2.2, the speed of an ECP brake-equipped train in Switch Mode shall not exceed 20 mph. The purpose of the 20 mph limitation, among Switch Mode's other restrictions, is to ensure the safe movement of the train with less than ideal brake operations while allowing the train to operate to a location where defective braking systems can be repaired or where cars can be added or removed from the train so that it will have at least eighty-five percent effective and operative brakes.

BLET notes that paragraph (d)(4), as proposed in the NPRM, appeared to prohibit a railroad from opting to move an ECP brake operated train with less than 85% operative brakes in Switch Mode to the nearest rearward repair location. If FRA intended to prohibit a backhaul, BLET expressed interest in FRA's rationale. The proposed rule provided for the movement of defective equipment to the ''nearest forward'' repair location and did not intend to prohibit a backhaul of equipment when appropriate. The purpose of FRA invoking its discretionary authority under 49 U.S.C. 20306 to partially except application of 49 U.S.C. 20303 to ECP brake operations was to remove a disincentive towards ECP brake implementation by providing operational flexibility when hauling defective equipment for the purposes of repair. FRA intends to allow the railroads to move defective equipment to the first suitable location for repairs in either direction it so chooses. Accordingly, FRA has clarified the final rule to provide for such movement to the ''nearest or nearest forward repair location.'' Paragraph (e) permits trains operating in ECP brake mode with defective ECP brakes to be used or hauled without civil penalty liability under part 232 to its destination, not to exceed 3,500 miles. Such defects must be found for the first time during a Class I brake test or en route. As previously mentioned, FRA believes that a train operating in ECP brake mode can safely continue to its destination with some ineffective or inoperative brakes. Accordingly, paragraph (e) proposes that all such trains be permitted to travel to its destination, not to exceed 3,500 miles, without incurring civil penalty liability in relation to the use of those brakes. Paragraph (e) also proposes that this civil penalty immunity be extended to such trains with ECP brake defects found at the initial terminal. If such defects are found after a train is put together in preparation for its next departure, it may be overly burdensome to require that the train be taken apart for repair. If a brake repair may be performed without taking the train apart, FRA acknowledges that the repair may cause undue delay. If the ECP brake defect is found at the location where a Class I inspection is performed, FRA believes that such burdens and delays may be avoided in light of the increased safety afforded by ECP brake systems.

FRA believes that this flexibility needs to be afforded differently to defects that are known to exist upon a car's arrival at its destination or at a location where a Class I brake test will be required on the train than to defects found for the first time at the location where a Class I brake test is performed. If a freight car equipped with an ECP brake system is known to have arrived with ineffective or inoperative brakes at the location of a train's initial terminal or at a location where a Class I brake test is required under § 232.607(b), that car is subject to the limitations in paragraph (b), not paragraph (e). Paragraph (b) intends to ensure that known defects are repaired before continued use and to prevent trains operating in ECP brake mode from traveling indefinitely without repairing their defective ECP brakes. On the other hand, by retaining paragraph (e) as proposed, FRA recognizes the burden placed on operators to comply with such a rule when it discovers the defect when it is in the process of putting a train together or after a train is already put together and inspected. Paragraph (e) recognizes that burden by treating the train similarly to a train that detects a defective ECP brake while it is en route.

Paragraph (f) provides limited flexibility for trains operating in ECP brake mode with a non-brake safety appliance defect on a car equipped with ECP brakes. To enjoy such flexibility under paragraph (f), the car may only be used or hauled to the nearest or nearest forward location for repairs. As noted above, in light of the increased safety levels afforded by ECP brake system technologies, the final rule allows trains operating in ECP brake mode with defective ECP brakes to travel to its destination, not to exceed 3,500 miles. FRA does not believe it prudent to provide the same level of flexibility to cars operating in ECP brake-equipped trains with non-brake safety appliance defects, since an ECP brake system's increased safety level does not reduce the dangers of such defects. However, FRA does believe that flexibility should be afforded to permit the direct hauling of such equipment to the nearest or nearest forward repair location. To require the hauling of ECP brake equipment to the nearest location where necessary repairs can be effectuated, rather than allowing such to the nearest forward location, could create unnecessary safety hazards. As there initially will only be a limited number of ECP brake-equipped trains in operation at any given time, the ability to switch cars from one ECP train to another, merely for the purposes of getting the car to a closer repair facility, will be severely limited. Rather than requiring cars equipped with ECP brakes to be hauled in non-ECP braked trains, where their brakes will be inoperative, FRA believes it is safer to permit the car to continue in the train equipped with ECP brakes to the next forward location where the necessary non-brake safety appliance repairs can be made.

In the event trains must include cars equipped with brake systems not compatible with the train's brake system, the final rule includes requirements to ensure the safe operation of such trains. Paragraph (g) allows a train operating with a conventional pneumatic brake system-regardless of whether it is a train with ''stand-alone'' conventional pneumatic brakes or an ECP brake-equipped train operating in conventional pneumatic brake mode—to include cars with stand-alone ECP brake systems. To maintain an acceptable level of safety, however, paragraph (g) requires that such trains must have at least 95 percent effective and operative brakes at the conclusion of a Class I brake test, inclusive of all cars regardless of braking systems. Further, to meet the same level of safety intended by 49 CFR 232.103(d), paragraph (g) also requires that the train have 100 percent effective and operative conventional pneumatic brakes at the Class I brake test site when operating in conventional pneumatic mode.

Accordingly, paragraph (g) allows trains equipped with a conventional pneumatic brake system—or with ECP brake systems and operating in conventional pneumatic brake mode—to operate with freight cars equipped with stand-alone ECP brake systems under limited circumstances. Under paragraph (g), any such train not in compliance with those circumstances shall not be operated. The purpose of these limitations is to ensure the safe operation of such trains that contain cars with incompatible stand-alone ECP brake systems. FRA understands that

some trains operating with conventional pneumatic brakes may need to carry cars with incompatible stand-alone ECP brake systems, especially when the implementation of ECP brake system technology is in its infant stages. For instance, FRA anticipates that a need may arise to move a new ECP brake-equipped car in a train operating with conventional pneumatic brakes from the car manufacturer's facility or a repair shop to a location where the railroad operates trains equipped with ECP brakes. FRA also anticipates that a dual mode ECP brake system operating in ECP brake mode may incur a malfunction—such as a broken train line cable or locomotive controller—forcing the operator to switch the train's operation to conventional pneumatic brake mode. As long as the train's total number of cars with ineffective or inoperative brakes does not fall below the threshold percentage contained in paragraph (g)—via reference to paragraph (d)—FRA believes that the train may safely include cars with incompatible stand-alone ECP brake systems.

Paragraph (g) includes requirements for the subject train and each of its stand-alone ECP brake-equipped cars. For such a train to operate, it must comply with the minimum percentage of operative brakes required by paragraph (h) when at an initial terminal—which will be discussed below—or paragraph (d) when en route for the same reasons discussed in paragraph (d). Under paragraph (g), a stand-alone ECP brake-equipped car in a train operating with conventional pneumatic brakes can only be moved for delivery to a railroad receiving the equipment or to a location where the car may be added to a train operating in ECP brake mode. Otherwise, the movement of the car is restricted to the nearest available location where necessary repairs can be effectuated. In addition, such cars must be tagged in accordance with § 232.15(b) for the same reasons as stated for the analysis of paragraph (b) and placed in the train in accordance with § 232.15(e). Section 232.15(e) contains the requirements regarding the placement of cars in a train that have inoperative brakes. The requirements contained in that paragraph are consistent with the current industry practice and are part of almost every major railroad's operating rules. By incorporating § 232.15(e) by reference, paragraph (g) prohibits the placing of a vehicle with inoperative brakes at the rear of the train and the consecutive placing of more than two vehicles with inoperative brakes, as test track demonstrations have indicated that when three consecutive cars in a train operating with conventional pneumatic brakes have their brakes cut-out, it is not always possible to obtain an emergency brake application on trailing cars. To remain consistent with existing industry practice, paragraph (g), by referencing § 232.15(e), requires that such equipment shall not be placed in a train if it has more than two consecutive individual control valves cut out or if the brakes controlled by the valve are inoperative.

NS is concerned that § 232.609 does not adequately allow for the handling of defective equipment with ECP brake systems. NS notes that § 232.609(g)(2)(iii) requires compliance with § 232.15(e)(2), which states that ''no more than two freight cars with either inoperative brakes or not equipped with power brakes shall be consecutively placed in the train.'' Due to the efficiencies gained in stopping and the drastically reduced slack action, says NS, for ECP trains this should be increased to ''no more than five freight cars with defective air brakes to being cut out electronically.'' NS supports that no more than five cars that are electronically cut out shall be placed consecutively within the train, two of which may be pneumatically cut out. ECP brake-equipped cars that have the brakes electronically cut out, says NS, will retain the same rapid venting of brake pipe in order to produce a pneumatic emergency with no adverse effects on the braking system. NYAB and Wabtec make the same proposal.

FRA sees the merit in the proposal of NS, NYAB, and Wabtec and continues to believe that § 232.15(e)(1) should apply to the placement of cars equipped with ECP brakes in trains operated with ECP brakes, since it is always dangerous when the last car in the train is without braking capacity. FRA also continues to believe that no more than two consecutive cars should be placed in a train with their brakes pneumatically cut out, since the train's pneumatic brake application should remain available in emergency situations, especially in trains operating with ECP overlay systems. FRA recognizes that a train operated with ECP brakes may safely initiate an emergency brake application with up to five ECP brake-equipped cars electronically cut out via the car's CCD. Pneumatically cut out brakes will increase the length of the brake pipe, which may slow the rapid venting of brake pipe pressure to the point where an emergency brake application cannot be made. However, all effective and operative ECP brakes should be able to apply in an ECP brake operated train, since the train line cable continues to carry the emergency transmission with equal strength and speed throughout the entire train. Accordingly, any increase in consecutive cars equipped with ECP brakes with ineffective or inoperative brakes may only affect train handling, not train line braking communications.

FRA recognizes that a railroad may be more familiar with each territory it traverses and may be in a better position to determine how many consecutive cars with electronically cut out brakes may be allowed without causing safety issues. However, in the interests of public safety, and in light of the comments made by the brake manufacturers and railroads, FRA believes that the performance characteristics of the ECP brake system will safely allow for up to five consecutive cars to be electronically cut out in a train.

FRA further recognizes that a one-to-one CCD-to-car ratio does not exist for all cars. Intermodal cars, for example, have more platforms than CCDs and control valves. Accordingly, for the same reasons provided above, the final rule prevents more than five consecutive platforms with electronically cut out brakes on intermodal trains. Thus, to ensure sufficient train handling safety, the final rule also requires that the sets of consecutive cars with electronically cut out brakes be sufficiently spaced. FRA expects the number of cars with operative brakes buffering between these sets to differ depending upon a variety of factors including, but not limited to, the length of the train, the weight of the train and certain cars, the types of cars, and the territory. The sufficiency of buffer cars, therefore, must be determined by each railroad and enforced by FRA on a case-by-case basis.

Paragraph (h) includes additional requirements for freight trains equipped and operating with conventional pneumatic brakes when departing an initial terminal with stand-alone ECP brake-equipped freight cars. On such trains, paragraph (h) allows the train to depart its initial terminal with at least ninety-five percent effective and operative brakes and up to five percent of the cars to be equipped with ECP brakes. However, each car equipped with conventional pneumatic brake systems must have effective and operative brakes and each car equipped with dual mode ECP brake systems must operate in conventional pneumatic brake mode and have effective and operative conventional pneumatic brakes. The five percent of cars with

potentially defective brakes may only be cars equipped with stand-alone ECP brake systems.

Paragraph (i) provides for the electronic tagging of defective ECP brake equipment when being moved in a train operating in ECP brake mode. FRA recognizes that § 232.15(b) already provides requirements for electronic tagging of defective equipment. However, in view of the ECP brake system's unique characteristics, it is not entirely clear how § 232.15(b) would appropriately apply to electronic records developed, retained, and maintained by ECP brake systems. Accordingly, paragraph (i) contains the criteria necessary to determine whether an ECP brake system complies with § 232.15(b).

In the NPRM, FRA stated that, in order for an ECP brake system to provide electronic tagging of equipment with defective safety appliances, the ECP brake system must provide appropriate, constant, and accurate information to the crew via a display in the cab of the lead locomotive, and ensure that the information is securely stored and is accessible to FRA and appropriate operating and inspection personnel. To ensure the integrity of electronic tagging, FRA asserted, the ECP brake system must securely store the information. FRA sought comments on how secure a system must be.

BLET and AAR responded to this proposal with concerns relating to the secure storage of information requirement. According to BLET, any resolution of electronic recordkeeping issues should consider the solutions provided by the RSAC Locomotive Safety Standards Working Group. AAR does not believe it likely that an employee would seek to override the ECP software. In any event, AAR points out that since there is no information security requirement for paper records, there is no reason to require information security for electronic records. FRA agrees with BLET and AAR on this issue and has not included the information security requirement in the final rule. However, the remainder of the proposal has been retained in the final rule. FRA continues to believe that the electronic tag information must be accessible for safety and oversight purposes. Paragraph (i) makes clear that an automated tracking system approved for use by FRA must be capable of being reviewed and monitored by FRA at any time. The information should also be accessible to subsequent train crews that require notification of defects.

In the NPRM, FRA acknowledged that some railroads may also desire to use the ECP brake system to electronically tag defective non-ECP brake equipment. FRA anticipates that such electronic tagging would have to be manually entered into the system, since safety appliances are not monitored by the ECP brake system. FRA sought comments on whether the rule should include provisions allowing for the manual input of non-ECP brake defects into ECP brake systems for electronic tagging purposes. FRA also sought comments on what requirements and allowances should be made in consideration of that interest, including means to associate or merge ECP brake system information with information not monitored electronically by the ECP brake system. No comments were received on this issue. Accordingly, FRA has not provided for such electronic tagging capabilities in the final rule. This does not mean that a railroad is prevented from bringing an electronic tagging program to FRA for its approval under § 232.15(b) when it pertains to non-ECP brake defects and utilizes the ECP brake technology to electronically tag and track such equipment.

In the NPRM, FRA acknowledged that locomotive engineers may be distracted or subjected to information overload by multiple monitors or displays in the locomotive cab, thus potentially endangering the safe operation of the train. FRA sought comments and information on this issue. In Wabtec's and NYAB's experience, the additional display has not been an issue with the operators. In the event that an additional display is added, say the brake manufacturers, the information displayed is minimal and straight forward. In the case where ECP brake system information is integrated into the existing displays, ECP information replaces air brake information. BLET states that Appendix E to Part 236 addresses the issue of human-machine interface design where positive train control technology is implemented. Otherwise, says BLET, this issue is not ripe for resolution in the final rule. AAR agrees, stating that information overload caused by multiple monitors or displays in the locomotive cab is better suited for a separate proceeding. In light of the comments, the final rule does not include any requirements relating to ECP brake system monitors and displays.

Paragraph (j) requires that the railroads adopt and comply with written procedures governing the movement of defective equipment. The procedures must comply with the related regulatory requirements, including those in the final rule. FRA expects each railroad to develop appropriate procedures regarding its handling and repair of defective equipment containing ECP brake systems or hauled in trains operating in ECP brake mode. FRA acknowledges that many railroads may already have such procedures in place. FRA believes that the establishment of these procedures is the most effective means by which to minimize the possibility of future accidents caused by the movement of defective equipment on cars and trains equipped with ECP brake systems or operating in ECP brake mode. Given the introduction of new technology and its partial incompatibility with existing systems, FRA believes the need for adoption and compliance with such procedures is critical for continued safety in the rail industry.

BLET suggests that the procedures governed by paragraph (j) should be filed with, rather than merely be made available to, FRA. FRA has placed the burden on the railroads to be custodians of the information referenced in paragraph (j)(1). FRA only needs access to the information in certain situations and does not require ownership or custodianship. Accordingly, FRA sees no need to expend its resources on receiving and maintaining such files.

In contrast, however, the information required in paragraph (j)(2) must be filed with FRA for continual enforcement purposes. FRA cannot be expected to enforce its rules relating to the handling of defective equipment without this information instantly and continually available. To ensure compliance with the requirements concerning the performance of ECP brake system repairs, paragraph (j)(2) requires railroads to submit to FRA, prior to operating ECP brake systems in revenue service, a list identifying locations where such repairs may be made. FRA believes that the list should encompass a sufficient number of locations to ensure that Class I brake tests are performed at appropriate intervals and that trains equipped with ECP brake systems do not travel further than their destination or 3,500 miles without being inspected and repaired at Class I brake test locations and repair facilities. If a railroad adds or removes any repair facility from its system, paragraph (j)(2) requires that the railroad amend or modify that list by timely notifying FRA of those changes at least 15 days in advance.

Paragraph (k) explicitly excepts other portions of part 232 as they apply to ECP brake systems. For instance, paragraph (k) excepts application of § 232.15(a)(2) and (a)(5) through (a)(7), which generally require that equipment with defective safety appliances be

repaired at the location where they are first discovered to be defective or that they be moved only to the nearest available location where necessary repairs can be performed. As noted above, FRA believes that freight cars equipped with ECP brakes and freight trains operating in ECP brake mode need to be provided some flexibility in being handled for repair and when moving equipment with defective safety appliances. The provisions contained in § 232.15(a), if applied, would frequently frustrate the purpose of FRA's proposal and ignore the safety advances provided by ECP braking systems.

Paragraph (k) also excepts § 232.15(a)(8), which prohibits the movement of a defective car or locomotive in a train required to receive a Class I brake test at that location. As discussed in detail above, paragraph (a) allows a train operated with ECP brakes to leave its initial terminal with only ninety-five percent operative brakes after a Class I brake test. By doing so, paragraph (a) implicitly excepts trains operating in ECP brake mode from § 232.103(d), which prohibits a train from departing from its initial terminal with any inoperative or ineffective brakes. Nevertheless, paragraph (k) intends to clearly and explicitly except § 232.103(d). An explicit exception in this rule does not imply that there are no independent and implicit exceptions elsewhere. Finally, § 232.103(e) ''contains a clear and absolute prohibition on train movement if more than 15 percent of the cars in a train have their brakes cut out or have otherwise inoperative brakes,'' thus preventing a train's movement ''if less than 85 percent of the cars in that train have effective and operative brakes.'' Due to relief proposed by this section, however, the strict limits imposed by § 232.103(e) would no longer be applicable to trains regulated under these proposed rules. Accordingly, paragraph (k) excepts § 232.103(e).

BLET does not support 232.609(k) and does not believe that FRA should invoke its discretionary authority under 49 U.S.C. § 20306 to exempt railroads from the requirements of 20303. As noted above in the discussion contained in Section IX of this document, FRA has considered BLET's concerns and has decided to invoke its discretionary authority.

*Section 232.611 Periodic Maintenance*

FRA intends that all unexcepted and unmodified rules under part 232 apply to ECP brake operations. For the purposes of further clarity, however, paragraph (a) of § 232.611 reminds the operators of equipment with ECP brake systems to comply with the maintenance requirements contained in § 232.303(b) through (d), which require the performance of certain tests and inspections whenever a car is on a shop or repair track. FRA continues to believe that a repair or shop track provides an ideal setting for railroads to conduct an individualized inspection on a car's brake system to ensure its proper operation. FRA also continues to believe that such inspections are necessary to reduce the potential of overlooking cars with excessive piston travel during the performance of ordinary brake inspections. If any problems are detected at that location, the personnel needed to make any necessary corrections are already present. Furthermore, performing these inspections at this time ensures proper operation of the cars' brakes and eliminates the potential of having to cut cars out of an assembled train and, thus, should reduce inspection times and make for more efficient operations.

FRA continues to believe that § 232.303(b) and (c) should apply to all operations, including those with ECP brake systems. Section 232.303(b) requires testing of each car on a shop or repair track to determine that its air brakes apply and remain applied until a release is initiated. If the brakes fail to apply or to remain applied until a release is initiated, the car must be repaired and retested. Section § 232.303(c) requires piston travel to be inspected and, if necessary, adjusted. FRA intends for this to be accomplished in accordance with the stencil or badge plate on cars equipped with ECP brakes in accordance with § 232.607(f)(2).

FRA also continues to believe that § 232.303(d) should apply to all operations, including those with ECP brake systems. Section 232.303(d) lists brake system components requiring inspection prior to releasing a car from a shop or repair track. This section requires inspection of a car's hand brakes, angle cocks to ensure proper positioning to allow maximum air flow, and brake indicators, if equipped, to ensure their accuracy and proper operation. A periodic inspection is an ideal time for the railroad to inspect these items while imposing the least burden on the railroad's inspection and repair forces.

In addition to requiring continued compliance with § 232.303(b) through (d), paragraph (a) requires further inspection of freight cars equipped with ECP brake systems prior to release from a shop or repair track. These additional requirements afford the inspector the opportunity to look at each car more thoroughly and take into consideration an ECP brake system's unique characteristics. For instance, while § 232.303(d) requires inspectors to ensure that brake pipes are securely clamped, paragraph (a) provides the equivalent for ECP brake systems by requiring the secured clamping of ECP brake system wires. Accordingly, paragraph (a) requires inspectors to check the ECP brake system's wiring and brackets, electrical connections, electrical grounds, and any car mounted ECP brake system component. During such inspections, inspectors must look for problems such as frayed wiring, loose or damaged brackets, and wires that have become loose due to a fallen bracket. FRA believes that a missing bracket may be overlooked during a regular train yard inspection or Class I brake test and the final rule requires shop or repair track inspections of such ECP brake related components to ensure their safe operation.

Paragraph (a)(3) as proposed required the testing of the train line cable's electrical grounds and impedance. NYAB and Wabtec asserted that paragraph (a)(3) as proposed should be removed entirely. According to these brake manufacturers, train line integrity tests, which should be performed subsequent to repairs or replacement of the ECP brake-equipped train line or as part of a single car air brake test, do not require impedance testing, since they can be performed via resistance and grounds tests using commonly available measurements tools. AAR concurs with the brake manufacturers' submission, asserting that an impedance test is unnecessary. One of the labor representatives disagrees with the manufacturers, urging FRA to retain impedance testing of train line cables in the final rule.

FRA believes that the main purpose of cable impedance testing is checking the integrity of the train line electrical cable to assure that there is no electrical shortage between the wires and electrical current leakage through the ground connections. Since the current leakage testing of train line cable is a routine single car air brake test procedure and the ECP brake system continuously monitors the integrity of the train line cable, the additional impedance testing of train line cable wires is redundant and therefore unnecessary. FRA also believes that independently testing for grounds (i.e., check for the legitimate presence of cable shield connections to the car frame) is not necessary since paragraph (a)(2) already requires that a single car air brake test include a review and repair of the ECP brake system electrical connections. FRA continues to believe

that the brake manufacturers are in the best position to determine the level of testing that can be integrated into a single car air brake test. Accordingly, the proposal that periodic testing include electrical impedance and grounds testing is not being included in the final rule.

Paragraph (b) requires railroads to submit periodic single car air brake test procedures to FRA for approval and paragraph (c) requires railroads to comply with such submitted and approved procedures whenever they perform a single car air brake test. FRA must be given an opportunity to review and comment on any revision of the procedures by which these tests are performed to ensure that there is no degradation in safety resulting from any such modification and to ensure consistency in how the tests are performed. FRA notes that the review and approval required by paragraph (b) are necessary to prevent railroads from making unilateral changes to the test procedures. Paragraph (b) requires the industry to follow the special approval process contained in § 232.17 in order to initially submit the procedures to FRA for approval.

Paragraph (c) requires the performance of a single car air brake test on a car equipped with ECP brakes upon the occurrence of most of the events identified in § 232.305. Except for the exceptions provided herein, FRA continues to believe that § 232.305 adequately covers the parameters and timeliness of single car air brake tests. Paragraph (f), however, excepts application to a car equipped with stand-alone ECP brakes of § 232.305(b)(2), which requires a car that is on a shop or repair track to receive a single car air brake test if one has not been performed on the car within the previous 12 months. FRA believes that since the car's CCD performs a self-diagnostic of the brake system each time the car is initialized and used in a train, there is no need to perform a single car air brake test on a car that has not received such a test within the last 12 months.

FRA acknowledges that railroads may retrofit ECP brake systems on existing cars equipped with conventional pneumatic brake systems. While § 232.305(e) requires a single car air brake test on each new or rebuilt car prior to placing or using it in revenue service, it is unclear whether this rule applies to cars retrofitted with ECP brake systems. Accordingly, to ensure the proper and safe operation of cars with newly installed ECP brake systems, paragraph (d) requires the performance of a single car air brake test prior to placing the car in revenue service. FRA believes that it is essential for retrofitted cars to receive this test prior to returning to revenue service in order to ensure the proper operation of the vehicle's new brake system. Since this is a requirement when installing a new brake system, the cost of this requirement is minimal and merely incorporates the industry's current practices.

FRA acknowledges that, after receiving approval of the single car air brake test standard from FRA in accordance with paragraph (b), a railroad or an industry representative may—through its experience—subsequently determine better procedures applicable to single car air brake tests of cars equipped with ECP brake systems. Accordingly, FRA recognizes that the industry may find it necessary to modify the single car air brake test procedures from time to time. Section 232.307 provides regulatory procedures for those seeking modification of an approved single car air brake test procedure. Paragraph (b) extends the application of § 232.307 to single car air brake test procedures for cars equipped with ECP brake systems.

FRA believes that § 232.307 provides the industry with a quick and efficient procedure to seek modification of an incorporated or approved testing procedure and provides both FRA and other interested parties an opportunity to review potential changes prior to their becoming effective. The process under § 232.307 permits the industry to modify the single car air brake test procedures and permits those modifications to become effective 75 days from the date that FRA publishes the requested modification in the **Federal Register**, if no objection to the requested modification is raised by either FRA or any other interested party. The process allows FRA and other interested parties 60 days to review and raise objections to any proposed modification requested by the industry and submitted to FRA. FRA believes the process established in § 232.307 will meet the needs of AAR and the industry to expeditiously modify the single car air brake test procedures required by and approved under paragraph (b).

FRA continues to believe that, for the process to work at optimum efficiency, AAR and the industry would be best served if they ensure that there is open communication regarding any modifications with both FRA and the representatives of affected employees prior to requesting any modification of the procedures. This will ensure that interested parties are fully informed of any potential modification and their concerns are addressed or allayed before a request for modification is submitted to FRA. This information and dialogue will eliminate the potential for objections being submitted when the requested modification is officially sought.

As previously noted, for ECP brake-equipped freight cars, the final rule contemplates replacing application of the single car air brake test in § 232.305(a) with a new single car air brake test submitted and approved under § 232.611(b). To make this clear, paragraph (f) excepts application of § 232.305(a) as it applies to all cars equipped with ECP brakes, regardless of whether they are dual mode or stand-alone. To preserve the requirement of using a qualified person to perform single car air brake tests on cars equipped with ECP brakes, however, the final rule includes appropriate language in paragraphs (c) and (d).

FRA acknowledges that the self-monitoring capabilities of ECP brake systems may eliminate the need to perform single car air brake tests on a time-specific basis. Accordingly, paragraph (f) also excepts § 232.305(b)(2) as it applies to single car air brake tests for cars with stand-alone ECP brake systems. Since cars with dual mode ECP brake systems include all of the components of a conventional pneumatic brake system and may be operated in conventional pneumatic brake mode at any time, paragraph (f) does not intend to provide those cars relief from section 232.305(b)(2).

BLET asserts that there should be no exception from § 232.305(b)(2). According to BLET, the FMECA recommends the continuation of periodic single car testing to assure power brake functionality. UP states that it disagrees with the FRA proposal to require a single car air brake test whenever an ECP braked car is shopped for a non-braking defect. Under current AAR rules, says UP, a conventionally braked freight car is only subject to a single car air brake test when the braking system itself is service or repaired, or if 5 years have passed since the last such test or if 8 years had passed since the equipment was built.

UP apparently misunderstands the existing rule and the proposed rule. In addition to the requirements under § 232.305(c) and (d) that cars must be tested every 5 or 8 years, § 232.305(b)(2) requires a single air brake test when the car is found on a repair track ''for any reason'' and it has not received a single car air brake test within the previous 12-month period. Since this rule was enacted, it has always applied to all freight cars. The single car air brake test

is critical to ensuring the safe and proper operation of the brake equipment on the Nation's fleet of freight cars. When FRA issued § 232.305(b)(2), the single car air brake test was the sole method by which air brake equipment on freight cars is periodically tested to identify potential problems before they result in a brake becoming inoperative. It will now also apply to dual mode ECP brake-equipped freight cars.

However, stand-alone ECP brake-equipped freight cars will be exempt from § 232.305(b)(2) pursuant to paragraph (f). Accordingly, each stand-alone ECP brake-equipped car will not require a single car air brake test each time it is on a repair track. FRA believes that a reduction in the frequency of single car air brake tests is justified for stand-alone ECP brake-equipped cars in light of the ECP brake system's self-monitoring capabilities. However, the final rule maintains most of the requirements under § 232.305. FRA agrees with BLET and the FMECA that such periodic testing should continue and FRA continues to believe that insufficient information exists at this time to completely eliminate the need to conduct periodic single car air brake tests on ECP brake-equipped cars.

Section 232.305(f) was initially enacted to allow the continued operation of cars already in service that had received a single car air brake test before a more formal standard was adopted by the 2001 final power brake rule. While paragraph (f) of § 232.611 as proposed also excepted the application of § 232.305(f), FRA believes that § 232.305(f) should actually be removed from the rules in its entirety, since it no longer applies to any car, regardless of its brake system technology. Accordingly, § 232.305(f) is hereby deleted.

With the need for the submission and adoption of a new single car air brake test for ECP brake systems, FRA recognizes that the same flexibility initially afforded by § 232.305(f) may be necessary to allow for the continued operation of ECP brake-equipped cars currently in service under the existing waivers. New paragraph (g) intends to provide for such flexibility by considering the last single car air brake test performed on any ECP brake-equipped car prior to June 15, 2009, pursuant to the then existing standards, to be considered the last single car air brake test for that car. Accordingly, each such car would not require an additional single car air brake test in accordance with § 232.305(e) and 232.611(d).

Under paragraph (b), no car should be in service if it has not received a single car air brake test under a procedural standard submitted to and approved by FRA. Since no such standard has yet been submitted and approved, all trains under the existing waiver would be required to be taken out of service upon the publication of this rule. To avoid this unintended consequence and to provide flexibility for ECP brake-equipped cars already in service, paragraph (g) provides more time for the submission and approval of a single car air brake test standard submitted pursuant to paragraph (b) and § 232.17.

FRA understands that AAR has formed a group, which includes AAR Brake Committee members, the ECP brake manufacturers, and FRA, for the purpose of developing single car air brake test procedures for freight cars equipped with ECP brakes. FRA expects these procedures will become part of the AAR Standards and Recommended Practices once they are developed and adopted by the AAR. Accordingly, for the same reasons FRA implemented § 232.305(f) (2001), the date that all cars equipped with ECP brakes will receive a single car air brake test under the existing standard prior to June 15, 2009, shall be considered the date for the last single car air brake test for that car.

*Section 232.613 End-of-Train Devices*

Current FRA regulations specify design and performance standards for one-way and two-way EOT telemetry devices, which, at a minimum, have the capability of determining rear-of-train brake pipe pressure and of transmitting this information by radio to a receiving unit in the controlling locomotive. Most EOT units in service are battery operated and also incorporate a rear end marker required under 49 CFR part 221. Optional features include transmission of information regarding rear end motion and battery status. Most units operate on the same ultra high frequency (UHF), but each rear unit has a discrete identification code which must be recognized by the HEU before the message is acknowledged. The more modern two-way EOT device, in addition to the features of the one-way EOT device, has the ability of activating the emergency air valve at the rear of the train upon receiving an emergency brake application command from the HEU. This is a desirable feature in event of a blockage in the brake pipe that would prevent the pneumatic transmission of the emergency brake application throughout the entire train.

Provisions governing the use of one-way EOT telemetry devices were initially incorporated into the power brake regulations in 1986. Pursuant to the Rail Safety Enforcement and Review Act, Public Law 102–365 (Sept. 3, 1992), which amends the Federal Rail Safety Act (FRSA) of 1970 (45 U.S.C. 421, 431 et seq.), FRA held rulemakings to amend the power brake regulations, including those concerning one-way and two-way EOTs. 62 FR 278 (Jan. 2, 1997); 66 FR 4104 (Jan. 17, 2001). The resulting regulations, contained in subpart E of part 232, specify the requirements related to the performance, operation, and testing of EOT devices for conventional pneumatic braking.

The new ECP–EOT devices—which must comply with AAR standards such as S–4200 and S–4220—will provide many of the same functions that conventional two-way EOT devices use on trains with conventional pneumatic brakes. In addition to serving as the final node on the ECP brake system's train line cable termination circuit and as the system's ''heart beat'' monitoring and confirming train, brake pipe, power supply line, and digital communications cable continuity, the ECP–EOT device transmits to the HEU a status message that includes the brake pipe pressure, the train line cable's voltage, and the ECP–EOT device's battery power level. Since the ECP–EOT device—unlike a conventional EOT device—will communicate with the HEU exclusively through the digital communications cable and not via a radio signal, it does not need to perform the function of venting the brake pipe to atmospheric pressure to engage an emergency brake application. However, ECP–EOT devices do verify the integrity of the train line cable and provide a means of monitoring the brake pipe pressure and gradient, providing the basis for an automatic- rather than engineer-commanded-response if the system is not adequately charged. In the case of ECP brakes, the brake pipe becomes a redundant- rather than primary-path for sending emergency brake application commands. Under certain communication break downs between the ECP–EOT device, the HEU, and any number of CCDs, the system will self-initiate an emergency brake application.

FRA acknowledges that ECP–EOT devices, with their additional and changed features, may not comply with the rules under subpart E. Accordingly, paragraph (d) excepts trains operating in ECP brake mode from having to comply with subpart E of part 232 and the remainder of section 232.613 provides alternative requirements. Paragraph (a) provides for the minimum requirements under which an ECP–EOT device must operate. Paragraph (b) requires that each ECP brake operated includes a properly connected ECP–EOT device that

comports with the requirements under paragraph (a).

AAR and NS noted that, similarly to trains operating with conventional air brake systems, a train operated with ECP brakes may include a locomotive as the train's rear vehicle performing the same function as an EOT device. According to AAR, a locomotive at the rear of a train can perform all the functions performed by an EOT device. BLET concurs with AAR and NS and proposes that § 232.613(c) be redrafted to permit the use of a locomotive in lieu of an ECP–EOT device. FRA agrees because a locomotive equipped with ECP brakes functions the same as an ECP–EOT device. They both provide the same feedback loop between the HEU and end of the train. Accordingly, paragraph (c) provides for a locomotive equipped with ECP brakes to be used in lieu of an ECP–EOT device in a train operated with ECP brakes.

NYAB and Wabtec state that a conventional EOT unit is subject to annual calibration to address issues relating to its radio and BP pressure transducer. However, since an ECP–EOT device does not require a radio and the ECP brake system continuously monitors the brake pipe pressure transducer, the brake manufacturers contend, it does not require annual calibration.

FRA agrees with the brake manufacturers' comments regarding annual ECP–EOT device calibration. Unlike conventional EOT units, ECP–EOT devices do not require radios. Annual calibration of the brake pipe pressure transducer is not necessary in light of the ECP brake system's brake pipe pressure readings at each individual ECP brake operated car and ability to confirm train line integrity. Accordingly, the final rule does not require annual calibration and testing.

## XII. Regulatory Impact and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in Docket No. FRA–2006–26175 a Regulatory Analysis addressing the economic impact of this final rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. Access to the docket may also be obtained electronically through the Federal eRulemaking Portal at *http://www.regulations.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

For purposes of analysis, FRA has assumed that this final rule will support business decisions by Class I railroads to convert unit train service, such as coal and intermodal, to ECP brake operations over a 10-year period. This type of service is characterized by intensive utilization of assets and is reasonably discrete in terms of operational requirements. Although carload service is dispersed over the national rail network, unit train service tends to be concentrated in certain corridors. Locomotives are or could be dedicated to this service (e.g., as in the extensive use of high traction alternating current (AC) locomotives in coal service). FRA believes that, as costs and benefits are validated and the technology's market enjoys economies of scale, additional markets will benefit from ECP brake technology.

The benefits of voluntarily implementing and using ECP brakes under this rule substantially exceed the costs. If the industry were to implement ECP brakes to the extent estimated in this final rule, it would cost it approximately $1.7 billion (discounted at 7%). The largest portion of these voluntary costs, $1.2 billion, would be the cost to convert freight cars to ECP brakes and the remaining costs relate to locomotive conversion and training. The total benefits of the final rule would total approximately $9.7 billion (discounted at 7%), if ECP brakes are adopted as estimated. Of those benefits, the $1 billion in regulatory relief and the $1.2 billion in fuel savings together exceed the costs. The remaining benefits include accident risk reduction, environmental cleanup savings, track out-of-service time reduction, wheel replacement savings, and network velocity improvements. The expected benefits of ECP braking technology appear to justify the investment, provided that the conversion is focused first on the high-mileage, unit and unit-like train services that would most benefit from its use.

As presented in the following tables, FRA estimates that the present value (PV), discounted at 7 percent of the total 20-year benefits and costs which the industry would be expected to incur if it elected to comply with the alternative requirements contained in this rule is $9.7 billion and $1.7 billion, respectively:

TOTAL 20-YEAR BENEFITS AND DISCOUNTED BENEFITS

[At 3% and 7%]

| | Benefits | 3% Discount | 7% Discount |
|---|---|---|---|
| Highway-Rail Accident Risk Reduction | $25,802,114 | $17,897,484 | $11,513,191 |
| Rail Equipment Accident Risk Reduction | 286,687,494 | 198,859,081 | 127,923,151 |
| Environmental Cleanup Savings | 113,296,427 | 78,587,395 | 50,554,127 |
| Track Out-of-Service Time for Accidents | 10,825,104,763 | 7,508,769,780 | 4,830,282,231 |
| Regulatory Relief | 2,283,662,829 | 1,586,425,219 | 1,022,855,259 |
| Fuel Savings | 2,745,000,000 | 1,904,052,986 | 1,224,849,552 |
| Wheel Replacement Savings | 1,601,250,000 | 1,110,697,575 | 714,495,572 |
| Network Velocity Improvement of 1 mph | 2,500,000,000 | 2,101,494,145 | 1,698,459,555 |
| Total Benefits | 20,380,803,627 | 14,506,783,665 | 9,680,932,638 |

TOTAL 20-YEAR COSTS AND DISCOUNTED COSTS

[at 3% and 7%]

| | Costs | 3% Discount | 7% Discount |
|---|---|---|---|
| Freight Car Costs | $1,746,326,400 | $1,467,957,882 | $1,186,425,904 |
| Locomotive Costs | 582,624,000 | 489,752,370 | 395,825,320 |
| Employee Training | 231,470,835 | 165,421,968 | 111,016,540 |
| Total Costs | 2,560,421,235 | 2,123,132,221 | 1,693,267,763 |

*B. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in Docket No. FRA–2006–26175 an Analysis of Impact on Small Entities (AISE) that assesses the small entity impact of this rule. Document inspection and copying facilities are available at the Department of Transportation Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590. Docket material is also available on the Federal eRulemaking Portal at *http://www.regulations.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

''Small entity'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a ''small entity'' in the railroad industry is a railroad business ''line-haul operation'' that has fewer than 1,500 employees and a ''switching and terminal'' establishment with fewer than 500 employees. SBA's ''size standards'' may be altered by Federal agencies, in consultation with SBA and in conjunction with public comment.

Pursuant to that authority FRA has published a final statement of agency policy that formally establishes ''small entities'' as being railroads that meet the line-haulage revenue requirements of a Class III railroad. See 68 FR 24891 (May 9, 2003). Currently, the revenue requirements are $20 million or less in annual operating revenue. The $20 million limit is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment (49 CFR part 1201). The same dollar limit on revenues is established to determine whether a railroad, shipper, or contractor is a small entity. FRA uses this alternative definition of ''small entity'' for this rulemaking.

For this rulemaking, there are approximately 523 small railroads that could potentially receive regulatory relief. However, railroads are not mandated to convert to ECP brake technology. Regulatory relief provides an incentive for most long-haul services to convert. Smaller railroads do not operate over 1,000 miles or 1,500 miles and would not benefit economically by converting to this technology. Hence, FRA does not expect this regulation to impact any small railroads.

The small entity segment of the railroad industry faces little in the way of intramodal competition. Small railroads generally serve as ''feeders'' to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for the larger railroads. Smaller railroads that carry unit and unit-like commodities often operate the train with the locomotives and cars without ownership of the equipment. They transport those cars over relatively short distances and then turn them over to the larger systems, which transport them relatively long distances to their ultimate destination, or for handoff back to a smaller railroad for final delivery. Although there are situations in which the relative interests of large and small railroads may not always coincide, the relationships between the large and small entity segments of the railroad industry are more supportive and co-dependent than competitive.

It is also extremely rare for small railroads to compete with each other. As mentioned above, small railroads generally serve smaller, lower density markets and customers. They exist, and often thrive, doing business in markets where there is not enough traffic to attract the larger carriers that are designed to handle large volumes over distance at a profit. As there is usually not enough traffic to attract service by a large carrier, there is also not enough traffic to sustain more than one smaller carrier. There are also significant barriers to entry in the railroad industry, including the need to own rights-of-way, build track, purchase fleets. Thus, even to the extent that the rule may have an economic impact, it should have no impact on the intramodal competitive position of small railroads.

The AISE developed in connection with this final rule concludes that this final rule will only likely impact four Class I railroads that voluntarily choose to implement ECP brakes in their operations and therefore should not have any economic impact on small entities. Smaller railroads that carry unit and unit-like commodities often operate and transport trains owned by other parties over relatively short distances and turn them over to larger systems that, in turn, transport those trains relatively long distances to their ultimate destination or to another small railroad for final delivery. FRA recognizes that small entities may, in some cases, be involved in specific route segments for trains that originate or terminate on a Class I railroad. In these cases, the cars involved are more likely to be owned or provided by shippers or a Class I railroad. Mutual support arrangements and shared power practices are likely to ensure that the smaller railroad will not require trains equipped with ECP brakes for this service. Further, FRA anticipates that train operations using ECP brakes will be limited to long hauls of commodities such as intermodal, coal, ore, non-metallic minerals, motor vehicle parts, and grain for many years. Since small railroads do not handle such commodities, they will not likely receive large blocks of cars equipped with ECP brakes from Class I railroads.

Since FRA does not expect small railroads to convert to ECP brake technology within the period of the analysis, this final rule is not anticipated to affect any small entities. Thus, FRA certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities under the

Regulatory Flexibility Act or Executive Order 13272.

*C. Paperwork Reduction Act*

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

| CFR section | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| 229.27—Annual tests | 30,000 locomotives | 30,000 tests | 15 minutes | 7,500 hours. |
| 232.3—Applicability—Export, industrial, & other cars not owned by railroads-identification. | 559 railroads | 8 cards | 10 minutes | 1 hour. |
| 232.7—Waivers | 559 railroads | 20 petitions | 40 hours | 800 hours. |
| 232.11—Penalties—Knowingly falsifying a record/report. | 559 railroads | 1 falsified recd/rpt | 10 minutes | .17 hour. |
| 232.15—Movement of Defective Equipment: | | | | |
| —Tags | 1,620,000 cars | 128,400 tags | 2.5 minutes | 5,350 hours. |
| —Written Notification | 1,620,000 cars | 25,000 notices | 3 minutes | 1,250 hours. |
| 232.17—Special Approval Procedure: | | | | |
| —Petitions for special approval of safety-critical revision. | 559 railroads | 4 petitions | 100 hours | 400 hours. |
| —Petitions for special approval of pre-revenue service acceptance plan. | 559 railroads | 2 petitions | 100 hours | 200 hours. |
| —Service of petitions | 559 railroads | 4 petitions | 40 hours | 160 hours. |
| —Statement of interest | Public/railroads | 14 statements | 8 hours | 112 hours. |
| —Comment | Public/railroads | 13 comments | 4 hours | 52 hours. |
| 232.103—Gen'l requirements—all train brake systems. | 114,000 cars | 70,000 stickers | 10 minutes | 11,667 hours. |
| 232.105—Gen'l requirements for locomotives—Inspection. | 30,000 locomotives | 30,000 forms | 5 minutes | 2,500 hours. |
| 232.107—Air source requirements and cold weather operations—Monitoring Plan (Subsequent Years). | 10 new railroads | 1 plan | 40 hours | 40 hours. |
| —Amendments to Plan | 50 railroads/plans | 10 amendments | 20 hours | 200 hours. |
| —Recordkeeping | 50 railroads/plans | 1,150 records | 20 hours | 23,000 hours. |
| 232.109—Dynamic brake requirements—status. | 559 railroads | 1,656,000 records | 4 minutes | 110,400 hours. |
| —Inoperative dynamic brakes | 30,000 locomotives | 6,358 records | 4 minutes | 424 hours. |
| —Tag bearing words ''inoperative dynamic brakes''. | 30,000 locomotives | 6,358 tags | 30 seconds | 53 hours. |
| —Deactivated dynamic brakes (Sub. Yrs.). | 8,000 locomotives | 10 stencilings | 5 minutes | 1 hour. |
| —Operating rules (Subsequent Years). | 5 new railroads | 5 op. rules | 4 hours | 20 hours. |
| —Amendments | 559 railroads | 15 amendments | 1 hour | 15 hours. |
| —Requests to increase 5 mph overspeed restriction. | 559 railroads | 5 requests | 30 min/20 hrs. | 103 hours. |
| —Knowledge criteria—locomotive engineers—Sub Yrs. | 5 new railroads | 5 amendments | 16 hours | 80 hours. |
| 232.111—Train information handling | 5 new railroads | 5 procedures | 40 hours | 200 hours. |
| —Sub. Yrs.—Amendments | 100 railroads | 100 amendments | 20 hours | 2,000 hours. |
| —Report requirements to train crew | 559 railroads | 2,112,000 reports | 10 minutes | 352,000 hours. |
| 232.203—Training requirements—Tr. Prog.: | | | | |
| —Sub Yr | 15 railroads | 5 programs | 100 hours | 500 hours. |
| —Amendments to written program | 559 railroads | 559 amendments | 8 hours | 4,472 hours. |
| —Training records | 559 railroads | 67,000 records | 8 minutes | 8,933 hours. |
| —Training notifications | 559 railroads | 67,000 notific | 3 minutes | 3,350 hours. |
| —Audit program | 559 railroads | 1 plan/559 cop | 40 hours/1 min | 49 hours. |
| —Amendments to validation/assessment program. | 559 railroads | 50 amendments | 20 hours | 1,000 hours. |
| 232.205—Class 1 brake test—Notifications/Records. | 559 railroads | 1,646,000 records | 45 seconds | 20,575 hours. |
| 232.207—Class 1A brake tests—Subsequent Years. | 559 railroads | 5 des. Lists | 1 hour | 5 hours. |
| —Notification | 559 railroads | 5 amendments | 1 hour | 5 hours. |
| 232.209—Class II brake tests—intermediate inspection. | 559 railroads | 1,597,400 commun | 3 seconds | 1,331 hours. |
| 232.213—Extended haul trains | 83,000 long dist. movements. | 100 letters | 15 minutes | 25 hours. |
| —Record of all defective/inoperative brakes. | N/A | N/A | N/A | N/A. |
| 232.303—Gen'l requirements—single car test. | 1,600,000 frgt. cars | 5,600 tags | 5 minutes | 467 hours. |

| CFR section | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| —Last repair track brake test/single car test. | 1,600,000 frgt. cars .... | 320,000 stncl ..... | 5 minutes ..... | 26,667 hours. |
| 232.305—Single Car tests ..... | 1,600,000 frgt. cars .... | 320,00 tests/records .. | 45 minutes ..... | 240,000 hours. |
| 232.307—Modification of Single Car Air Brake Test Procedures (Old Rqmnt)—Req. | AAR ..... | 1 req. + 3 copies ..... | 4 hrs. + 5 min ..... | 4 hours. |
| —Affirmation Statement on Mod. Req. to Employee Representatives. | AAR ..... | 1 statement + 4 copies. | 30 min. + 5 min ..... | 1 hour. |
| —Comments on Modification Request. | Public/Int. Parties ..... | 2 comments ..... | 60 minutes ..... | 2 hours. |
| 232.309—Repair track brake test ..... | 640 shops ..... | 5,000 tests ..... | 30 minutes ..... | 2,500 hours. |
| 232.403—Unique Code ..... | 245 railroads ..... | 12 requests ..... | 5 minutes ..... | 1 hour. |
| 232.407—Operations requiring 2-way EOTs | 245 railroads ..... | 50,000 comm ..... | 30 seconds ..... | 417 hours. |
| 232.409—Insp. and Testing of EOTs ..... | 245 railroads ..... | 447,500 comm ..... | 30 seconds ..... | 3,729 hours. |
| —Telemetry Equipment—Testing and Calibration. | 245 railroads ..... | 32,708 mar. units ..... | 1 minute ..... | 545 hours. |
| 232.503—Process to introduce new brake technology. | 559 railroads ..... | 1 letter ..... | 1 hour ..... | 1 hour. |
| —Special approval ..... | 559 railroads ..... | 1 request ..... | 3 hours ..... | 3 hours. |
| 232.505—Pre-revenue svc accept. test plan—Sub Yr. | 559 railroads ..... | 1 procedure ..... | 160 hours ..... | 160 hours. |
| —Amendments ..... | 559 railroads ..... | 1 procedure ..... | 40 hours ..... | 40 hours. |
| —Design description ..... | 559 railroads ..... | 1 petition ..... | 67 hours ..... | 67 hours. |
| —Report to FRA Assoc. Admin. for Safety. | 559 railroads ..... | 1 report ..... | 13 hours ..... | 13 hours. |
| —Brake system technology testing | 559 railroads ..... | 5 descriptions ..... | 40 hours ..... | 200 hours. |
| 232.603—Configuration Management—New Requirements. | | | | |
| —Configuration Management Plan Submitted to FRA. | 4 railroads ..... | 1 plan ..... | 160 hours ..... | 160 hours. |
| —Subsequent Years ..... | 4 railroads ..... | 1 plan ..... | 60 hours ..... | 60 hours. |
| —Modification of Standards ..... | 4 railroads ..... | 1 request + 2 copies .. | 8 hours + 5 min ..... | 8 hours. |
| —Affirmative statement + statement copies re: modification request. | 4 railroads ..... | 4 statements + 24 copies. | 1 hour + 5 min ..... | 6 hours. |
| —Comments on requested modification. | Public/Int. Parties ..... | 4 comments ..... | 2 hours ..... | 8 hours. |
| 232.605—ECP Brakes: Training—New Requirements. | 4 railroads ..... | 4 programs ..... | 100 hours ..... | 400 hours. |
| —Adopt/Developing an ECP Training Prog.—Yr. One. —Subsequent Years. | 4 railroads ..... | 2 programs ..... | 100 hours ..... | 200 hours. |
| —ECP Brakes Training of Employees—Yr. One. | 4 railroads ..... | 6,409 tr. Empl ..... | 8 hrs/24 hrs ..... | 105,512 hours. |
| —ECP Brakes Training of Employees—Sub. Yrs. | 4 railroads ..... | 6,409 tr. Empl ..... | 1 hour/8 hours ..... | 30,264 hours. |
| —ECP Training Records—Yr. One | 4 railroads ..... | 6,409 records ..... | 8 minutes ..... | 855 hours. |
| —ECP Training Records—Subsequent Years. | 4 railroads ..... | 6,409 records ..... | 4 minutes ..... | 428 hours. |
| —Assessment of ECP Training Plan | 4 railroads ..... | 4 plans ..... | 40 hours ..... | 160 hours. |
| —Adopt Operating Rules for ECP Brakes. | 4 railroads ..... | 4 Op. Rules ..... | 24 hours ..... | 96 hours. |
| —Loco. Engineers—ECP Brakes Systems: Criteria For Certification. | 4 railroads ..... | 4 amended Programs | 40 hours ..... | 160 hours. |
| 232.607—ECP Inspection and Testing—New Requirements: | | | | |
| —Initial Terminal—Inspections and Notification of Class I Brake Tests. | 4 railroads ..... | 10,000 insp. + 10,000 notific. | 90 min. + 45 sec ..... | 15,125 hours. |
| —Cars added or removed en route—Class I Br. Test. | 4 railroads ..... | 1,000 insp. + 500 notific. | 60 min. + 45 sec ..... | 1,006 hours. |
| —Non-ECP cars added to ECP Trains—Inspections and Tags for Defective Cars. | 200 Cars ..... | 200 insp. + 400 tags/ rcds. | 5 min. + 2.5 min ..... | 34 hours. |
| 232.609—Handling of Defective Equipment with ECP Brake Systems—New Requirements: | | | | |
| —Freight Car w/defective conventional brakes moved in train operating in ECP brake mode. | 25 Cars ..... | 50 tags ..... | 2.5 minutes ..... | 2 hours. |
| —Inspections/Tagging for ECP Train moving w/less than 85 percent operative/effective brakes. | 20 Cars ..... | 20 Insp. + 40 tags/ records. | 5 min. + 2.5 min ..... | 3 hours. |

| CFR section | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---|---|---|---|
| 232.609—Freight Car with ECP brake system found with defective non-brake safety appliance—Tagging. | 75 Cars | 150 tags | 2.5 minutes | 6 hours. |
| —Conventional Train with stand-alone ECP brake equipped cars—Tagging. | 500 Cars | 1,000 tags | 2.5 minutes | 42 hours. |
| —Procedures for handling ECP brake system repairs and designation of repair locations. | 4 railroads | 4 procedures | 24 hours | 96 hours. |
| —List of repair locations | 4 railroads | 4 lists | 8 hours | 32 hours. |
| —Notification to FRA Safety Administrator regarding change to repair location list. | 4 railroads | 1 notification | 1 hour | 1 hour. |
| 232.611—Periodic Maintenance—New Requirements: | | | | |
| —Inspections before being released from repair Shop. | 500 fr. Cars | 500 insp. & records | 10 minutes | 83 hours. |
| —Procedures for ECP Single Car Tests. | 1 Railroad Rep | 1 procedure + 2 copies. | 24 hours + 5 min | 24 hours. |
| —Single Car Air Brake Tests—Records. | 2,500 fr. Cars | 2,500 tests/rcd | 45 minutes | 1,875 hours. |
| —Modification of Single Car Test Standards. | 1 Railroad Rep | 1 mod. Proc | 40 hours | 40 hours. |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or contact Ms. Nakia Jackson at 202–493–6073; or via e-mail at *robert.brogan@dot.gov* or *nakia.jackson@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. Comments to OMB may be sent by mail to: The Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, attn: FRA Desk Officer. Comments may also be sent to OMB at the following address: *oira_submissions@omb.eop.gov*.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

*D. Federalism Implications*

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the proposed regulation. Where a regulation has Federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

In the NPRM, FRA stated that this proposed rule has preemptive effect. Subject to a limited exception for essentially local safety or security hazards, FRA stated that its requirements will establish a uniform Federal safety standard that must be met, and state requirements covering the same subject are displaced, whether those standards are in the form of state statutes, regulations, local ordinances, or other forms of state law, including state common law. Section 20106 of Title 49 of the United States Code, FRA said, provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA and within the Department of Transportation. In particular, the notice of proposed rulemaking did not change the preemption provision of part 232; this final rule amends the preemption provision, § 232.13, to conform to the recent clarifying amendments to 49 U.S.C. 20106.

AAJ filed comments expressing its belief that FRA should revise the ''Federalism Implications'' section of the preamble to reflect Congress's intention that federal rail safety regulations do not preempt an individual's right to pursue a state tort law claim against a railroad company. According to AAJ, section 1528 of the ''Implementing Recommendation of the 9/11 Commission Act of 2007'' (the 9/11 Act) clarifies that 49 U.S.C. 20106 does not preempt State law causes of action. AAR disagrees, stating that, by its plain language, section 1528 ''is intended solely to reject a preemption

defense where the defendant has violated the federal standard of care embodied in a federal regulation or a plan created pursuant to a federal regulation.'' According to AAR, section 1528 does not eliminate preemption of common law claims, but reaffirms that state law is preempted whenever the Secretaries of Transportation and Homeland Security issue a regulation or order covering the applicable subject matter, unless the local safety or security hazard exception applies.

Normal State negligence standards apply where there is no Federal action covering the subject matter. In Section 1528 of Public Law 110–53, Congress clarified the availability of State law causes of action under section 20106 where there is Federal action covering the subject matter. As amended, 49 U.S.C. 20106 provides that issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local railroad safety or railroad security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce. Section 20106 permits State tort actions arising from events or activities occurring on or after January 18, 2002, for the following: (a) A violation of the Federal standard of care established by regulation or order issued by the Secretary of Transportation (with respect to railroad safety, such as these regulations) or the Secretary of Homeland Security (with respect to railroad security); (b) a party's violation of, or failure to comply with, its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the two Secretaries; and (c) a party's violation of a State standard that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce. Nothing in Section 20106 creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

While this recent amendment has altered the preemptive reach of Section 20106, it is important to note that there are limits to this exception allowing state tort actions under this statute. For example, Congress provided an exception only for an action in State court seeking damages for personal injury, death, or property damage. The statute does not provide for the recovery of punitive damages in the permitted common law tort actions. In addition, the statute permits actions for violation of an internal plan, rule, or standard only when such internal plan, rule, or standard is created pursuant to a Federal regulation or order issued by DOT or DHS. While parties are encouraged to go beyond the minimum regulatory standard in establishing internal safety and security standards, such standards that exceed the requirements of Federal regulation or order are not created pursuant to Federal regulation or order. Accordingly, there is no clear authorization of a common law tort action alleging a violation of those aspects of such an internal plan, rule, or standard related to the subject matter of this regulation that exceed the minimum required by the Federal regulation or order.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. This final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. FRA concludes that this final rule will not impose any direct compliance costs on State and local governments and has no federalism implications, other than the preemption of state laws covering the subject matter of this final rule, which occurs by operation of law under 49 U.S.C. 20106 whenever FRA issues a rule or order. Elements of the final rule dealing with safety appliances affect an area of safety that has been pervasively regulated at the Federal level for over a century. Accordingly, the final rule amendments in that area will involve no impacts on Federal relationships.

*E. Environmental Impact*

FRA has evaluated this final rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. See 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows: (c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * * (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

*F. Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $132,000,000 or more in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. This final rule may result in the expenditure, in the aggregate, of $132,000,000 or more in any one year. However, those expenses are not mandated and would only be incurred by the private sector if it wishes to take advantage of the regulatory relief provided by this final rule. Although the preparation of such a statement is not required, the analytical requirements under Executive Order 12866 are similar to the analytical requirements under the Unfunded Mandates Reform Act of 1995 and, thus, the same analysis complies with both analytical requirements.

*G. Energy Impact*

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 ( May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

**List of Subjects in 49 CFR Part 232**

Electronically controlled pneumatic brakes, Incorporation by reference, Penalties, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

**The Rule**

■ In consideration of the foregoing, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

## PART 232—BRAKE SYSTEM SAFETY STANDARDS FOR FREIGHT AND OTHER NON-PASSENGER TRAINS AND EQUIPMENT; END OF TRAIN DEVICES

■ 1. The authority citation for Part 232 continues to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 232.5 is amended by adding definitions *car control device (CCD), dual mode ECP brake system, ECP, ECP brake mode, ECP brake system, ECP–EOT device, emulator CCD, overlay ECP brake system, stand-alone CCD, stand-alone ECP brake system, switch mode,* and *train line cable;* by revising the definition *train, unit or train, cycle* and adding the definition *yard limits* as follows in alphabetical order:

**§ 232.5 Definitions.**

* * * * *

*Car control device (CCD)* means an electronic control device that replaces the function of the conventional pneumatic service and emergency portions of a car's air brake control valve during electronic braking and provides for electronically controlled service and emergency brake applications.

*Dual mode ECP brake system* means an ECP brake system that is equipped with either an emulator CCD or an overlay ECP brake system on each car which can be operated in either ECP brake mode or conventional pneumatic brake mode.

*ECP* means ''electronically controlled pneumatic'' when applied to a brake or brakes.

*ECP brake mode* means operating a car or an entire train using an ECP brake system.

*ECP brake system* means a train power braking system actuated by compressed air and controlled by electronic signals from the locomotive or an ECP–EOT to the cars in the consist for service and emergency applications in which the brake pipe is used to provide a constant supply of compressed air to the reservoirs on each car but does not convey braking signals to the car. ECP brake systems include dual mode and stand-alone ECP brake systems.

*ECP–EOT device* means an end-of-train device for an ECP brake system that is physically the last network node in the train, pneumatically and electrically connected at the end of the train to the train line cable operating with an ECP brake system.

* * * * *

*Emulator CCD* means a CCD that is capable of optionally emulating the function of the pneumatic control valve while in a conventionally braked train.

* * * * *

*Overlay ECP brake system* means a brake system that has both conventional pneumatic brake valves and ECP brake components, making it capable of operating as either a conventional pneumatic brake system or an ECP brake system. This brake system can operate in either a conventionally braked train using the conventional pneumatic control valve or in an ECP braked train using the ECP brake system's CCD.

* * * * *

*Stand-alone CCD* means a CCD that can operate properly only in a train operating in ECP brake mode and cannot operate in a conventional pneumatically braked train.

*Stand-alone ECP brake system* means a brake system equipped with a CCD that can only operate the brakes on the car in ECP brake mode.

* * * * *

*Switch Mode* means a mode of operation of the ECP brake system that allows operation of that train at 20 miles per hour or less when the train's ECP–EOT device is not communicating with the lead locomotive's HEU, the train is separated during road switching operations, or the ECP brake system has stopped the train because the percentage of operative brakes fell below 85%. Many of the ECP brake system's fault detection/response procedures are suspended during Switch Mode.

* * * * *

*Train line cable* is a two-conductor electric wire spanning the train and carrying both electrical power to operate all CCDs and ECP–EOT devices and communications network signals.

*Train, unit or train, cycle* means a train that, except for the changing of locomotive power or for the removal or replacement of defective equipment, remains coupled as a consist and operates in a continuous loop or continuous loops without destination.

* * * * *

*Yard limits* means a system of tracks, not including main tracks and sidings, used for classifying cars, making-up and inspecting trains, or storing cars and equipment.

* * * * *

■ 3. Section 232.13 is amended by revising paragraph (a) to read as follows:

**§ 232.13 Preemptive effect.**

(a) Under 49 U.S.C. 20106, issuance of the regulations in this part preempts any State law, rule, regulation, order or standard covering the same subject matter, except for a provision necessary to eliminate or reduce a local safety hazard if that provision is not incompatible with this part and does not impose an undue burden on interstate commerce. Nothing in this paragraph shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care established by this part, has failed to comply with its own plan, rule, or standard that it created pursuant to this part, or has failed to comply with a State law, regulation, or order that is not incompatible with the first sentence of this paragraph.

* * * * *

■ 4. Section 232.17 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 232.17 Special approval procedure.**

(a) *General.* The following procedures govern consideration and action upon requests for special approval of a plan under § 232.15(g); an alternative standard under § 232.305, § 232.603, or a single car test procedure under § 232.611; and pre-revenue service acceptance testing plans under subpart F of this part.

(b) *Petitions for special approval of an alternative standard or test procedure.* Each petition for special approval of a plan under § 232.15(g); an alternative standard under § 232.305 or § 232.603; or a single car test procedure under § 232.611 shall contain:

(1) The name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition;

(2) The plan, alternative standard, or test procedure proposed, in detail, to be submitted for or to meet the particular requirement of this part;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the plan, alternative standard, or test procedure, will be consistent with the guidance under § 232.15(f), if applicable, and will provide at least an equivalent level of safety or otherwise meet the requirements contained in this part; and

(4) A statement affirming that the railroad has served a copy of the petition on designated representatives of its employees, together with a list of the names and addresses of the persons served.

* * * * *

■ 5. Section 232.103 is amended by revising paragraph (f) to read as follows:

**§ 232.103 General requirements for all train brake systems.**

* * * * *

(f) Each car in a train shall have its air brakes in effective operating condition unless the car is being moved for repairs in accordance with §§ 232.15 and 232.609. The air brakes on a car are not in effective operating condition if its brakes are cut-out or otherwise inoperative or if the piston travel exceeds:

(1) 10 1/2 inches for cars equipped with nominal 12-inch stroke brake cylinders; or

(2) The piston travel limits indicated on the stencil, sticker, or badge plate for the brake cylinder with which the car is equipped.

* * * * *

■ 6. Section 232.205 is amended by revising the first two sentences of paragraph (c)(5) to read as follows:

**§ 232.205 Class I brake test-initial terminal inspection.**

* * * * *

(c) * * *

(5) For cars equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within 6 to 9 inches. If piston travel is found to be less than 6 inches or more than 9 inches, it must be adjusted to nominally 7½ inches. * * * * * * * * *

**§ 232.213 [Amended]**

■ 7. Section 232.213 is amended by removing paragraphs (a)(6) and (a)(7) and redsignating paragraphs (a)(8) and (a)(9) as (a)(6) and (a)(7) respectively.

■ 8. Section 232.303 is amended by revising the first three sentences of paragraph (c) to read as follows:

**§ 232.303 General requirements.**

* * * * *

(c) A car on a shop or repair track shall have its piston travel inspected. For cars equipped with 8½-inch or 10-inch diameter brake cylinders, piston travel shall be within 6 to 9 inches. If piston travel is found to be less than 6 inches or more than 9 inches, it must be adjusted to nominally 7½ inches. * * * * * * * * *

■ 9. Section 232.305 is amended by revising the first sentence of paragraph (a) and removing paragraph (f); the revision reads as follows:

**§ 232.305 Single car air brake tests.**

(a) Single car air brake tests shall be performed by a qualified person in accordance with either Section 3.0, ''Tests-Standard Freight Brake Equipment,'' and Section 4.0, ''Special Tests,'' of the Association of American Railroads Standard S–486–04, ''Code of Air Brake System Tests for Freight Equipment,'' contained in the AAR *Manual of Standards and Recommended Practices, Section E* (January 1, 2004); an alternative procedure approved by FRA pursuant to § 232.17; or a modified procedure approved in accordance with the provisions contained in § 232.307. * * *

* * * * *

■ 10. Part 232 is amended by adding a new subpart G to read as follows:

## Subpart G—Electronically Controlled Pneumatic (ECP) Braking Systems

Sec.



**§ 232.601 Scope.**

This subpart contains specific requirements applicable to freight trains and freight cars equipped with ECP brake systems. This subpart also contains specific exceptions from various requirements contained in this part for freight trains and freight cars equipped with ECP brake systems.

**§ 232.602 Applicability.**

This subpart applies to all railroads that operate a freight car or freight train governed by this part and equipped with an ECP brake system. Unless specifically excepted or modified in this section, all of the other requirements contained in this part are applicable to a freight car or freight train equipped with an ECP brake system.

**§ 232.603 Design, interoperability, and configuration management requirements.**

(a) *General.* A freight car or freight train equipped with an ECP brake system shall, at a minimum, meet the Association of American Railroads (AAR) standards contained in the AAR Manual of Standards and Recommended Practices related to ECP brake systems listed below; an alternate standard approved by FRA pursuant to § 232.17; or a modified standard approved in accordance with the provisions contained in paragraph (f) of this section. The incorporation by reference of the AAR standards identified in this section was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the incorporated documents may be obtained from the Association of American Railroads, 50 F Street, NW., Washington, DC 20001, 202–639–2100, *www.aar.org.* You may inspect a copy at the Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC, 202–493–6300 or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* The applicable standards, which are incorporated into this regulation by reference, include the following:

(1) AAR S–4200, ''Electronically Controlled Pneumatic (ECP) Cable-Based Brake Systems—Performance Requirements,'' (Adopted 1999; Revised: 2002, 2004, 2008);

(2) AAR S–4210, ''ECP Cable-Based Brake System Cable, Connectors, and Junction Boxes—Performance Specifications,'' (Adopted: 1999; Revised 2002, 2007);

(3) AAR S–4220, ''ECP Cable-Based Brake DC Power Supply—Performance Specification,'' Version 2.0 (Adopted: 1999; Revised: 2002);

(4) AAR S–4230, ''Intratrain Communication (ITC) Specification for Cable-Based Freight Train Control System,'' Version 3.0 (Adopted: 1999; Revised: 2002, 2004);

(5) AAR S–4240, ''ECP Brake Equipment—Approval Procedure'' (Adopted: 2007);

(6) AAR S–4250, ''Performance Requirements for ITC Controlled Cable-Based Distributed Power Systems,'' Version 2.0 (Adopted: 2003; Revised: 2004);

(7) AAR S–4260, ''ECP Brake and Wire Distributed Power Interoperability Test Procedures'' (Adopted: 2007); and

(8) AAR S–4270, ''ECP Brake System Configuration Management'' (Adopted: 2008).

(b) *Approval.* A freight train or freight car equipped with an ECP brake system and equipment covered by the AAR standards incorporated by reference in this section shall not be used without conditional or final approval by AAR in accordance with AAR Standard S–4240, ''ECP Brake Equipment—Approval Procedures'' (2007).

(c) *Configuration management.* A railroad operating a freight train or freight car equipped with ECP brake systems shall adopt and comply with the configuration management plan developed in accordance with the AAR standards incorporated by reference in this section. FRA reserves the right to audit a manufacturer's configuration management plan at any time.

(d) *Exceptions.* (1) A freight car or freight train equipped with a stand-alone ECP brake system shall be excepted from the requirement in § 232.103(l) referencing AAR Standard S–469–47, ''Performance Specification for Freight Brakes.''

(2) The provisions addressing the introduction of new brake system technology contained in subpart F of this part are not applicable to a freight car or freight train equipped with an ECP brake system approved by AAR in accordance with paragraph (b) of this section, conditionally or otherwise, as of the effective date of this rule.

(e) *New technology.* Upon written request supported by suitable justification and submitted pursuant to the special approval procedures in § 232.17, the Associate Administrator may except from the requirements of subpart F of this part the testing of new ECP brake technology, demonstration of new ECP brake technology, or both, where testing or demonstration, or both, will be conducted pursuant to an FRA-recognized industry standard and FRA is invited to monitor the testing or demonstration, or both.

(f) *Modification of standards.* The AAR or other authorized representative of the railroad industry may seek modification of the industry standards identified in or approved pursuant to paragraph (a) of this section. The request for modification will be handled and shall be submitted in accordance with the modification procedures contained in § 232.307.

### § 232.605 Training requirements.

(a) *Inspection, testing and maintenance.* A railroad that operates a freight car or freight train equipped with an ECP brake system and each contractor that performs inspection, testing, or maintenance on a freight car or freight train equipped with an ECP brake system shall adopt and comply with a training, qualification, and designation program for its employees that perform inspection, testing or maintenance of ECP brake systems. The training program required by this section shall meet the requirements in §§ 232.203(a), (b), (e), and (f).

(b) *Operating rules.* A railroad operating a freight train or freight car equipped with an ECP brake system shall amend its operating rules to govern safe train handling procedures related to ECP brake systems and equipment under all operating conditions and shall tailor its operating rules to the specific equipment and territory of the railroad.

(c) *Locomotive engineers.* A railroad operating a freight car or freight train equipped with an ECP brake system shall adopt and use in its training program under part 240 specific knowledge, skill, and ability criteria to ensure that its locomotive engineers are fully trained with the operating rules governing safe train handling procedures related to ECP brake systems and equipment under all operating conditions and tailored to the specific equipment and territory of the railroad.

### § 232.607 Inspection and testing requirements.

(a) *Trains at initial terminal.* A freight train operating in ECP brake mode shall receive the following inspections at its point of origin (initial terminal):

(1) A Class I brake test as described in § 232.205(c) by a qualified mechanical inspector (QMI); and

(2) A pre-departure inspection pursuant to part 215 of this chapter by an inspector designated under § 215.11 of this chapter.

(b) *Trains en route.* (1) Except for a unit or cycle train, a train operating in ECP brake mode shall not operate a distance that exceeds its destination or 3,500 miles, whichever is less, unless inspections meeting the requirements of paragraph (a) of this section are performed on the train.

(2) A unit or cycle train operating in ECP brake mode shall receive the inspections required in paragraph (a) of this section at least every 3,500 miles.

(3) The greatest distance that any car in a train has traveled since receiving a Class I brake test by a qualified mechanical inspector will determine the distance that the train has traveled.

(4) A freight train operating in ECP brake mode shall receive a Class I brake test as described in § 232.205(c) by a qualified person at a location where the train is off air for a period of more than:

(i) 24 hours, or

(ii) 80 hours, if the train remains inaccessible to the railroad and in an extended-off-air facility. For the purpose of this section, an extended-off-air facility means a location controlled by a sole shipper or consignee which restricts access to the train and provides sufficient security to deter vandalism.

(c) *Cars added en route.* (1) Each freight car equipped with an ECP brake system that is added to a freight train operating in ECP brake mode shall receive a Class I brake test as described in § 232.205(c) by a qualified person, unless all of the following are met:

(i) The car has received a Class I brake test by a qualified mechanical inspector within the last 3,500 miles;

(ii) Information identified in § 232.205(e) relating to the performance of the previously received Class I brake test is provided to the train crew;

(iii) The car has not been off air for more than 24 hours or for more than 80 hours, if that train remains in an extended-off-air facility; and

(iv) A visual inspection of the car's brake systems is conducted to ensure that the brake equipment is intact and properly secured. This may be accomplished as part of the inspection required under § 215.13 of this chapter and may be conducted while the car is off air.

(2) Each car and each solid block of cars not equipped with an ECP brake system that is added to a train operating in ECP brake mode shall receive a visual inspection to ensure it is properly placed in the train and safe to operate and shall be moved and tagged in

accordance with the provisions contained in § 232.15.

(d) *Class III brake test* (1) A Class III brake test shall be performed on a freight train operating in ECP brake mode by a qualified person, as defined in § 232.5, to test the train's brake system whenever the continuity of the brake pipe or electrical connection is broken or interrupted.

(2) In lieu of observing the brake pipe changes at the rear of a freight train with the end-of-train telemetry device referred to in §§ 232.211(c) and (d), the operator shall verify that the brakes applied and released on the rear car of the freight train by observing the ECP brake system's display in the locomotive cab.

(e) *Initialization.* (1) A freight train operating in ECP brake mode shall be initialized as described in paragraph (e)(2) whenever the following occurs:

(i) Class I brake test.

(ii) Class III brake test.

(iii) Whenever the ECP brake system is powered on.

(2) Initialization shall, at a minimum:

(i) initialize the ECP brake system pursuant to AAR Series Standard S–4200; and

(ii) be performed in the sequential order of the vehicles in the train.

(3) Whenever an ECP brake system is initialized pursuant to this paragraph, the train crew must ensure that the total number of cars indicated by the ECP brake system is the same as the total number of cars indicated on the train consist.

(f) *Modifications to existing brake inspections.* (1) In lieu of the specific brake pipe service reductions and increases required in this part, an electronic signal that provides an equivalent application and release of the brakes shall be utilized when conducting any required inspection or test on a freight car or freight train equipped with an ECP brake system and operating in ECP brake mode.

(2) In lieu of the specific piston travel ranges contained in this part, the piston travel on freight cars equipped with ECP brake systems shall be within the piston travel limits stenciled or marked on the car or badge plate consistent with the manufacturers recommended limits, if so stenciled or marked.

(g) *ECP brake system train line cable.* Each ECP brake system train line cable shall:

(1) be located and guarded to provide sufficient vertical clearance;

(2) not cause any tripping hazards;

(3) not hang with one end free whenever the equipment is used in a train movement;

(4) not be positioned to interfere with the use of any safety appliance; or

(5) not have any of the following conditions:

(i) Badly chafed or broken insulation.

(ii) Broken plugs, receptacles or terminals.

(iii) Broken or protruding strands of wire.

(h) *Exceptions.* A freight car or a freight train shall be exempt from the requirements contained in §§ 232.205(a) and (b), 232.207, 232.209, and 232.211(a) when it is equipped with an ECP brake system and operating in ECP brake mode.

**§ 232.609 Handling of defective equipment with ECP brake systems.**

(a) Ninety-five percent of the cars in a train operating in ECP brake mode shall have effective and operative brakes prior to use or departure from the train's initial terminal or any location where a Class I brake test is required to be performed on the entire train by a qualified mechanical inspector pursuant to § 232.607.

(b) A freight car equipped with an ECP brake system that is known to have arrived with ineffective or inoperative brakes at initial terminal of the next train which the car is to be included or at a location where a Class I brake test is required under §§ 232.607(b)(1) through (b)(3) shall not depart that location with ineffective or inoperative brakes in a train operating in ECP brake mode unless:

(1) The location does not have the ability to conduct the necessary repairs;

(2) The car is hauled only for the purpose of repair to the nearest forward location where the necessary repairs can be performed consistent with the guidance contained in § 232.15(f);

(3) The car is not being placed for loading or unloading while being moved for repair unless unloading is necessary for the safe repair of the car; and

(4) The car is properly tagged in accordance with § 232.15(b).

(c) A freight car equipped with only conventional pneumatic brakes shall not move in a freight train operating in ECP brake mode unless it would otherwise have effective and operative brakes if it were part of a conventional pneumatic brake-equipped train or could be moved from the location in defective condition under the provisions contained in, and tagged in accordance with, § 232.15.

(d) A freight train operating in ECP brake mode shall not move if less than 85 percent of the cars in the train have operative and effective brakes. However, after experiencing a penalty stop for having less than 85 percent operative and effective brakes, a freight train operating in ECP brake mode may be moved if all of the following are met:

(1) The train is visually inspected;

(2) Appropriate measures are taken to ensure that the train is safely operated to the location where necessary repairs or changes to the consist can be made;

(3) A qualified person determines that it is safe to move the train; and

(4) The train is moved in ECP brake Switch Mode to the nearest or nearest forward location where necessary repairs or changes to the consist can be made.

(e) A freight car or locomotive equipped with an ECP brake system that is found with inoperative or ineffective brakes for the first time during the performance of a Class I brake test or while en route may be used or hauled without civil penalty liability under this part to its destination, not to exceed 3,500 miles; provided, all applicable provisions of this section are met and the defective car or locomotive is hauled in a train operating in ECP brake mode.

(f) A freight car equipped with an ECP brake system that is part of a train operating in ECP brake mode:

(1) that is found with a defective non-brake safety appliance may be used or hauled without civil penalty under this part to the nearest or nearest forward location where the necessary repairs can be performed consistent with the guidelines contained in § 232.15(f).

(2) that is found with an ineffective or inoperative brake shall be hauled in accordance with the following:

(i) § 232.15(e)(1).

(ii) No more than two freight cars with brakes pneumatically cut out or five freight cars or five units in a multi-unit articulated piece of equipment with brakes electronically cut out shall be consecutively placed in the same train.

(g) A train operating with conventional pneumatic brakes shall not operate with freight cars equipped with stand-alone ECP brake systems unless:

(1) The train has at least the minimum percentage of operative brakes required by paragraph (h) of this section when at an initial terminal or paragraph (d) of this section when en route; and

(2) The stand-alone ECP brake-equipped cars are:

(i) Moved for the purpose of delivery to a railroad receiving the equipment or to a location for placement in a train operating in ECP brake mode or being moved for repair to the nearest available location where the necessary repairs can be made in accordance with §§ 232.15(a)(7) and (f);

(ii) Tagged in accordance with § 232.15(b); and

(iii) Placed in the train in accordance with § 232.15(e).

(h) A train equipped and operated with conventional pneumatic brakes

may depart an initial terminal with freight cars that are equipped with stand-alone ECP brake systems provided all of the following are met:

(1) The train has 100 percent effective and operative brakes on all cars equipped with conventional pneumatic brake systems;

(2) The train has at least 95 percent effective and operative brakes when including the freight cars equipped with stand-alone ECP brake systems; and

(3) The requirements contained in paragraph (g) of this section are met.

(i) *Tagging of defective equipment.* A freight car equipped with an ECP brake system that is found with ineffective or inoperative brakes will be considered electronically tagged under § 232.15(b)(1) and (b)(5) if the car is used or hauled in a train operating in ECP brake mode and the ECP brake system meets the following:

(1) The ECP brake system is able to display information in the cab of the lead locomotive regarding the location and identification of the car with defective brakes;

(2) The information is stored or downloaded and is accessible to FRA and appropriate operating and inspection personnel; and

(3) An electronic or written record of the stored or downloaded information is retained and maintained in accordance with § 232.15(b)(3).

(j) *Procedures for handling ECP brake system repairs and designation of repair locations.* (1) Each railroad operating freight cars equipped with ECP brake systems shall adopt and comply with specific procedures developed in accordance with the requirements related to the movement of defective equipment contained in this subpart. These procedures shall be made available to FRA upon request.

(2) Each railroad operating freight trains in ECP brake mode shall submit to FRA's Associate Administrator for Safety a list of locations on its system where ECP brake system repairs will be performed. A railroad shall notify FRA's Associate Administrator for Safety in writing 30 days prior to any change in the locations designated for such repairs. A sufficient number of locations shall be identified to ensure compliance with the requirements related to the handling of defective equipment contained in this part.

(k) *Exceptions:* All freight cars and trains that are specifically identified, operated, and handled in accordance with this section are excepted from the movement of defective equipment requirements contained in § 232.15(a)(2), (a)(5) through (a)(8), and 232.103(d) and (e).

**§ 232.611 Periodic maintenance.**

(a) In addition to the maintenance requirements contained in § 232.303(b) through (d), a freight car equipped with an ECP brake system shall be inspected and repaired before being released from a shop or repair track to ensure the proper and safe condition of the following:

(1) ECP brake system wiring and brackets;

(2) ECP brake system electrical connections; and

(3) Car mounted ECP brake system components.

(b) *Single car air brake test procedures.* Prior to placing a freight car equipped with an ECP brake system into revenue service, a railroad or a duly authorized representative of the railroad industry shall submit a procedure for conducting periodic single car air brake tests to FRA for its approval pursuant to § 232.17.

(c) Except as provided in § 232.303(e), a single car air brake test conducted in accordance with the procedure submitted and approved in accordance with paragraph (b) of this section shall be performed by a qualified person on a freight car equipped with an ECP brake system whenever any of the events identified in § 232.305 occur, except for those paragraphs identified in paragraph (f) of this section.

(d) A single car air brake test conducted in accordance with the procedure submitted and approved in accordance with paragraph (b) of this section shall be performed by a qualified person on each freight car retrofitted with a newly installed ECP brake system prior to placing or using the car in revenue service.

(e) *Modification of single car test standard.* A railroad or a duly authorized representative of the railroad industry may seek modification of the single car test standard approved in accordance with paragraph (b) of this section. The request for modification will be handled and shall be submitted in accordance with the modification procedures contained in § 232.307.

(f) *Exceptions.* A freight car equipped with a stand-alone or dual mode ECP brake system is excepted from the single car air brake test procedures contained in § 232.305(a). A freight car equipped with a stand-alone ECP brake system is excepted from the single car test requirements contained in § 232.305(b)(2).

(g) For purposes of paragraphs (c) and (d) of this section, if a single car air brake test is conducted on a car prior to June 15, 2009, pursuant to the then existing AAR standards, it shall be considered the last single car air brake test for that car, if necessary.

**§ 232.613 End-of-train devices.**

(a) An ECP–EOT device shall, at a minimum, serve as the final node on the ECP brake circuit, provide a cable terminal circuit, and monitor, confirm, and report train, brake pipe, and train line cable continuity, cable voltage, brake pipe pressure, and the status of the ECP–EOT device battery charge. The ECP–EOT device shall transmit a status message (EOT Beacon) at least once per second, contain a means of communicating with the HEU, and be equipped with a brake pipe pressure transducer and a battery that charges from the train line cable.

(b) A railroad shall not move or use a freight train equipped with an ECP brake system unless that train is equipped with a functioning ECP–EOT device designed and operated in accordance with this subpart. The ECP–EOT device must be properly connected to the network and to the train line cable at the rear of the train.

(c) A locomotive equipped with ECP brakes can be used in lieu of an ECP–EOT device, provided it is capable of performing all of the functions of a functioning ECP–EOT device.

(d) *Exception.* A freight train operating in ECP brake mode is excepted from the end-of-train device requirements contained in subpart E of this part, provided that it is equipped with an ECP–EOT device complying with this section.

■ 11. Appendix A to part 232 is amended by revising footnote 1 and by adding an entry for subpart G to the end of the table to read as follows:

**Appendix A to Part 232—Schedule of Civil Penalties [1]**

[1] A penalty may be assessed against an individual only for a willful violation. Generally when two or more violations of these regulations are discovered with respect to a single unit of equipment that is placed or continued in service by a railroad, the appropriate penalties set forth above are aggregated

| Section | Violation | Willful violation |
|---|---|---|
| * * * * * * * | | |
| Subpart G—Electronically Controlled Pneumatic (ECP) Braking Systems | | |
| 232.603 Design, interoperability, and configuration management requirements: | | |
| (a) Failure to meet minimum standards | 7,500 | 11,000 |
| (b) Using ECP brake equipment without approval | 7,500 | 11,000 |
| (c) Failure to adopt and comply with a proper configuration management plan | 7,500 | 11,000 |
| 232.605 Training Requirements: | | |
| (a) Failure to adopt and comply with a proper training, qualification, and designation program for employees that perform inspection, testing or maintenance | (1) | (1) |
| (b) Failure to amend operating rules | 12,500 | 16,000 |
| (c) Failure to adopt and comply with proper training criteria for locomotive engineers | 12,500 | 16,000 |
| 232.607 Inspection and testing requirements: | | |
| (a)(1), (b), (c)(1) Complete or partial failure to perform inspection | (1) | (1) |
| (a)(2) Complete or partial failure to perform pre-departure inspection | 7,500 | 11,000 |
| (c)(1)(iv), (c)(2) Failure to perform visual inspection on a car added en route | 4,500 | 6,500 |
| (d) Failure to perform inspection | (1) | (1) |
| (e)(1), (2) Failure to properly initialize the train | 7,500 | 11,000 |
| (e)(3) Failure to ensure identical consist and system information | 7,500 | 11,000 |
| (f)(1) Failure to apply a proper brake pipe service reduction | (1) | (1) |
| (f)(2) Failure to properly adhere to the proper piston travel ranges | (1) | (1) |
| (g)(1)–(4) Improperly located and guarded cable | 7,500 | 11,000 |
| (g)(5) Condition of cable and connections | 7,500 | 11,000 |
| 232.609 Handling of defective equipment with ECP brake systems: | | |
| (a) Failure to have proper percentage of operative brakes from Class I brake test | (1) | (1) |
| (b) Failure to prevent a car known to arrive with defective brakes to depart location where a Class I brake test is required | 7,500 | 11,000 |
| (c) Improper movement of a car equipped with conventional pneumatic brakes | 7,500 | 11,000 |
| (d) Operating with less than 85 percent operative brakes | (1) | (1) |
| (f)(2)(i) Improper placement of defective conventional brake equipment | (1) | (1) |
| (f)(2)(ii) Improper placement of defective ECP brake equipment | 7,500 | 11,000 |
| (g) Improper movement of defective stand-alone ECP brake equipment in a train operating with conventional pneumatic brakes | (1) | (1) |
| (h) Improper movement from initial terminal of stand-alone ECP brake equipment in a conventional brake operated train | (1) | (1) |
| (i) Failure to tag equipment | (1) | (1) |
| (j)(1) Failure to adopt and comply with procedures for the movement of defective equipment | 7,500 | 11,000 |
| (j)(2) Failure to submit list of ECP brake system repair locations | 7,500 | 11,000 |
| 232.611 Periodic maintenance: | | |
| (a) Failure to ensure the proper and safe condition of car | 7,500 | 11,000 |
| (b)–(d) Failure to perform test | 7,500 | 11,000 |
| 232.613 End-of-train devices: | | |
| (a) Failure to meet design standards for ECP–EOT devices | 7,500 | 11,000 |
| (b) Moving with an improper or improperly connected ECP–EOT device | 9,500 | 13,000 |

Failure to observe any condition for movement of defective equipment set forth in § 232.15(a) will deprive the railroad of the benefit of the movement-for-repair provision and make the railroad and any responsible individuals liable for penalty under the particular regulatory section(s) concerning the substantive defect(s) present on the equipment at the time of movement.

Failure to provide any of the records or plans required by this part pursuant to § 232.19 will be considered a failure to maintain or develop the record or plan and will make the railroad liable for penalty under the particular regulatory section(s) concerning the retention or creation of the document involved.

Failure to properly perform any of the inspections specifically referenced in § 232.209, § 232.213, § 232.217, and subpart G may be assessed under each section of this part or this chapter, or both, that contains the requirements for performing the referenced inspection.

Issued in Washington, DC, on September 19, 2008.

**Joseph H. Boardman,**

*Federal Railroad Administrator.*

[FR Doc. E8–22549 Filed 10–15–08; 8:45 am]

**BILLING CODE 4910–06–P**

up to a maximum of $11,000 per day. An exception to this rule is the $15,000 penalty for willful violation of § 232.503 (failure to get FRA approval before introducing new technology) with respect to a single unit of equipment; if the unit has additional violative conditions, the penalty may routinely be aggregated to $15,000. Although the penalties listed for failure to perform the brake inspections and tests under § 232.205 through § 232.209 may be assessed for each train that is not properly inspected, failure to perform any of the inspections and tests required under those sections will be treated as a violation separate and distinct from, and in addition to, any substantive violative conditions found on the equipment contained in the train consist. Moreover, the Administrator reserves the right to assess a penalty of up to $27,000 for any violation where circumstances warrant. *See* 49 CFR part 209, appendix A.


Federal Register

**Thursday,**
**October 16, 2008**

## Part V

# Federal Deposit Insurance Corporation

**12 CFR Part 327**
**Assessments; Proposed Rule; Establishment of FDIC Restoration Plan; Notice**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**12 CFR Part 327**

**RIN 3064–AD35**

## Assessments

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice of proposed rulemaking and request for comment.

**SUMMARY:** The FDIC is proposing to amend 12 CFR part 327 to: Alter the way in which it differentiates for risk in the risk-based assessment system; revise deposit insurance assessment rates, including base assessment rates; and make technical and other changes to the rules governing the risk-based assessment system.

**DATES:** Comments must be received on or before November 17, 2008.

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

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include the RIN number in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m.

*Instructions:* All submissions received must include the agency name and RIN for this rulemaking. All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/propose.html* including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Munsell W. St. Clair, Chief, Banking and Regulatory Policy Section, Division of Insurance and Research, (202) 898–8967; and Christopher Bellotto, Counsel, Legal Division, (202) 898–3801.

**SUPPLEMENTARY INFORMATION:**

## I. Background

### *The Reform Act*

On February 8, 2006, the President signed the Federal Deposit Insurance Reform Act of 2005 into law; on February 15, 2006, he signed the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (collectively, the Reform Act).[1] The Reform Act enacted the bulk of the recommendations made by the FDIC in 2001.[2] The Reform Act, among other things, required that the FDIC, ''prescribe final regulations, after notice and opportunity for comment * * * providing for assessments under section 7(b) of the Federal Deposit Insurance Act, as amended * * *,'' thus giving the FDIC, through its rulemaking authority, the opportunity to better price deposit insurance for risk.[3]

The Federal Deposit Insurance Act, as amended by the Reform Act, continues to require that the assessment system be risk-based and allows the FDIC to define risk broadly. It defines a risk-based system as one based on an institution's probability of causing a loss to the deposit insurance fund due to the composition and concentration of the institution's assets and liabilities, the amount of loss given failure, and revenue needs of the Deposit Insurance Fund (the fund or DIF).[4]

Before passage of the Reform Act, the deposit insurance funds' target reserve ratio—the designated reserve ratio (DRR)—was generally set at 1.25 percent. Under the Reform Act, however, the FDIC may set the DRR within a range of 1.15 percent to 1.50 percent of estimated insured deposits. If the reserve ratio drops below 1.15 percent—or if the FDIC expects it to do so within six months—the FDIC must, within 90 days, establish and implement a plan to restore the DIF to 1.15 percent within five years (absent extraordinary circumstances).[5]

The FDIC may restrict the use of assessment credits during any period that a restoration plan is in effect. By statute, however, institutions may apply credits towards any assessment imposed, for any assessment period, in an amount equal to the lesser of (1) the amount of the assessment, or (2) the amount equal to three basis points of the institution's assessment base.[6]

The Reform Act also restored to the FDIC's Board of Directors the discretion to price deposit insurance according to risk for all insured institutions regardless of the level of the fund reserve ratio.[7]

The Reform Act left in place the existing statutory provision allowing the FDIC to ''establish separate risk-based assessment systems for large and small members of the Deposit Insurance Fund.'' [8] Under the Reform Act, however, separate systems are subject to a new requirement that ''[n]o insured depository institution shall be barred from the lowest-risk category solely because of size.'' [9]

### *The 2006 Assessments Rule*

#### Overview

On November 30, 2006, the FDIC published in the **Federal Register** a final rule on the risk-based assessment system (the 2006 assessments rule).[10] The rule became effective on January 1, 2007.

The 2006 assessments rule created four risk categories and named them Risk Categories I, II, III and IV. These four categories are based on two criteria: capital levels and supervisory ratings. Three capital groups—well capitalized, adequately capitalized, and undercapitalized—are based on the leverage ratio and risk-based capital ratios for regulatory capital purposes. Three supervisory groups, termed A, B, and C, are based upon the FDIC's consideration of evaluations provided by the institution's primary federal

[1] Federal Deposit Insurance Reform Act of 2005, Public Law 109–171, 120 Stat. 9; Federal Deposit Insurance Conforming Amendments Act of 2005, Public Law 109–173, 119 Stat. 3601.

[2] After a year long review of the deposit insurance system, the FDIC made several recommendations to Congress to reform the deposit insurance system. See *http://www.fdic.gov/deposit/insurance/initiative/direcommendations.html* for details.

[3] Section 2109(a)(5) of the Reform Act. Section 7(b) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)).

[4] 12 Section 7(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(1)(C)). The Reform Act merged the former Bank Insurance Fund and Savings Association Insurance Fund into the Deposit Insurance Fund.

[5] Section 7(b)(3)(E) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(E)).

[6] Section 7(b)(3)(E)(iii) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(E)(iii)).

[7] The Reform Act eliminated the prohibition against charging well-managed and well-capitalized institutions when the deposit insurance fund is at or above, and is expected to remain at or above, the designated reserve ratio (DRR). This prohibition was included as part of the Deposit Insurance Funds Act of 1996. Public Law 104–208, 110 Stat. 3009, 3009–479. However, while the Reform Act allows the DRR to be set between 1.15 percent and 1.50 percent, it also generally requires dividends of one-half of any amount in the fund in excess of the amount required to maintain the reserve ratio at 1.35 percent when the insurance fund reserve ratio exceeds 1.35 percent at the end of any year. The Board can suspend these dividends under certain circumstances. The Reform Act also requires dividends of all of the amount in excess of the amount needed to maintain the reserve ratio at 1.50 when the insurance fund reserve ratio exceeds 1.50 percent at the end of any year. 12 U.S.C. 1817(e)(2).

[8] Section 7(b)(1)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(1)(D)).

[9] Section 2104(a)(2) of the Reform Act amending Section 7(b)(2)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(2)(D)).

[10] 71 FR 69282. The FDIC also adopted several other final rules implementing the Reform Act, including a final rule on operational changes to part 327. 71 FR 69270.

regulator and other information the FDIC deems relevant.[11] Group A consists of financially sound institutions with only a few minor weaknesses; Group B consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the insurance fund; and Group C consists of institutions that pose a substantial probability of loss to the insurance fund unless effective corrective action is taken.[12] Under the 2006 assessments rule, an institution's capital and supervisory groups determine its risk category as set forth in Table 1 below. (Risk categories appear in Roman numerals.)

TABLE 1—DETERMINATION OF RISK CATEGORY

| Capital category | Supervisory group | | |
|---|---|---|---|
| | A | B | C |
| Well Capitalized | I | | |
| Adequately Capitalized | | II | III |
| Undercapitalized | | III | IV |

The 2006 assessments rule established the following base rate schedule and allowed the FDIC Board to adjust rates uniformly from one quarter to the next up to three basis points above or below the base schedule, provided that no single change from one quarter to the next can exceed three basis points.[13] Base assessment rates within Risk Category I vary from 2 to 4 basis points, as set forth in Table 2 below.

TABLE 2—CURRENT BASE ASSESSMENT RATES

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 2 | 4 | 7 | 25 | 40 |

* Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

The 2006 assessments rule set actual rates beginning January 1, 2007, as set out in Table 3 below.

TABLE 3—CURRENT ASSESSMENT RATES

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 5 | 7 | 10 | 28 | 43 |

*Rates for institutions that do not pay the minimum or maximum rate vary between these rates.

These rates remain in effect. Any increase in rates above the actual rates in effect requires a new notice-and-comment rulemaking.

Risk Category I

Within Risk Category I, the 2006 assessments rule charges those institutions that pose the least risk a minimum assessment rate and those that pose the greatest risk a maximum assessment rate two basis points higher than the minimum rate. The rule charges other institutions within Risk Category I a rate that varies incrementally by institution between the minimum and maximum.

Within Risk Category I, the 2006 assessments rule combines supervisory ratings with other risk measures to further differentiate risk and determine assessment rates. The *financial ratios method* determines the assessment rates for most institutions in Risk Category I using a combination of weighted CAMELS component ratings and the following financial ratios:

- The Tier 1 Leverage Ratio;
- Loans past due 30–89 days/gross assets;
- Nonperforming assets/gross assets;
- Net loan charge-offs/gross assets; and

[11] The term ''primary federal regulator'' is synonymous with the statutory term ''appropriate federal banking agency.'' Section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

[12] The capital groups and the supervisory groups have been in effect since 1993. In practice, the supervisory group evaluations are generally based on an institution's composite CAMELS rating, a rating assigned by the institution's supervisor at the end of a bank examination, with 1 being the best rating and 5 being the lowest. CAMELS is an acronym for component ratings assigned in a bank examination: Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. A composite CAMELS rating combines these component ratings, which also range from 1 (best) to 5 (worst). Generally speaking, institutions with a CAMELS rating of 1 or 2 are put in supervisory group A, those with a CAMELS rating of 3 are put in group B, and those with a CAMELS rating of 4 or 5 are put in group C.

[13] The Board cannot adjust rates more than 2 basis points below the base rate schedule because rates cannot be less than zero.

• Net income before taxes/risk-weighted assets.

The weighted CAMELS components and financial ratios are multiplied by statistically derived pricing multipliers and the products, along with a uniform amount applicable to all institutions subject to the financial ratios method, are summed to derive the assessment rate under the base rate schedule. If the rate derived is below the minimum for Risk Category I, however, the institution will pay the minimum assessment rate for the risk category; if the rate derived is above the maximum rate for Risk Category I, then the institution will pay the maximum rate for the risk category.

The multipliers and uniform amount were derived in such a way to ensure that, as of June 30, 2006, 45 percent of small Risk Category I institutions (other than institutions less than 5 years old) would have been charged the minimum rate and approximately 5 percent would have been charged the maximum rate. While the FDIC has not changed the multipliers and uniform amount since adoption of the 2006 assessments rule, the percentages of institutions that have been charged the minimum and maximum rates have changed over time as institutions' CAMELS component ratings and financial ratios have changed. Based upon June 30, 2008 data, approximately 28 percent of small Risk Category I institutions (other than institutions less than 5 years old) were charged the minimum rate and approximately 19 percent were charged the maximum rate.

The *debt issuer rating method* determines the assessment rate for large institutions that have a long-term debt issuer rating.[14] Long-term debt issuer ratings are converted to numerical values between 1 and 3 and averaged. The weighted average of an institution's CAMELS components and the average converted value of its long-term debt issuer ratings are multiplied by a common multiplier and added to a uniform amount applicable to all institutions subject to the supervisory and debt ratings method to derive the assessment rate under the base rate schedule. Again, if the rate derived is below the minimum for Risk Category I, the institution will pay the minimum assessment rate for the risk category; if the rate derived is above the maximum for Risk Category I, then the institution will pay the maximum rate for the risk category.

The multipliers and uniform amount were derived in such a way to ensure that, as of June 30, 2006, about 45 percent of Risk Category I large institutions (other than institutions less than 5 years old) would have been charged the minimum rate and approximately 5 percent would have been charged the maximum rate. These percentages have changed little from quarter to quarter thereafter even though industry conditions have changed. Based upon June 30, 2008, data, and ignoring the large bank adjustment (described below), approximately 45 percent of Risk Category I large institutions (other than institutions less than 5 years old) were charged the minimum rate and approximately 11 percent were charged the maximum rate.

Assessment rates for insured branches of foreign banks in Risk Category I are determined using ROCA components.[15]

For any Risk Category I large institution or insured branch of a foreign bank, initial assessment rate determinations may be modified up to half a basis point upon review of additional relevant information (the large bank adjustment).[16]

With certain exceptions, beginning in 2010, the 2006 assessments rule charges new institutions (those established for less than five years) in Risk Category I, regardless of size, the maximum rate applicable to Risk Category I institutions. Until then, new institutions are treated like all others, except that a well-capitalized institution that has not yet received CAMELS component ratings is assessed at one basis point above the minimum rate applicable to Risk Category I institutions until it receives CAMELS component ratings.

*The Need for a Restoration Plan*

As part of a separate rulemaking in November 2006, the FDIC also set the DRR at 1.25 percent, effective January 1, 2007. In November 2007, the Board voted to maintain the DRR at 1.25 percent for 2008.[17] In November 2006, the FDIC projected that the assessment rate schedule established by the 2006 assessments rule would raise the reserve ratio from 1.23 percent at the end of the second quarter of 2006 to 1.25 percent by 2009.[18] At the time, insured institution failures were at historic lows (no insured institution had failed in almost two-and-a-half years prior to the rulemaking, the longest period in the FDIC's history without a failure) and industry returns on assets (ROAs) were near all time highs. The FDIC's projection assumed the continued strength of the industry. By March 2008, the condition of the industry had deteriorated, and FDIC projected higher insurance losses compared to recent years. However, even with this increase in projected failures and losses, the reserve ratio was still estimated to reach the Board's target of 1.25 percent in 2009. Therefore, the Board voted in March 2008 to maintain the existing assessment rate schedule.

Recent failures, as well as deterioration in banking and economic conditions, however, have significantly increased the fund's loss provisions, resulting in a decline in the reserve ratio. As of June 30, 2008, the reserve ratio stood at 1.01 percent, 18 basis points below the reserve ratio as of March 31, 2008. The FDIC expects a higher rate of insured institution failures in the next few years compared to recent years; thus, the reserve ratio may continue to decline. Because the reserve ratio has fallen below 1.15 percent and is expected to remain below 1.15 percent, the FDIC must establish and implement a restoration plan to restore the reserve ratio to 1.15 percent. Absent extraordinary circumstances, the reserve ratio must be restored to 1.15 percent within five years. The FDIC has adopted a restoration plan (the Restoration Plan), the critical component of which is this notice of proposed rulemaking (NPR).[19] To fulfill

[14] The final rule defined a large institution as an institution (other than an insured branch of a foreign bank) that has $10 billion or more in assets as of December 31, 2006 (although an institution with at least $5 billion in assets may also request treatment as a large institution). If, after December 31, 2006, an institution classified as small reports assets of $10 billion or more in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as large beginning the following quarter. If, after December 31, 2006, an institution classified as large reports assets of less than $10 billion in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter. 12 CFR 327.8(g) and (h) and 327.9(d)(6).

[15] ROCA stands for Risk Management, Operational Controls, Compliance, and Asset Quality. Like CAMELS components, ROCA component ratings range from 1 (best rating) to a 5 rating (worst rating). Risk Category 1 insured branches of foreign banks generally have a ROCA composite rating of 1 or 2 and component ratings ranging from 1 to 3.

[16] The FDIC has issued additional Guidelines for Large Institutions and Insured Foreign Branches in Risk Category I (the large bank guidelines) governing the large bank adjustment. 72 FR 27122 (May 14, 2007).

[17] 71 FR 69325 (Nov. 30, 2006) and 72 FR 65576 (Nov. 21, 2007).

[18] Beginning in 2007, assessment rates ranged between 5 and 43 cents per $100 in assessable deposits. When setting the rate schedule, the FDIC projects future changes to the fund balance from losses, operating expenses, assessment and investment revenue, as well as the outlook for insured deposit growth. Since the final rule was issued, the Board has opted to leave rates unchanged.

[19] On October 7, 2008, the FDIC established and implemented the Restoration Plan, which is being published in the **Federal Register** as a companion to this NPR. To determine whether the reserve ratio has returned to the statutory range within five years, the FDIC will rely on the December 31, 2013

the requirements of the Restoration Plan, the FDIC must increase the assessment rates it currently charges. Since the current rates are already 3 basis points uniformly above the base rate schedule established in the 2006 assessments rule, a new rulemaking is required. The FDIC is also proposing other changes to the assessment system, primarily to ensure that riskier institutions will bear a greater share of the proposed increase in assessments.

## II. Overview of the Proposal

In this notice of proposed rulemaking, the FDIC proposes to improve the way the assessment system differentiates risk among insured institutions by drawing upon measures of risk that were not included when the FDIC first revised its assessment system pursuant to the Reform Act. The FDIC believes that the proposal will make the assessment system more sensitive to risk. The proposal should also make the risk-based assessment system fairer, by limiting the subsidization of riskier institutions by safer ones. In addition, the FDIC proposes to change assessment rates, including base assessment rates, to raise assessment revenue required under the Restoration Plan.

The FDIC's proposals are set out in detail in ensuing sections, but are briefly summarized here. These changes, except for the proposed rate increase for the first quarter of 2009, which is discussed below, would take effect April 1, 2009.

### *Risk Category I*

The FDIC proposes to introduce a new financial ratio into the financial ratios method. This new ratio would capture brokered deposits (in excess of 10 percent of domestic deposits) that are used to fund rapid asset growth. In addition, the FDIC proposes to update the uniform amount and the pricing multipliers for the weighted average CAMELS rating and financial ratios.

The FDIC proposes that the assessment rate for a large institution with a long-term debt issuer rating be determined using a combination of the institution's weighted average CAMELS component rating, its long-term debt issuer ratings (converted to numbers and averaged) and the financial ratios method assessment rate, each equally weighted. The new method would be known as the large bank method.

Under the proposal, the financial ratios method or the large bank method, whichever is applicable, would determine a Risk Category I institution's *initial* base assessment rate. The FDIC proposes to broaden the spread between minimum and maximum initial base assessment rates in Risk Category I from the current 2 basis points to an initial range of 4 basis points and to adjust the percentage of institutions subject to these initial minimum and maximum rates.

### *Adjustments*

Under the proposal, an institution's total base assessment rate could vary from the initial base rate as the result of possible adjustments. The FDIC proposes to increase the maximum possible Risk Category I large bank adjustment from one-half basis point to one basis point. Any such adjustment up or down would be made before any other adjustment and would be subject to certain limits, which are described in detail below.

The FDIC proposes to lower an institution's base assessment rate based upon its ratio of long-term unsecured debt and, for small institutions, certain amounts of Tier 1 capital to domestic deposits (the unsecured debt adjustment).[20] Any decrease in base assessment rates would be limited to two basis points.

The FDIC proposes to raise an institution's base assessment rate based upon its ratio of secured liabilities to domestic deposits (the secured liability adjustment). An institution's ratio of secured liabilities to domestic deposits (if greater than 15 percent), would increase its assessment rate, but the resulting base assessment rate after any such increase could be no more than 50 percent greater than it was before the adjustment. The secured liability adjustment would be made after any large bank adjustment or unsecured debt adjustment.

An institution in Risk Category II, III or IV would be subject to the unsecured debt adjustment and secured liability adjustment. In addition, the FDIC proposes a final adjustment for brokered deposits (the brokered deposit adjustment) for institutions in these risk categories. An institution's ratio of brokered deposits to domestic deposits (if greater than 10 percent) would increase its assessment rate, but any increase would be limited to no more than 10 basis points.

### *Insured Branches of Foreign Banks*

The FDIC proposes to make conforming changes to the pricing multipliers and uniform amount for insured branches of foreign banks in Risk Category I. The insured branch of a foreign bank's initial base assessment rate would be subject to any large bank adjustment, but not to the unsecured debt adjustment or secured liability adjustment.

### *New Institutions*

The FDIC also proposes to make conforming changes in the treatment of new insured depository institutions.[21] For assessment periods beginning on or after January 1, 2010, any new institutions in Risk Category I would be assessed at the maximum initial base assessment rate applicable to Risk Category I institutions, as under the current rule.

Effective for assessment periods beginning before January 1, 2010, until a Risk Category I new institution received CAMELS component ratings, it would have an initial base assessment rate that was two basis points above the minimum initial base assessment rate applicable to Risk Category I institutions, rather than one basis point above the minimum rate, as under the current rule. All other new institutions in Risk Category I would be treated as are established institutions, except as provided in the next paragraph.

Either before or after January 1, 2010: No new institution, regardless of risk category, would be subject to the unsecured debt adjustment; any new institution, regardless of risk category, would be subject to the secured liability adjustment; and a new institution in Risk Categories II, III or IV would be subject to the brokered deposit adjustment. After January 1, 2010, no new institution in Risk Category I would be subject to the large bank adjustment.

### *Assessment Rates*

To implement the proposed changes to risk-based assessments described above and to raise sufficient revenue to ensure that the goals of the Restoration Plan are accomplished within 5 years as required by statute, initial base assessment rates would be as set forth in Table 4 below.

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reserve ratio, which is the first date after October 7, 2013 for which the reserve ratio will be known.

[20] Long-term unsecured debt includes senior unsecured and subordinated debt.

[21] Subject to exceptions, a new insured depository institution is a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed. 12 CFR 327.8(l)

TABLE 4—PROPOSED INITIAL BASE ASSESSMENT RATES

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 10 | 14 | 20 | 30 | 45 |

* Initial base rates that were not the minimum or maximum rate would vary between these rates.

After applying all possible adjustments, minimum and maximum total base assessment rates for each risk category would be as set out in Table 5 below.

TABLE 5—TOTAL BASE ASSESSMENT RATES

| | Risk category I | Risk category II | Risk category III | Risk category IV |
|---|---|---|---|---|
| Initial base assessment rate | 10–14 | 20 | 30 | 45 |
| Unsecured debt adjustment | −2–0 | −2–0 | −2–0 | −2–0 |
| Secured liability adjustment | 0–7 | 0–10 | 0–15 | 0–22.5 |
| Brokered deposit adjustment | | 0–10 | 0–10 | 0–10 |
| Total base assessment rate | 8–21.0 | 18–40.0 | 28–55.0 | 43–77.5 |

* All amounts for all risk categories are in basis points annually. Total base rates that were not the minimum or maximum rate would vary between these rates.

The FDIC proposes that these rates and other revisions to the assessment rules take effect for the quarter beginning April 1, 2009, and be reflected in the fund balance as of June 30, 2009, and assessments due September 30, 2009. However, at the time of the issuance of the final rule the FDIC may need to set a higher base rate schedule based on information available at that time, including any intervening institution failures and updated failure and loss projections. A higher base rate schedule may also be necessary because of changes to the proposal in the final rule, if these changes have the overall effect of changing revenue for a given rate schedule.

The proposed rule would continue to allow the FDIC Board to adopt actual rates that were higher or lower than total base assessment rates without the necessity of further notice and comment rulemaking, provided that: (1) The Board could not increase or decrease rates from one quarter to the next by more than three basis points without further notice-and-comment rulemaking; and (2) cumulative increases and decreases could not be more than three basis points higher or lower than the total base rates without further notice-and-comment rulemaking.

The FDIC also proposes to raise the current rates uniformly by seven basis points for the assessment for the quarter beginning January 1, 2009, which would be reflected in the fund balance as of March 31, 2009, and assessments due June 30, 2009. Rates for the first quarter of 2009 only would be as follows:

TABLE 6—PROPOSED ASSESSMENT RATES FOR THE FIRST QUARTER OF 2009

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 12 | 14 | 17 | 35 | 50 |

*Rates for institutions that did not pay the minimum or maximum rate would vary between these rates.

The proposed rates for the first quarter of 2009 would raise almost as much assessment revenue as under the rates proposed beginning April 1, 2009. Data and system requirements do not make it feasible to adopt the proposed changes to the risk-based assessment system discussed in previous paragraphs until the second quarter of 2009.

*Technical and Other Changes*

The FDIC also proposes to make technical changes and one minor non-technical change to existing assessment rules. These changes, which would be effective April 1, 2009, are detailed below.

**III. Risk Category I: Financial Ratios Method**

*Brokered Deposits and Asset Growth*

The FDIC stated in the 2006 assessments rule that it:

> [M]ay conclude that additional or alternative financial measures, ratios or other risk factors should be used to determine risk-based assessments or that a new method of differentiating for risk should be used. In any of these events, changes would be made through notice-and-comment rulemaking.[22]

The FDIC has reached such a conclusion and proposes to add a new financial measure to the financial ratios method. This new financial measure, the adjusted brokered deposit ratio, would measure the extent to which

[22] 71 FR 69,282, 69,290.

brokered deposits are funding rapid asset growth. The adjusted brokered deposit ratio would affect only those established Risk Category I institutions whose total assets were more than 20 percent greater than they had been four years previously, after adjusting for mergers and acquisitions, and whose brokered deposits made up more than 10 percent of domestic deposits.[23] [24] Generally speaking, the greater an institution's asset growth and the greater its percentage of brokered deposits, the greater would be the increase in its initial base assessment rate.

If an institution's ratio of brokered deposits to domestic deposits were 10 percent or less or if the institution's asset growth over the previous four years were less than 20 percent, the adjusted brokered deposit ratio would be zero and would have no effect on the institution's assessment rate. If an institution's ratio of brokered deposits to domestic deposits exceeded 10 percent and its asset growth over the previous four years were more than 40 percent, the adjusted brokered deposit ratio would equal the institution's ratio of brokered deposits to domestic deposits less the 10 percent threshold. If an institution's ratio of brokered deposits to domestic deposits exceeded 10 percent but its asset growth over the previous four years were between 20 percent and 40 percent, the adjusted brokered deposit ratio would be equal to a gradually increasing fraction of the ratio of brokered deposits to domestic deposits (minus the 10 percent threshold), so that small increases in asset growth rates would lead to only small increases in assessment rates. Overall asset growth rates of 20 to 40 percent would be transformed into a fraction between 0 and 1 by multiplying an amount equal to the overall rate of growth minus 20 percent by 5 and expressing the result as a number rather than as a percentage (so that, for example, 5 times 10 percent would equal 0.500).[25] The adjusted brokered deposit ratio would never be less than zero. Appendix A contains a detailed mathematical definition of the ratio. Table 7 gives examples of how the adjusted brokered deposit ratio would be determined.

TABLE 7—ADJUSTED BROKERED DEPOSIT RATIO

| A | B | C | D | E | F |
|---|---|---|---|---|---|
| Example | Ratio of brokered deposits to domestic deposits | Ratio of brokered deposits to domestic deposits minus 10 percent threshold (Column B minus 10 percent) | Cumulative asset growth rate over four years | Asset growth rate factor | Adjusted brokered deposit ratio (Column C times column E) |
| 1 | 5.0% | 0.0% | 5.0% | ..... | 0.0% |
| 2 | 15.0% | 5.0% | 5.0% | ..... | 0.0% |
| 3 | 5.0% | 0.0% | 25.0% | 0.250 | 0.0% |
| 4 | 35.0% | 25.0% | 30.0% | 0.500 | 12.5% |
| 5 | 25.0% | 15.0% | 50.0% | 1.000 | 15.0% |

In Examples 1, 2 and 3, either the institution has a ratio of brokered deposits to domestic deposits that is less than 10 percent (Column B) or its four-year asset growth rate is less than 20 percent (Column D). Consequently, the adjusted brokered deposit ratio is zero (Column F). In Example 4, the institution has a ratio of brokered deposits to domestic deposits of 35 percent (Column B), which, after subtracting the 10 percent threshold, leaves 25 percent (Column C). Its assets are 30 percent greater than they were four years previously (Column D), so the fraction applied to obtain the adjusted brokered deposit ratio is 0.5 (Column E) (calculated as $5 \cdot (30 \text{ percent} - 20$ percent, with the result expressed as a number rather than as a percentage)). Its adjusted brokered deposit ratio is, therefore, 12.5 percent (Column F) (which is 0.5 times 25 percent). In Example 5, the institution has a lower ratio of brokered deposits to domestic deposits (25 percent in Column B) than in Example 4 (35 percent). However, its adjusted brokered deposit ratio (15 percent in Column F) is larger than in Example 4 (12.5 percent) because its assets are more than 40 percent greater than they were four years previously (Column D). Therefore, its adjusted brokered deposit ratio is equal to its brokered deposit to domestic deposit ratio of 25 percent minus the 10 percent threshold (Column F).

The FDIC is proposing this new risk measure for a couple of reasons. A number of costly institution failures, including some recent failures, have experienced rapid asset growth before failure and have funded this growth through brokered deposits. Moreover, statistical analysis reveals a significant correlation between rapid asset growth funded by brokered deposits and the probability of an institution's being downgraded from a CAMELS composite 1 or 2 rating to a CAMELS composite 3, 4 or 5 rating within a year. A significant correlation is the standard the FDIC used when it adopted the financial ratios method in the 2006 assessments rule.

The proposed rule would adopt the definition of brokered deposit in Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f), which is the definition used in banks' quarterly Reports of Condition and Income (Call Reports) and thrifts' quarterly Thrift Financial Reports (TFRs). The FDIC is proposing that all brokered deposits be included in an institution's ratio of brokered deposits to domestic deposits used to determine its adjusted brokered deposit ratio, including brokered deposits that consist of balances swept into an insured institution by another institution, such as balances swept from a brokerage account. At present, it would be impossible to exclude these deposits, since institutions do not separately report them in the Call

[23] Generally, an established institution is a bank or thrift that has been chartered for at least five years as of the last day of any quarter for which it is being assessed. 12 CFR 327.8(m).

[24] An institution that four years previously had filed no report of condition or had reported no assets would be treated as having no growth unless it was a participant in a merger or acquisition (either as the acquiring or acquired institution) with an institution that had reported assets four years previously.

[25] The ratio of brokered deposits to domestic deposits and four-year asset growth rate would remain unrounded (to the extent of computer capabilities) when calculating the adjusted brokered deposit ratio. The adjusted brokered deposit ratio itself (expressed as a percentage) would be rounded to three digits after the decimal point prior to being used to calculate the assessment rate.

Report or TFR. Moreover, sweep programs may be structured so that swept balances are not brokered deposits.[26] Nevertheless, the FDIC is particularly interested in comments on whether brokered deposits that consist of swept balances should be excluded from the ratio and, if so, how they should be excluded.

The proposed definition of brokered deposits would also include amounts an institution receives through a network that divides large deposits and places them at more than one institution to ensure that the deposit is fully insured, even where the institution accepts these deposits only on a reciprocal basis, such that, for any deposit received, the institution places the same amount (but held by a different depositor) with another institution through the network. At present, it would again be impossible to exclude these deposits, since institutions do not separately report them in the Call Report or TFR. The FDIC is also particularly interested in comments on whether these deposits should be excluded from the ratio and, if so, how they should be excluded.

The proposed definition would exclude amounts not defined as a brokered deposit by statute. Thus, many high cost deposits would be excluded from the definition, potentially including those received through listing services or the Internet. At present, it would be impossible to include these deposits, since institutions do not separately report them in the Call Report or TFR. Nevertheless, the FDIC is particularly interested in comments on whether these deposits should be included in the definition of brokered deposits for purposes of the adjusted brokered deposit ratio and, if so, how they should be included.

*Pricing Multipliers and the Uniform Amount*

The FDIC also proposes to recalculate the uniform amount and the pricing multipliers for the weighted average CAMELS component rating and financial ratios. The existing uniform amount and pricing multipliers were derived from a statistical estimate of the probability that an institution will be downgraded to CAMELS 3, 4 or 5 at its next examination using data from the end of the years 1984 to 2004.[27] These probabilities were then converted to pricing multipliers for each risk measure. The proposed new pricing multipliers were derived using essentially the same statistical techniques, but based upon data from the end of the years 1988 to 2006.[28] The proposed new pricing multipliers are set out in Table 8 below.

TABLE 8—PROPOSED NEW PRICING MULTIPLIERS

| Risk measures* | Pricing multipliers** |
|---|---|
| Tier 1 Leverage Ratio | (0.056) |
| Loans Past Due 30—89 Days/ Gross Assets | 0.576 |
| Nonperforming Assets/Gross Assets | 1.073 |
| Net Loan Charge-Offs/Gross Assets | 1.213 |
| Net Income before Taxes/ Risk-Weighted Assets | (0.762) |
| Adjusted Brokered Deposit Ratio | 0.055 |
| Weighted Average CAMELS Component Rating | 1.088 |

* Ratios are expressed as percentages.
** Multipliers are rounded to three decimal places.

To determine an institution's initial assessment rate under the base assessment rate schedule, each of these risk measures (that is, each institution's financial measures and weighted average CAMELS component rating) would continue to be multiplied by the corresponding pricing multipliers. The sum of these products would be added to (or subtracted from) a new uniform amount, 9.872.[29] The new uniform amount is also derived from the same statistical analysis.[30] As at present, no initial base assessment rate within Risk Category I would be less than the minimum initial base assessment rate applicable to the category or higher than the initial base maximum assessment rate applicable to the category. The proposed rule would set the initial minimum base assessment rate for Risk Category I at 10 basis points and the maximum initial base assessment rate for Risk Category I at 14 basis points.

To compute the values of the uniform amount and pricing multipliers shown above, the FDIC chose cutoff values for the predicted probabilities of downgrade such that, using June 30, 2008 Call Report and TFR data: (1) 25 percent of small institutions in Risk Category I (other than institutions less than 5 years old) would have been charged the minimum initial assessment rate; and (2) 15 percent of small institutions in Risk Category I (other than institutions less than 5 years old) would have been charged the maximum initial assessment rate.[31] These cutoff values would be used in future periods, which could lead to different percentages of institutions being charged the minimum and maximum rates.

In comparison, under the current system: (1) Approximately 28 percent of small institutions in Risk Category I (other than institutions less than 5 years old) were charged the existing minimum assessment rate; and (2) approximately 19 percent of small institutions in Risk Category I (other than institutions less than 5 years old) were charged the existing maximum assessment rate based on June 30, 2008 data.

Table 9 gives initial base assessment rates for three institutions with varying characteristics, assuming the proposed new pricing multipliers given above, using initial base assessment rates for institutions in Risk Category I of 10 basis points to 14 basis points.[32]

[26] For example, a swept deposit may not be a brokered deposit if: (1) Balances are swept for the primary purposes of facilitating customers' purchase and sale of securities, rather than the placement of funds with depository institutions; (2) swept amounts do not exceed 10 percent of the brokerage's cash management account and retirement account assets; and (3) fees are paid on a per customer or account basis, rather than size of account basis, and are for administrative services, rather than for placement of deposits. Are Funds Held in ''Cash Management Accounts'' Viewed as Brokered Deposits by the FDIC? (FDIC Advisory Opinion 05–02 Feb. 3, 2005).

[27] Data on downgrades to CAMELS 3, 4 or 5 is from the years 1985 to 2005. The ''S'' component rating was first assigned in 1997. Because the statistical analysis relies on data from before 1997, the ''S'' component rating was excluded from the analysis.

[28] For the adjusted brokered deposit ratio, assets at the end of each year are compared to assets at the end of the year four years earlier, so assets at the end of 1988, for example, are compared to assets at the end of 1984.

[29] Appendix A provides the derivation of the pricing multipliers and the uniform amount to be added to compute an assessment rate. The rate derived will be an annual rate, but will be determined every quarter.

[30] The uniform amount would be the same for all institutions in Risk Category I (other than large institutions that have long-term debt issuer ratings, insured branches of foreign banks and, beginning in 2010, new institutions).

[31] The cutoff value for the minimum assessment rate is a predicted probability of downgrade of approximately 2 percent. The cutoff value for the maximum assessment rate is approximately 15 percent.

[32] These are the initial base rates for Risk Category I proposed below.

TABLE 9—INITIAL BASE ASSESSMENT RATES FOR THREE INSTITUTIONS *

| | Pricing multiplier | Institution 1 | | Institution 2 | | Institution 3 | |
|---|---|---|---|---|---|---|---|
| | | Risk measure value | Contribution to assessment rate | Risk measure value | Contribution to assessment rate | Risk measure value | Contribution to assessment rate |
| A | B | C | D | E | F | G | H |
| Uniform Amount | 9.872 | ..... | 9.872 | ..... | 9.872 | ..... | 9.872 |
| Tier 1 Leverage Ratio (%) | (0.056) | 9.590 | (0.537) | 8.570 | (0.480) | 7.500 | (0.420) |
| Loans Past Due 30–89 Days/Gross Assets (%) | 0.576 | 0.400 | 0.230 | 0.600 | 0.345 | 1.000 | 0.576 |
| Nonperforming Loans/Gross Assets (%) | 1.073 | 0.200 | 0.215 | 0.400 | 0.429 | 1.500 | 1.610 |
| Net Loan Charge-Offs/Gross Assets(%) | 1.213 | 0.147 | 0.178 | 0.079 | 0.096 | 0.300 | 0.364 |
| Net Income Before Taxes/Risk-Weighted Assets (%) | (0.762) | 2.500 | (1.905) | 1.951 | (1.487) | 0.518 | (0.395) |
| Adjusted Brokered Deposit Ratio (%) | 0.055 | 0.000 | 0.000 | 12.827 | 0.705 | 24.355 | 1.340 |
| Weighted Average CAMELS Component Ratings | 1.088 | 1.200 | 1.306 | 1.450 | 1.578 | 2.100 | 2.285 |
| Sum of contributions | ..... | ..... | 9.36 | ..... | 11.06 | ..... | 15.23 |
| Initial Base Assessment Rate | ..... | ..... | 10.00 | ..... | 11.06 | ..... | 14.00 |

* Figures may not multiply or add to totals due to rounding.[33]

The initial base assessment rate for an institution in the table is calculated by multiplying the pricing multipliers (Column B) by the risk measure values (Column C, E or G) to produce each measure's contribution to the assessment rate. The sum of the products (Column D, F or H) plus the uniform amount (the first item in Column D, F and H) yields the initial base assessment rate. For Institution 1 in the table, this sum actually equals 9.36 basis points, but the table reflects the proposed initial base minimum assessment rate of 10 basis points. For Institution 3 in the table, the sum actually equals 15.23 basis points, but the table reflects the proposed initial base maximum assessment rate of 14 basis points.

Under the proposed rule, the FDIC would continue to have the flexibility to update the pricing multipliers and the uniform amount annually, without further notice-and-comment rulemaking. In particular, the FDIC would be able to add data from each new year to its analysis and could, from time to time, exclude some earlier years from its analysis. Because the analysis would continue to use many earlier years' data as well, pricing multiplier changes from year to year should usually be relatively small.

On the other hand, as a result of the annual review and analysis, the FDIC may conclude, as it has in the proposed rule, that additional or alternative financial measures, ratios or other risk factors should be used to determine risk-based assessments or that a new method of differentiating for risk should be used. In any of these events, the FDIC would again make changes through notice-and-comment rulemaking.

Financial measures for any given quarter would continue to be calculated from the report of condition filed by each institution as of the last day of the quarter.[34] CAMELS component rating changes would continue to be effective as of the date that the rating change is transmitted to the institution for purposes of determining assessment rates for all institutions in Risk Category I.[35]

## IV. Risk Category I: Large Bank Method

For large Risk Category I institutions now subject to the debt issuer rating method, the FDIC proposes to derive assessment rates from the financial ratios method as well as long-term debt issuer ratings and CAMELS component ratings. The new method would be known as the large bank method. The rate using the financial ratios method would first be converted from the range of initial base rates (10 to 14 basis points) to a scale from 1 to 3 (financial ratios score).[36] The financial ratios score would be given a 33⅓ percent weight in determining the large bank method assessment rate, as would both the weighted average CAMELS component rating and debt-agency ratings.

The weights of the CAMELS components would remain the same as in the current rule. The values assigned to the debt issuer ratings would also remain the same. The weighted CAMELS components and debt issuer ratings would continue to be converted to a scale from 1 to 3, as they are currently.

The initial base assessment rate under the large bank method would be derived as follows: (1) An assessment rate computed using the financial ratios method would be converted to a financial ratios score; (2) the weighted average CAMELS rating, converted long-term debt issuer ratings, and the financial ratios score would each be multiplied by a pricing multiplier and the products summed; and (3) a uniform amount would be added to the result. The resulting initial base assessment rate would be subject to a minimum and a maximum assessment rate. The pricing multiplier for the weighted average CAMELS ratings, converted long-term debt issuer rating and financial ratios score would be 1.764,

[33] Under the proposed rule, pricing multipliers, the uniform amount, and financial ratios would continue to be rounded to three digits after the decimal point. Resulting assessment rates would be rounded to the nearest one-hundredth (1/100th) of a basis point.

[34] Reports of condition include Reports of Income and Condition and Thrift Financial Reports.

[35] Pursuant to existing supervisory practice, the FDIC does not assign a different component rating from that assigned by an institution's primary federal regulator, even if the FDIC disagrees with a CAMELS component rating assigned by an institution's primary federal regulator, unless: (1) the disagreement over the component rating also involves a disagreement over a CAMELS composite rating; and (2) the disagreement over the CAMELS composite rating is not a disagreement over whether the CAMELS composite rating should be a 1 or a 2. The FDIC has no plans to alter this practice.

[36] The assessment rate computed using the financial ratios method would be converted to a financial ratios score by first subtracting 8 from the financial ratios method assessment rate and then multiplying the result by one-half. For example, if an institution had an initial base assessment rate of 11, 8 would be subtracted from 11 and the result would be multiplied by one-half to produce a financial ratios score of 1.5.

and the uniform amount would be 1.651.[37]

In recent periods, assessment rates for some large institutions have not responded in a timely manner to rapid changes in these institutions' financial conditions. Based on June 30, 2008 data and ignoring large bank adjustments, under the current system: (1) 45 percent of large institutions in Risk Category I (other than institutions less than 5 years old) would have been charged the existing minimum assessment rate, compared with 28 percent of small institutions; and (2) 11 percent of large institutions in Risk Category I (other than institutions less than 5 years old) would have been charged the existing maximum assessment rate, compared with 19 percent of small institutions. The FDIC's proposed values for pricing multipliers and the uniform amount are such that, using June 30, 2008 data, the percentages of large institutions in Risk Category I (other than new institutions less than 5 years old) that would have been charged the minimum and maximum initial base assessment rates would be the same as the percentages of small institutions that would have been charged these rates (25 percent at the minimum rate and 15 percent at the maximum rate).[38] [39] These cutoff values would be used in future periods, which could lead to different percentages of institutions being charged the minimum and maximum rates.

Large institutions that lack a long-term debt issuer rating are currently assessed using the financial ratios method by itself. This will continue under the proposed rule.

Under the proposed rule, the initial base assessment rate for an institution with a weighted average CAMELS converted value of 1.70, a debt issuer ratings converted value of 1.65 and a financial ratios method assessment rate of 11.50 basis points would be computed as follows:

- The financial ratios method assessment rate less 8 basis points would be multiplied by one-half (calculated as (11.5 basis points − 8 basis points) · 0.5) to produce a financial ratios score of 1.75.
- The weighted average CAMELS score, debt ratings score and financial ratios score would each be multiplied by 1.764 and summed (calculated as 1.70 · 1.764 + 1.65 · 1.764 + 1.75 · 1.764) to produce 8.996.
- A uniform amount of 1.651 would be added, resulting in an initial base assessment rate of 10.65 basis points.

The FDIC anticipates that incorporating the financial ratios score into the large bank method assessment rate would result in a more accurate distribution of initial assessment rates and in timelier assessment rate responses to changing risk profiles, while retaining the market and supervisory perspectives that debt and CAMELS ratings provide. A more accurate distribution of initial assessment rates should require fewer large bank adjustments to rates based upon reviews of additional relevant information.[40]

## V. Adjustment for Large Institutions and Insured Branches of Foreign Banks in Risk Category I

Under current rules, within Risk Category I, large institutions and insured branches of foreign banks are subject to an assessment rate adjustment (the large bank adjustment). In determining whether to make such an adjustment for a large institution or an insured branch of a foreign bank, the FDIC may consider such information as financial performance and condition information, other market or supervisory information, potential loss severity, and stress considerations. Any large bank adjustment is limited to a change in assessment rate of up to 0.5 basis points higher or lower than the rate determined using the supervisory ratings and financial ratios method, the supervisory and debt ratings method, or the weighted average ROCA component rating method, whichever is applicable. Adjustments are meant to preserve consistency in the orderings of risk indicated by assessment rates, to ensure fairness among all large institutions, and to ensure that assessment rates take into account all available information that is relevant to the FDIC's risk-based assessment decision.

The FDIC proposes to increase the maximum possible large bank adjustment to one basis point and to make the adjustment to an institution's base assessment rate before any other adjustments are made. The adjustment could not: (1) Decrease any rate so that the resulting rate would be less than the minimum initial base assessment rate; or (2) increase any rate above the maximum initial base assessment rate.

The FDIC makes this proposal for two primary reasons. First, at present, the difference between the minimum and maximum base assessment rates in Risk Category I is two basis points. The maximum one-half basis point large bank adjustment represents 25 percent of the difference between the minimum and maximum rates. While an adjustment of this size is generally sufficient to preserve consistency in the orderings of risk indicated by assessment rates and to ensure fairness, there have been circumstances where more than a half a basis point adjustment would have been warranted. The difference between the minimum and maximum base assessment rates would increase from two basis points under the current system to four basis points under the proposal. A half basis point large bank adjustment would represent only 12.5 percent of the difference between the minimum and maximum rates and would not be sufficient to preserve consistency in the orderings of risk indicated by assessment rates or to ensure fairness. The proposed increase in the maximum possible large bank adjustment would continue to represent 25 percent of the difference between the minimum and maximum rates.

The FDIC expects that, under the proposed rule, large bank adjustments would be made infrequently and for a limited number of institutions.[41] The FDIC's view is that the use of supervisory ratings, financial ratios and agency ratings (when available) would sufficiently reflect the risk profile and rank orderings of risk in large Risk Category I institutions in most (but not all) cases.

The FDIC expects to revise its large bank guidelines. Until then, the guidelines would be applied taking into account the changes resulting from this rulemaking.

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[37] Appendix 1 provides the derivation of the pricing multipliers and the uniform amount.

[38] The cutoff value for the minimum assessment rate is an average score of approximately 1.578. The cutoff value for the maximum assessment rate is approximately 2.334.

[39] A ''new'' institution, as defined in 12 CFR 327.8(l) is generally one that is less than 5 years old, but there are several exceptions, including, for example, certain otherwise new institutions in certain holding company structures. 12 CFR 327.9(d)(7). The calculation of percentages of small institutions, however, was determined strictly by excluding institutions less than 5 years old, rather than by using the definition of a ''new'' institution and its regulatory exceptions, since determination of whether an institution meets an exception to the definition of ''new'' requires a case-by-case investigation.

[40] The FDIC has issued additional Guidelines for Large Institutions and Insured Foreign Branches in Risk Category I (the large bank guidelines) governing these large bank adjustments. 72 FR 27122 (May 14, 2007).

[41] In the six quarters since the 2006 assessment rule went into effect, the total number of adjustments in any one quarter has ranged from 2 to 13. For the second quarter of 2008, the FDIC continued or implemented assessment rate adjustments for 13 large Risk Category I institutions, 12 to increase an institution's assessment rate, and 1 to decrease an institution's assessment rate. Additionally, the FDIC sent four institutions advance notification of a potential upward adjustment in their assessment rate.

## VI. Adjustment for Unsecured Debt for all Risk Categories

The FDIC proposes to lower an institution's initial base assessment rate (after making any large bank adjustment) using its ratio of long-term unsecured debt (and, for small institutions, certain amounts of Tier 1 capital) to domestic deposits.[42] Any decrease in base assessment rates as a result of this unsecured debt adjustment would be limited to two basis points.

For a large institution, the unsecured debt adjustment would be determined by multiplying the institution's long-term unsecured debt as a percentage of domestic deposits by 20 basis points. For example, a large institution with a long-term unsecured debt to domestic deposits ratio of 3.0 percent would see its initial base assessment rate reduced by 0.60 basis points (calculated as 20 basis points · 0.03). An institution with a long-term unsecured debt ratio to domestic deposits of 11.0 percent would have its assessment rate reduced by two basis points, since the maximum possible reduction would be two basis points. (20 basis points · 0.11 = 2.20 basis points, which exceeds the maximum possible reduction.)

For a small institution, the unsecured debt adjustment would factor in a certain amount of Tier 1 capital (qualified Tier 1 capital) in addition to long-term unsecured debt. The amount of qualified Tier 1 capital would be the sum of one-half of the amount between 10 percent and 15 percent of adjusted average assets (between 2 and 3 times the minimum Tier 1 leverage ratio requirement to be a well-capitalized institution) and the full amount of Tier 1 capital exceeding 15 percent of adjusted average assets (above 3 times the minimum Tier 1 leverage ratio requirement to be a well-capitalized institution).[43] The sum of qualified Tier 1 capital and long-term unsecured debt as a percentage of domestic deposits would be multiplied by 20 basis points to produce the unsecured debt adjustment.[44]

For example, consider a small institution with no long-term unsecured debt and a Tier 1 leverage ratio of 17 percent. Assume that each percentage point of the Tier 1 capital ratio equated to a ratio of Tier 1 capital to domestic deposits of 1.1 percent. The unsecured debt adjustment for the portion of capital between 10 percent and 15 percent of adjusted average assets would be 0.55 basis points (calculated as 20 basis points · (1.1 · 0.5 · (0.15—0.10)).[45] The unsecured debt adjustment for the portion of capital above 15 percent of adjusted gross assets would be 0.44 basis points (calculated as 20 basis points · (1.1 · (0.17–0.15)). The sum of the two portions of the adjustment equals 0.99 basis points.

Ratios for any given quarter would be calculated from the report of condition filed by each institution as of the last day of the quarter.

As noted above, unsecured debt would include senior unsecured and subordinated debt. A senior unsecured liability would be defined as the unsecured portion of other borrowed money.[46] Subordinated debt would be as defined in the report of condition for the reporting period.[47] Long-term unsecured debt would be defined as unsecured debt with at least one year remaining until maturity. However, institutions separately report neither long-term senior unsecured liabilities nor long-term subordinated debt in the report of condition. In a separate notice of proposed rulemaking, the Federal Financial Institution Examination Council has proposed revising the Call Report to report separately long-term senior unsecured liabilities and subordinated debt that meet this definition. The Office of Thrift Supervision (OTS) has also published a notice of proposed rulemaking that would adopt similar reporting requirements. Until banks separately report these amounts in the Call Report, the FDIC will use subordinated debt included in Tier 2 capital and will not include any amount of senior unsecured liabilities. These adjustments will also be made for TFR filers until thrifts separately report these amounts in the TFR.

When an institution fails, holders of unsecured claims, including subordinated debt, receive distributions from the receivership estate only if all secured claims, administrative claims and deposit claims have been paid in full. Consequently, greater amounts of long-term unsecured claims provide a cushion that can reduce the FDIC's loss in the event of failure.

The FDIC's proposed definition of a long-term senior unsecured liability, however, ignores features that may affect whether the liability would, in fact, reduce the FDIC's loss in the event of failure. The definition would include liabilities with put options or other provisions that would allow the holder to accelerate payment (for example, if capital fell below a certain level). Any kind of put or acceleration feature could undermine the long-term nature of the liability. The FDIC is particularly interested in comment on whether long-term senior unsecured liabilities should exclude those liabilities with put or other acceleration provisions.

The FDIC is proposing that for small institutions (but not large ones) the unsecured debt adjustment include a portion of Tier 1 capital. The FDIC has two primary reasons for this proposal. First, cost concerns and lack of demand generally make it difficult for small institutions to issue unsecured debt in the market. For reasons of fairness, the FDIC believes that small institutions that have large amounts of Tier 1 capital should receive an equivalent benefit for that capital. Second, the FDIC does not want to create an incentive for small institutions to convert existing Tier 1 capital into subordinated debt, for example, by having a shareholder in a closely held corporation redeem shares

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[42] For this purpose, an institution would be ''small'' if it met the definition of a small institution in 12 CFR 327.8(g)—generally, an institution with less than $10 billion in assets—except that it would not include an institution that would otherwise meet the definition for which the FDIC had granted a request to be treated as a large institution pursuant to 12 CFR 327.9(d)(6).

[43] Adjusted average assets would be used for Call Report filers; adjusted total assets would be used for TFR filers.

[44] The percentage of qualified Tier 1 capital and long-term unsecured debt to domestic deposits will remain unrounded (to the extent of computer capabilities). The unsecured debt adjustment will be rounded to two digits after the decimal point prior to being applied to the base assessment rate. Appendix 2 describes the unsecured debt adjustment for a small institution mathematically.

[45] Adjusted average assets would be used for Call Report filers; adjusted total assets would be used for TFR filers.

[46] Other borrowed money is reported on the Call Report in Schedule RC, item 16 and on the Thrift Financial Report as the sum of items SC720, SC740, and SC760.

[47] The definition of ''subordinated debt'' in the Call Report is contained in the Glossary under ''Subordinated Notes and Debentures.'' For the June 30, 2008 Call Report, the definition read, in pertinent part, as follows:

Subordinated Notes and Debentures: A subordinated note or debenture is a form of debt issued by a bank or a consolidated subsidiary. When issued by a bank, a subordinated note or debenture is not insured by a federal agency, is subordinated to the claims of depositors, and has an original weighted average maturity of five years or more. Such debt shall be issued by a bank with the approval of, or under the rules and regulations of, the appropriate federal bank supervisory agency * * *

When issued by a subsidiary, a note or debenture may or may not be explicitly subordinated to the deposits of the parent bank * * *

For purposes of the proposed rule, subordinated debt would also include limited-life preferred stock as defined in the report of condition for the reporting period. The definition of ''limited-life preferred stock'' in the Call Report is contained in the Glossary under ''Preferred Stock.'' For the June 30, 2008 Call Report, the definition read, in pertinent part, as follows:

Limited-life preferred stock is preferred stock that has a stated maturity date or that can be redeemed at the option of the holder. It excludes those issues of preferred stock that automatically convert into perpetual preferred stock or common stock at a stated date.

and receive subordinated debt. The FDIC is greatly interested in comments on this part of its proposal, including comments on whether the portion of a small institution's Tier 1 capital to be included in the unsecured debt adjustment should include more capital.

The FDIC is also particularly interested in comments on the size of the unsecured debt adjustment and whether it should be larger or smaller. The FDIC believes that the proposed two basis points is sufficient to encourage a significant number of institutions to issue additional subordinated debt or senior unsecured debt, but is interested in the views of commenters.

**VII. Adjustment for Secured Liabilities for All Risk Categories**

The FDIC proposes to raise an institution's base assessment rates based upon its ratio of secured liabilities to domestic deposits (the secured liability adjustment). An institution's ratio of secured liabilities to domestic deposits (if greater than 15 percent) would increase its assessment rate, but the resulting base assessment rate after any such increase could be no more than 50 percent greater than it was before the adjustment. The secured liability adjustment would be made after any large bank adjustment or unsecured debt adjustment.

Specifically, for an institution that had a ratio of secured liabilities to domestic deposits of greater than 15 percent, the secured liability adjustment would be the institution's base assessment rate (after taking into account previous adjustments) multiplied by the ratio of its secured liabilities to domestic deposits minus 0.15. However, the resulting adjustment could not be more than 50 percent of the institution's base assessment rate (after taking into account previous adjustments). For example, if an institution had a ratio of secured liabilities to domestic deposits of 25 percent, and a base assessment rate before the secured liability adjustment of 12 basis points, the secured liability adjustment would be the base rate multiplied by 0.10 (calculated as 0.25—0.15), resulting in an adjustment of 1.2 basis points. However, if the institution had a ratio of secured liabilities to domestic deposits of 70 percent, its base rate before the secured liability adjustment of 12 basis points would be multiplied by 0.50 rather than 0.55 (calculated as 0.70—0.15), since the resulting adjustment could be only 50 percent of the base assessment rate before the secured liability adjustment.[48]

Ratios of secured liabilities to domestic deposits for any given quarter would be calculated from the report of condition filed by each institution as of the last day of the quarter. For banks, secured liabilities would include Federal Home Loan Bank advances, securities sold under repurchase agreements, secured Federal funds purchased and ''other secured borrowings,'' as reported in banks' quarterly Call Reports. Thrifts also report Federal Home Loan Bank advances in their quarterly TFR, but, at present, do not separately report securities sold under repurchase agreements, secured Federal funds purchased or ''other secured borrowings.'' The OTS has also published a notice of proposed rulemaking to revise the TFR so that thrifts will separately report these items. Until the TFR is revised, any of these secured amounts not reported separately from unsecured or other liabilities by a thrift in its TFR would be imputed based on simple averages for Call Report filers as of June 30, 2008. As of that date, on average, 63.0 percent of the sum of Federal funds purchased and securities sold under repurchase agreements reported by Call Report filers were secured, and 49.4 percent of other borrowings were secured.

At present, an institution's secured liabilities do not directly affect its assessments. The exclusion of secured liabilities can lead to inequity. An institution with secured liabilities in place of another's deposits pays a smaller deposit insurance assessment, even if both pose the same risk of failure and would cause the same losses to the FDIC in the event of failure.

To illustrate with a simple example, assume that Bank A has $100 million in insured deposits, while Bank B has $50 million in insured deposits and $50 million in secured liabilities. Each poses the same risk of failure and is charged the same assessment rate. At failure, each has assets with a market value of $80 million. The loss to the DIF would be identical for Bank A and Bank B ($20 million each). The total assessments paid by Bank A and Bank B, however, would not be identical. Because secured liabilities do not currently figure into an institution's assessment, the DIF would receive twice as much assessment revenue from Bank A as from Bank B over a given period (despite identical FDIC losses at failure).

In general, under the current rules, substituting secured liabilities for unsecured liabilities (including subordinated debt) raises the FDIC's loss in the event of failure without providing increased assessment revenue. Substituting secured liabilities for deposits can also lower an institution's franchise value in the event of failure, which increases the FDIC's losses, all else equal.[49]

**VIII. Adjustment for Brokered Deposits for Risk Categories II, III and IV**

In addition to the unsecured debt adjustment and the secured liability adjustment, the FDIC is proposing that an institution in Risk Category II, III, or IV also be subject to an assessment rate adjustment for brokered deposits (the brokered deposit adjustment). This adjustment would be limited to those institutions whose ratio of brokered deposits to domestic deposits was greater than 10 percent; asset growth rates would not affect the adjustment. The adjustment would be determined by multiplying 25 basis points times the difference between an institution's ratio of brokered deposits to domestic deposits and 0.10.[50] However, the adjustment would never be more than 10 basis points. The adjustment would be added to the base assessment rate after all other adjustments had been made. Ratios for any given quarter would be calculated from the Call Reports or TFRs filed by each institution as of the last day of the quarter.

A brokered deposit would again be as defined in Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f), which is the definition used in banks' quarterly Call Reports and thrifts quarterly TFRs. However, the FDIC is again particularly interested in comments on whether the definition of a brokered deposit for purposes of the brokered deposit ratio should exclude sweep accounts or deposits received through a network on a reciprocal basis that meet the statutory definition of a brokered deposit or should include high cost deposits, including those received through a listing service and the

[48] Under the proposed rule, the ratio of secured deposits to domestic deposits would be rounded to three digits after the decimal point. The resulting amount and adjusted assessment rate would be rounded to the nearest one-hundredth (1/100th) of a basis point.

[49] Overall, whether substituting secured liabilities for deposits increases, decreases, or leaves unchanged the FDIC's loss given failure also depends on how the substitution affects the proportion of insured and uninsured deposits, but FDIC's assessment revenue will always decline with a substitution.

[50] Under the proposed rule, the ratio of brokered deposits to domestic deposits would be rounded to three digits after the decimal point. The resulting brokered deposit charge would be rounded to the nearest one-hundredth (1/100th) of a basis point.

Internet, that do not meet the statutory definition.

Significant reliance on brokered deposits tends to increase an institution's risk profile, particularly as the institution's financial condition weakens. Insured institutions-particularly weaker ones-typically pay higher rates of interest on brokered deposits. When an institution becomes noticeably weaker or its capital declines, the market or statutory restrictions may limit its ability to attract, renew or roll over these deposits, which can create significant liquidity challenges.[51]

Also, significant reliance on brokered deposits tends to decrease greatly the franchise value of a failed institution. In a typical failure, the FDIC seeks to find a buyer for a failed institution's branches among the institutions located in or around the service area of the failed institution. A potential buyer usually seeks to increase its market share in the service area of the failed institution through the acquisition of the failed institution and its assets and deposits, but most brokered deposits originate from outside an institution's market area. The more core deposits that the buyer can obtain through the acquisition of the failed institution, the greater the market share of deposits (and the loans and other products that typically follow the core deposits) it can capture. Furthermore, brokered deposits may not be part of many potential buyers' business plans, limiting the field of buyers. Thus, the lower franchise value of the failed institution created by its reliance on brokered deposits leads to a lower price for the failed institution, which increases the FDIC's losses upon failure.

In addition, as noted earlier, several institutions that have recently failed have experienced rapid asset growth before failure and have funded this growth through brokered deposits. The FDIC believes that these reasons warrant the additional charge for significant levels of brokered deposits.

To illustrate the brokered deposit adjustment with a simple example, take a Risk Category II institution with an initial base assessment rate of 20 basis points and a ratio of brokered deposits to domestic deposits of 40 percent. Multiplying 25 basis points times the difference between the institution's ratio of brokered deposits to domestic deposits and 10 percent yields 7.5 basis points (calculated as 25 basis points · (0.4–0.1)). Because this amount is less than the maximum possible brokered deposit adjustment of 10 basis points, the brokered deposit adjustment would be as calculated, 7.5 basis points. Assuming that the secured liabilities adjustment for this institution is 2 basis points and that the institution has no other assessment rate adjustments, the total base assessment rate would be 29.5 basis points (calculated as (20 basis points + 2 basis points + 7.5 basis points).

## IX. Insured Branches of Foreign Banks

Because the base assessment rates would be higher and the difference between the minimum and maximum initial base assessment rates would increase from two to four basis points under the proposal, the FDIC proposes to make a conforming change for insured branches of foreign banks in Risk Category I. Under the proposal, an insured branch of a foreign bank's weighted average of ROCA component ratings would be multiplied by 5.291 (which would be the pricing multiplier) and 1.651 (which would be a uniform amount for all insured branches of foreign banks) would be added to the product.[52] The resulting sum would equal a Risk Category I insured branch of a foreign bank's initial base assessment rate, provided that the amount could not be less than the minimum initial base assessment rate nor greater than the maximum initial assessment rate. A Risk Category I insured branch of a foreign bank's initial base assessment rate would be subject to any large bank adjustment. Total base assessment rates could not be less than the minimum initial base assessment rate applicable to Risk Category I institutions nor greater than the maximum initial base assessment rate applicable to Risk Category I institutions. Insured branches of a foreign bank not in Risk Category I are charged the initial base assessment rate for the risk category in which they are assigned.

No insured branch of a foreign bank in any risk category would be subject to the unsecured debt adjustment, secured liability adjustment or brokered deposit adjustment. Insured branches of foreign banks are branches, not independent depository institutions. In the event of failure, the FDIC would not necessarily have access to the institution's capital or be protected by its subordinated debt or unsecured liabilities. Consequently, an unsecured debt adjustment would appear to be inappropriate. At present, these branches do not report comprehensively on secured liabilities. In the FDIC's view, the burden of increased reporting on secured liabilities would outweigh any benefit.

## X. New Institutions

The FDIC also proposes to make conforming changes in the treatment of new insured depository institutions.[53] For assessment periods beginning on or after January 1, 2010, any new institutions in Risk Category I would be assessed at the maximum initial base assessment rate applicable to Risk Category I institutions, as under the current rule.

Effective for assessment periods beginning before January 1, 2010, until a Risk Category I new institution received CAMELS component ratings, it would have an initial base assessment rate that was two basis points above the minimum initial base assessment rate applicable to Risk Category I institutions, rather than one basis point above the minimum rate, as under the current rule.[54] All other new institutions in Risk Category I would be treated as are established institutions, except as provided in the next paragraph.

Either before or after January 1, 2010: no new institution, regardless of risk category, would be subject to the unsecured debt adjustment; any new institution, regardless of risk category, would be subject to the secured liability adjustment; and a new institution in Risk Categories II, III or IV would be subject to the brokered deposit

[51] An adequately capitalized institution can accept, renew and rollover brokered deposits only by obtaining a waiver from the FDIC. Even then, interest rate restrictions apply. An undercapitalized institution may not accept, renew or rollover brokered deposits at all. Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f).

[52] An insured branch of a foreign bank's weighted average ROCA component rating would continue to equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The uniform amount for insured branches is identical to the uniform amount under the large bank method. The pricing multiplier for insured branches is three times the amount of the pricing multiplier under the large bank method, since the initial base rate for an insured branch depends only on one factor (weighted average ROCA ratings), while the initial base rate under the large bank method depends on three factors, each equally weighted.

[53] Subject to exceptions, a new insured depository institution is a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed. 12 CFR 327.8(l)

[54] Certain credit unions that convert to a bank or thrift charter and certain otherwise new insured institutions in a holding company structure may be considered established institutions. Both before and after January 1, 2010, any such institution that is well capitalized but has not yet received CAMELS component ratings will be assessed at two basis points above the minimum initial base assessment rate applicable to Risk Category I institutions.

adjustment. After January 1, 2010, no new institution in Risk Category I would be subject to the large bank adjustment.

**XI. Assessment Rate Schedule**

Recent failures have significantly increased the fund's loss provisions, resulting in a decline in the reserve ratio. As of June 30, 2008, the reserve ratio stood at 1.01 percent, 18 basis points below the reserve ratio as of March 31, 2008. This is the lowest reserve ratio for a combined bank and thrift insurance fund since March 31, 1995. The FDIC expects a higher rate of insured institution failures in the next few years compared to recent years; thus, the reserve ratio may continue to decline. Because the reserve ratio has fallen below 1.15 percent and is expected to remain below 1.15 percent, the FDIC is required to establish and implement a Restoration Plan to restore the reserve ratio to 1.15 percent within five years, that is, by October 7, 2013.[55] To fulfill the requirements of the Restoration Plan that the FDIC is adopting simultaneously with the proposed rule, the FDIC must increase the average assessment rates it currently charges. Since the current rates are already 3 basis points uniformly above the base rate schedule established in the 2006 assessments rule, a new rulemaking is required. The other proposed changes to the assessment system described above also require new rulemaking.

*Base Rate Schedule*

Effective April 1, 2009, the FDIC proposes to set initial base assessment rates as described in Table 10 below.

TABLE 10—PROPOSED INITIAL BASE ASSESSMENT RATES

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 10 | 14 | 20 | 30 | 45 |

* Rates for institutions that did not pay the minimum or maximum rate would vary between these rates.

After making all possible adjustments under the proposed rule, total base assessment rates for each risk category would be within the ranges set forth in Table 11 below.

TABLE 11—TOTAL BASE ASSESSMENT RATES AFTER ADJUSTMENTS *

| | Risk category I | Risk category II | Risk category III | Risk category IV |
|---|---|---|---|---|
| Initial base assessment rate | 10–14 | 20 | 30 | 45 |
| Unsecured debt adjustment | −2–0 | −2–0 | −2–0 | −2–0 |
| Secured liability adjustment | 0–7 | 0–10 | 0–15 | 0–22.5 |
| Brokered deposit adjustment | | 0–10 | 0–10 | 0–10 |
| Total base assessment rate | 8–21.0 | 18–40.0 | 28–55.0 | 43–77.5 |

* All amounts for all risk categories are in basis points annually. Rates for institutions that did not pay the minimum or maximum rate would vary between these rates. Adjustments would be applied in the order listed in the table. The large bank adjustment would be made before any other adjustment.

The proposed base rates are intended to improve the way the assessment system differentiates risk among insured institutions and make the risk-based assessment system fairer, by limiting the subsidization of riskier institutions by safer ones. They are also intended to increase assessment revenue while the Restoration Plan is in effect in order to raise the reserve ratio to the minimum threshold of 1.15 percent within 5 years of the Plan's implementation. As explained in the next Section, given the FDIC's projections (described below), the proposed rate schedule would raise the reserve ratio to 1.26 percent by the end of 2013.

*Actual Rate Schedule, Ability To Adjust Rates and Effective Date*

Based on the information currently available, the FDIC proposes setting actual rates at the proposed total base assessment rate schedule effective April 1, 2009. The FDIC projects that this schedule would raise the overall average assessment rate to 13.5 basis points beginning in April 2009 and 12.6 basis points in 2010 and thereafter, from a 6.3 basis point average assessment rate (before accounting for credit use) as of June 30, 2008. For institutions in Risk Category I, the projected average rate would be 11.6 basis points beginning in April 2009 and 11.9 basis points in 2010 and thereafter, up from 5.5 basis points as of June 30, 2008.[56]

However, at the time of the issuance of the final rule, the FDIC may need to set a higher base rate schedule based on information available at that time, including any intervening institution failures and updated failure and loss projections. A higher base rate schedule may also be necessary because of changes to the proposal in the final rule, if these changes have the overall effect of changing revenue for a given rate schedule. In order to fulfill the statutory requirement to return the fund reserve ratio to 1.15 percent, the base rate schedule in the final rule could be substantially higher than the proposed

[55] Data on estimated insured deposits and the reserve ratio are available only for each quarter-end; therefore, the reserve ratio for the end of the fourth quarter of 2013 will be the first reserve ratio available after October 7 to measure compliance with the Restoration Plan's requirements. Deposit data needed to compute the reserve ratio will be available in February of the following year.

[56] Changes in the projected average rates under the proposed schedule over time reflect projected changes in the migration of institutions within and across risk categories.

base assessment rate schedule (for example, if projected or actual losses at the time of the final rule greatly exceed the FDIC's current estimates). The base rate schedule in the final rule could possibly be lower than the proposed base rate schedule. The FDIC seeks particular comment on possible alternative base rate schedules.

The rate schedule and the other revisions to the assessment rules would take effect for the quarter beginning April 1, 2009, which would be reflected in the June 30, 2009 fund balance and the invoices for assessments due September 30, 2009.

The proposed rule would continue to allow the FDIC Board to adopt actual rates that were higher or lower than total base assessment rates without the necessity of further notice-and-comment rulemaking, provided that: (1) The Board could not increase or decrease rates from one quarter to the next by more than three basis points; and (2) cumulative increases and decreases could not be more than three basis points higher or lower than the adjusted base rates. Continued retention of this flexibility would enable the Board to act in a timely manner to fulfill its mandate to raise the reserve ratio to at least 1.15 percent within the 5-year timeframe.

*Assessment Rates for the First Quarter of 2009*

The FDIC also proposes to raise the current rates uniformly by seven basis points for the assessment for the quarter beginning January 1, 2009, which would be reflected in the fund balance as of March 31, 2009, and assessments due June 30, 2009. Rates for the first quarter of 2009 only would be as set forth in Table 12:

TABLE 12—PROPOSED ASSESSMENT RATES FOR THE FIRST QUARTER OF 2009

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 12 | 14 | 17 | 35 | 50 |

*Rates for institutions that did not pay the minimum or maximum rate would vary between these rates.

The proposed rates for the first quarter of 2009 would raise almost as much assessment revenue as under the rates proposed beginning April 1, 2009. Data and system requirements do not make it feasible to adopt the proposed changes to the risk-based assessment system discussed above until the second quarter of 2009.

**XII. Assessment Revenue Needs Under the Restoration Plan**

*Summary*

Table 13 shows projected minimum initial base assessment rates needed to raise the reserve ratio to 1.15 percent (the lower bound under the requirements for the Restoration Plan) in 2013 for alternative average annual insured deposit growth rates and total costs of bank failures from 2008 through 2013.

TABLE 13—MINIMUM INITIAL BASE ASSESSMENT RATES (IN BASIS POINTS) NEEDED TO RAISE THE RESERVE RATIO TO 1.15 PERCENT IN 2013

| Insured deposit growth rate | If institution failures from 2008 to 2013 cost in total:* | | | | | |
|---|---|---|---|---|---|---|
| | $20 Billion | $30 Billion | $40 Billion | $50 Billion | $60 Billion | $70 Billion |
| 3% | 5 | 5 | 8 | 11 | 13 | 16 |
| 4% | 5 | 6 | 9 | 11 | 14 | 16 |
| 5% | 5 | 7 | 9 | 11 | 14 | 16 |
| 6% | 5 | 7 | 9 | 12 | 14 | 17 |
| 7% | 5 | 8 | 10 | 12 | 15 | 17 |

*Costs include $12.8 billion for actual and projected failures in 2008.

Under the FDIC's proposed rate schedule, the average rate is projected to be 13.5 basis points in 2009 (once the rates become effective in April) and 12.6 basis points in 2010 and beyond. For institutions in Risk Category I, the average rate is projected to be 11.6 basis points beginning in April 2009, rising to 11.9 basis points in 2010 and beyond. Given the FDIC's projections, the proposed rates would increase the reserve ratio to 1.26 percent by year-end 2013.

Current and emerging economic difficulties, particularly in the housing and construction sector, financial markets and commercial real estate, contribute to the FDIC's expectation of higher losses for the insurance fund. The insurance fund balance and reserve ratio are likely to experience further declines before recovering as the current problems confronting the banking industry abate. The FDIC projects that the reserve ratio will continue to fall for the remainder of this year and early 2009 to a low of 0.65 to 0.70 percent, as the fund's loss reserves for anticipated failures increase. Higher assessment revenue should begin to increase the reserve ratio gradually in the latter part of 2009. As described in more detail below, the FDIC's best estimate is that institution failures could cost the insurance fund approximately $40 billion from 2008 to 2013, of which approximately $13 billion represent actual and projected costs incurred this year (including almost $9 billion for the failure in July of one institution with over $30 billion in assets). The FDIC bases its loss projections on: Analysis of specific troubled institutions and risk factors that may adversely affect other institutions; analysis of recent and expected loss rates given failure; stress analyses of the effects of housing price declines and an economic slowdown in specific geographic areas on loan losses and bank capital; and recent and

historic supervisory rating downgrade and failure rates.

The FDIC also assumes that insured deposits would increase on average 5 percent per year from 2008 to 2013. This assumption is in line with the most recent 12-month growth rate and average annual growth rates over the past 5 and 10 years.

Table 13 shows that an initial minimum rate of 9 basis points is necessary for the reserve ratio to reach 1.15 percent by 2013 assuming that failures between 2008 and 2013 cost $40 billion and that insured deposits increase on average by 5 percent annually. With an initial minimum rate of 9 basis points, the FDIC projects that the reserve ratio would equal 1.18 percent by the end of 2013.[57] The FDIC's proposed rates, with an initial minimum rate of 10 basis points, would raise the reserve ratio to 1.26 percent by 2013. The FDIC believes that it would be prudent to provide this margin for error in the event that losses exceed the FDIC's best estimate or insured deposit growth is more rapid than expected.

The FDIC had previously expected that the reserve ratio would reach the 1.25 percent DRR by 2009, consistent with the Board's objectives for the insurance fund. The recent decline in the reserve ratio and projected higher rate of bank failures over the next few years make the possibility of reaching the DRR next year remote absent very high assessment rates, which the FDIC believes would be inappropriate under current conditions. Nonetheless, the goal of reaching the 1.25 percent DRR remains in effect. Under the proposed rates, the reserve ratio is projected to reach 1.26 percent by the end of 2013.

The FDIC recognizes that there is considerable uncertainty about its projections for losses and insured deposit growth, and that changes in assumptions about these and other factors could lead to different assessment revenue needs and rates. Under the terms of the Restoration Plan, the FDIC must update its projections for the insurance fund balance and reserve ratio at least semiannually while the Restoration Plan is in effect and adjust rates as necessary. In the event that losses exceed the FDIC's best estimate or insured deposit growth is more rapid than expected, the Board will be able to adjust assessment rates.

[57] If the minimum initial rate was 8 basis points or less, the reserve ratio is projected to fall short of the 1.15 percent threshold.

*Factors Considered in Setting the Level of Assessment Rates*

In setting assessment rates, the FDIC's Board of Directors has considered the following factors required by statute:

(i) The estimated operating expenses of the Deposit Insurance Fund.

(ii) The estimated case resolution expenses and income of the Deposit Insurance Fund.

(iii) The projected effects of the payment of assessments on the capital and earnings of insured depository institutions.

(iv) The risk factors and other factors taken into account pursuant to section 7(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. Section 1817(b)(1)) under the risk-based assessment system, including the requirement under section 7(b)(1)(A) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(1)(A)) to maintain a risk-based system.

(v) Other factors the Board of Directors has determined to be appropriate.[58]

The factors considered in setting assessment rates are discussed in more detail below.

Case Resolution Expenses (Insurance Fund Losses)

Insurance fund losses from recent insured institution failures and an expected higher rate of failures over the next few years will tend to reduce the fund balance and reserve ratio.

The FDIC expects that housing price declines, financial market turmoil, and generally weaker economic conditions will continue to exert stress on banking industry earnings and credit quality in the near term, most notably in residential real estate and construction and development lending. Significant uncertainty remains about the outlook for a recovery in mortgage securitization markets and the return of confidence to financial markets overall. Economic activity in the industrial Midwest has especially suffered from higher energy and commodity prices. Housing market downturns in Arizona, California, Nevada, Florida, and other coastal areas are contributing to declines in construction and consumer spending and economic downturns in those areas. Regional disparities in housing market and economic conditions, as well as financial market difficulties, have led in turn to variation in prospects among banks. Institutions most at risk include: (1) Those with large volumes of subprime and nontraditional mortgages, particularly those heavily reliant on securitization; and (2) those with heavy concentrations of residential real estate and construction and development loans in markets with the greatest housing price declines. Within each of these groups, those heavily reliant on non-core funding incur additional risks should the availability of these funds decline as conditions deteriorate.

In developing its projections of losses to the insurance fund, the FDIC drew from several sources. First, the FDIC relied heavily on supervisory analysis of troubled institutions. Supervisors also identified risk factors present in currently troubled institutions (or that were present in institutions that recently failed) to help analyze the potential for other institutions with those risk factors to cause losses to the insurance fund. Second, the FDIC drew on its analysis of losses to the fund in the event of failure. Current financial market and economic difficulties make simple reliance on the historical average or model estimates based on historical data inappropriate for projecting loss rates given failure, particularly in the near term.

The FDIC also relied on stress analysis designed to evaluate the effect of a large and widespread decline in housing prices and related deterioration in overall economic conditions on the capital positions and earnings of insured institutions. The stress test simulated the effects of high and rising loan loss rates directly resulting from falling housing prices and rising unemployment rates in various geographic areas to identify institutions most vulnerable to these types of stress. Under the stress test, institutions operating in those areas with the worst housing and economic conditions experience the largest increase in loss rates.

The FDIC categorized well-capitalized institutions into various groups based on stress test results and supervisory analysis. Based on recent and historical downgrade and failure experience, the FDIC then applied downgrade and failure assumptions for each group to

[58] Section 2104 of the Reform Act (amending section 7(b)(2) of the Federal Deposit Insurance Act, 12 U.S.C. 1817(b)(2)(B)). The risk factors referred to in factor (iv) include:

(i) The probability that the Deposit Insurance Fund will incur a loss with respect to the institution, taking into consideration the risks attributable to—

(I) Different categories and concentrations of assets;

(II) different categories and concentrations of liabilities, both insured and uninsured, contingent and noncontingent; and

(III) any other factors the Corporation determines are relevant to assessing such probability;

(ii) the likely amount of any such loss; and

(iii) the revenue needs of the Deposit Insurance Fund.

Section 7(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(1)(C)).

project the cost of failure to the fund over the next few years.[59]

Based on the various sources of information described above, the FDIC projects that the costs of institution failures from 2008 through 2013 may be approximately $40 billion. This figure includes almost $13 billion for the costs of actual and projected failures in 2008. The FDIC recognizes the considerable degree of uncertainty surrounding these projections and its analyses reveal that either higher or lower losses are plausible. This uncertainty underscores the need to update the outlook for insurance fund losses on a regular basis—at least semiannually—while the Restoration Plan is in effect and to consider adjustments to assessment rates.

Operating Expenses and Investment Income

The FDIC estimates that its operating expenses in 2008 will be $1 billion. Thereafter, the FDIC projects that operating expenses will increase on average by 5 percent annually.

The FDIC projects that its investment contributions (investment income plus or minus unrealized gains or losses on available-for-sale securities) this year will total $3.7 billion, or 7 percent of the start-of-year fund balance. A one-time unrealized gain of $1.6 billion from reclassifying the fund's held-to-maturity securities as available for sale as of June 30, 2008 bolsters this figure. Projected increases in interest rates, which will reduce the value of these securities, will partly offset this gain next year.[60] In addition, the FDIC expects that it will invest new funds in short-term securities (primarily overnight investments) to accommodate increased bank failure activity. The FDIC generally expects that these investments will earn lower rates than the longer-term securities that they are replacing and will therefore result in less interest income to the fund. Accounting for all of these factors, the FDIC projects investments to contribute an amount equal to 2.0 percent of the starting fund balance in 2009, rising gradually to 3.5 percent by 2011 and thereafter.

Assessment Revenue, Credit Use, and the Distribution of Assessments

The FDIC expects that assessment revenue in 2008 will total $3.0 billion: $4.4 billion in gross assessments charged less $1.4 billion in credits used. By the end of 2008, the projections indicate that only 4 percent of the original $4.7 billion in credits awarded will be remaining. As part of the Restoration Plan, the FDIC has the authority to restrict credit use while the plan is in effect, providing that institutions may still apply credits against their assessments equal to the lesser of their assessment or 3 basis points.[61] The FDIC has decided not to restrict credit use in the Restoration Plan. The FDIC projects that the amount of credits remaining at the time that the proposed new rates go into effect will be very small and that their continued use will have very little effect on the assessment rates necessary to meet the requirements of the plan.[62]

Accounting for the use of remaining credits, proposed uniform increase to current rates for the first quarter of 2009 and the proposed assessment rates effective April 1, 2009, and assuming 5 percent annual growth in the assessment base (which is approximately domestic deposits), the FDIC projects that the fund will earn assessment revenue of $10.3 billion for all of 2009.

For the quarter beginning April 1, 2009, the FDIC has derived gross assessment revenue (i.e., before applying any remaining credits) by assigning each insured institution to an assessment rate based on the proposed rate schedule and factors described above. Table 14 shows the distribution of institutions and domestic deposits by risk category (divided into four parts for Risk Category I) under the proposed initial base rate schedule (effective April 1, 2009) based on data as of June 30, 2008; Table 15 shows the distribution of institutions and domestic deposits by bands of proposed total base assessment rates.[63] For purposes of assessment revenue projections beginning next April, the FDIC relied on the proposed assessment rates based on data as of June 30, 2008, but also accounted for projected migration of institutions across risk categories as supervisory ratings change.

TABLE 14—DISTRIBUTION OF INITIAL BASE ASSESSMENT RATES AND DOMESTIC DEPOSITS*

[Data as of June 30, 2008]

| Risk category | Initial assessment rate | Number of institutions | Percent of institutions | Domestic deposits (in billions of $) | Percent of domestic deposits |
|---|---|---|---|---|---|
| I | 10 | 1,775 | 21 | 823.0 | 12 |
| | 10.01–12.00 | 2,976 | 35 | 2,945.7 | 42 |
| | 12.01–13.99 | 1,758 | 21 | 1,714.4 | 24 |
| | 14 | 1,219 | 14 | 593.3 | 8 |
| II | 20 | 588 | 7 | 896.5 | 13 |
| III | 30 | 121 | 1 | 27.1 | 0 |
| IV | 45 | 14 | 0 | 29.1 | 0 |

*This table and the following two tables exclude insured branches of foreign banks.

[59] For those institutions that were well rated one year ago but performed poorly under the stress simulations when applied to their balance sheets from last year, the FDIC identified the extent to which these institutions received supervisory ratings downgrades over the following year. To look beyond what may happen over one year, the FDIC supplemented this information with data from the late 1980s and early 1990s (a period of many bank failures) on ratings downgrades over a five-year horizon for institutions with financial characteristics similar to those performing poorly under the stress analysis. With this information, the FDIC developed projections of the volume of well-rated institutions likely to be downgraded over the next few years. The FDIC then considered data on failure rates from the late 1980s and early 1990s to project failure rates for those institutions that may be downgraded over the next few years, as well as those that are currently not well rated.

[60] Future interest rate assumptions are based on consideration of recent Blue Chip Financial Forecasts as well as recent forward rate curves. Forward rates are expected yields on securities of varying maturities for specific future points in time that are derived from the term structure of interest rates. (The term structure of interest rates refers to the relationship between current yields on comparable securities with different maturities.)

[61] Section 7(b)(3)(E)(iv) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)(3)(E)(iv)).

[62] For 2008, 2009 and 2010, credits may not offset more than 90 percent of an institution's assessment. Section 7(e)(3)(D)(ii) of the Federal Deposit Insurance Act (12 U.S.C. 1817(e)(3)(D)(ii)).

[63] The assessment base is almost equal to total domestic deposits.

TABLE 15—DISTRIBUTION OF TOTAL BASE ASSESSMENT RATES AND DOMESTIC DEPOSITS *

[Data as of June 30, 2008]

| Risk category | Total base assessment rate | Number of institutions | Percent of institutions | Domestic deposits (in billions of $) | Percent of domestic deposits |
|---|---|---|---|---|---|
| I | 8.00–10.00 | 1,834 | 22 | 806.6 | 11 |
| | 10.01–12.00 | 2,674 | 32 | 3,047.6 | 43 |
| | 12.01–14.00 | 2,588 | 31 | 1,632.5 | 23 |
| | 14.01–21.00 | 632 | 7 | 589.7 | 8 |
| II | 18.00–20.00 | 346 | 4 | 204.7 | 3 |
| | 20.01–40.00 | 242 | 3 | 691.8 | 10 |
| III | 28.00–30.00 | 72 | 1 | 8.0 | 0 |
| | 30.01–55.00 | 49 | 1 | 19.1 | 0 |
| IV | 43.00–45.00 | 9 | 0 | 5.8 | 0 |
| | 45.01–77.5 | 5 | 0 | 23.3 | 0 |

* Because of data limitations, secured liability adjustments for TFR filers are calculated using imputed values based on simple averages of Call Report filers as of June 30, 2008 (discussed below). Unsecured debt adjustments are calculated using ''Qualifying subordinated debt and redeemable preferred stock'' included in Tier 2 capital.

As noted earlier, the proposed changes to risk-based assessments are intended to better capture differences in risk and impose a greater share of the necessary increase in overall assessments on riskier institutions. Table 16 shows how institutions would have fared if the FDIC had proposed leaving the current risk-based assessment system unchanged except for a uniform increase in rates that would have produced the same revenue as under the proposed schedule. To produce the same revenue, the FDIC would have had to increase the current rates uniformly by 7.6 basis points, based upon data as of June 30, 2008. As the table shows, 85 percent of institutions, with 74 percent of domestic deposits, would pay a lower rate under the proposed assessment rate schedule than under a uniform increase of 7.6 basis points to the current rate schedule.

TABLE 16—DIFFERENCE BETWEEN PROPOSED ASSESSMENT RATES AND A UNIFORM INCREASE IN CURRENT RATES TO RAISE THE SAME REVENUE

[Data as of June 30, 2008]

| Compared to a uniform increase in current rates, proposed rates are: | Number of institutions | Percent of institutions | Domestic deposits (in billions of $) | Percentage of total domestic deposits |
|---|---|---|---|---|
| Over 4 bp lower | 339 | 4 | 64 | 1 |
| 2–4 bp lower | 3,070 | 36 | 1,551 | 22 |
| 0–2 bp lower | 3,819 | 45 | 3,551 | 51 |
| 0–2 bp higher | 463 | 5 | 785 | 11 |
| 2–4 bp higher | 541 | 6 | 321 | 5 |
| 4–6 bp higher | 110 | 1 | 121 | 2 |
| 6–8 bp higher | 49 | 1 | 244 | 3 |
| 8–10 bp higher | 18 | 0 | 245 | 3 |
| Over 10 bp higher | 42 | 0 | 146 | 2 |

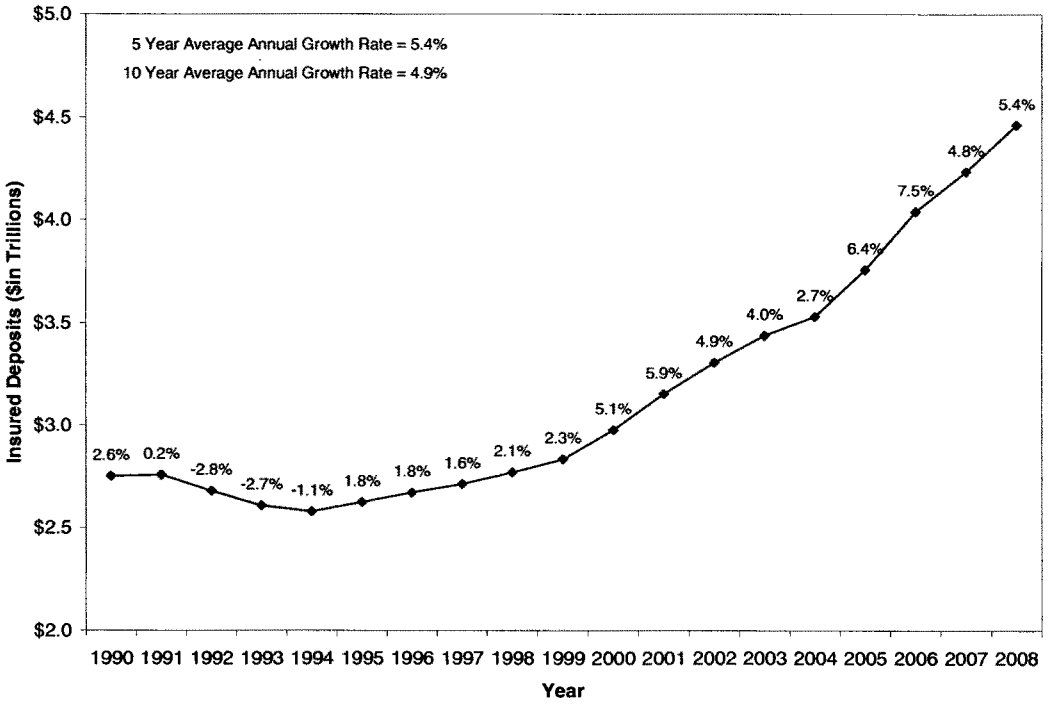
Estimated Insured Deposits

The FDIC believes that it is reasonable to plan for annual insured deposit growth of 5 percent. Over the 12 months ending June 30, 2008, estimated insured deposits increased by 5.4 percent. The most recent five and ten year average growth rates are also approximately 5 percent. Chart 1 depicts insured deposit growth since 1990.

Chart 1

Annual Insured Deposit Growth Rates

(June to June)




Projections of insured deposits are subject to considerable uncertainty. Insured deposit growth over the near term could rise more rapidly due to a ''flight to quality'' attributable to financial and economic uncertainties. On the other hand, as the experience of the late 1980s and early 1990s demonstrated, lower overall growth in the banking industry and the economy could depress rates of growth of total domestic and insured deposits. As Table 13 shows, a one percentage point increase or decrease in average annual insured deposit growth rates will not have a significant effect on the assessment rates necessary to meet the requirements of the Restoration Plan, other factors equal.

Effect on Capital and Earnings

Appendix 3 contains an analysis of the effect of proposed rates on the capital and earnings of insured institutions. Given the assumptions in the analysis, for the industry as a whole, projected total assessments in 2009 would result in capital that would be 0.3 percent lower than if the FDIC did not charge assessments and 0.1 percent lower than if current assessment rates remained in effect. The proposed assessments would cause 6 institutions whose equity-to-assets ratio would have exceeded 4 percent in the absence of assessments to fall below that percentage and 5 institutions to fall below 2 percent. The proposed increase in assessments would cause 3 institutions whose equity-to-assets ratio would have exceeded 4 percent under current assessments to fall below that threshold and 1 institution to fall below 2 percent.

For the industry as a whole, assessments in 2009 would result in pre-tax income that would be 11 percent lower than if the FDIC did not charge assessments and 5.6 percent lower than if current assessment rates remained in effect. Appendix 3 also provides an analysis of the range of effects on capital and earnings.

Other Factors That the Board May Consider

In its consideration of proposed rates, the FDIC Board has considered other factors that it deems appropriate, as permitted by law.

*Flexibility to accommodate economic and industry conditions.* The Reform Act generally provides up to 5 years for the FDIC to raise the fund's reserve ratio to at least 1.15 percent under the Restoration Plan. The FDIC Board had previously set rates with an objective of raising the reserve ratio to the 1.25 percent DRR by next year. The recent decline in the reserve ratio and an anticipated higher rate of bank failures over the next few years make the possibility of reaching the 1.25 percent DRR—or even 1.15 percent—next year remote absent very high assessment rates. The FDIC believes that such high rates would be inappropriate under current and projected economic and financial conditions. The FDIC's proposed rates take advantage of the flexibility to raise rates more gradually.

*Reaching the DRR.* The FDIC had previously expected that the reserve ratio would reach the 1.25 percent DRR by 2009, consistent with the Board's objectives for the insurance fund. The recent decline in the reserve ratio and an anticipated increase in bank failures make the possibility of reaching the DRR next year remote absent very high assessment rates, which the FDIC believes would be inappropriate under current conditions. Nonetheless, the goal of reaching the 1.25 percent DRR remains in effect. Under the proposed rates, the reserve ratio is projected to reach 1.26 by the end of 2013.

*Updating projections regularly.* The FDIC recognizes that there is

considerable uncertainty about its projections for losses and insured deposit growth, and that changes in assumptions about these and other factors could lead to different assessment revenue needs and rates. The FDIC projects that, under its proposed rates, the reserve ratio will increase to 1.26 percent by year-end 2013, providing a margin for error in the event that losses exceed the FDIC's best estimate or insured deposit growth is more rapid than expected. Nonetheless, the FDIC expects to update its projections for the insurance fund balance and reserve ratio at least semiannually while the Restoration Plan is in effect and adjust rates as necessary.

**XIII. Technical and Other Changes**

The FDIC is proposing to change the way assessment rates are determined for a large institution that is subject to the large bank method (or an insured branch of a foreign bank) when it moves from Risk Category I to Risk Category II, III or IV during a quarter.

At present, if, during a quarter, a CAMELS (or ROCA) rating change occurs that results in a large institution that is subject to the supervisory and debt ratings method or an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution's assessment rate for the portion of the quarter that it was in Risk Category I is based upon its assessment rate for the prior quarter. No new Risk Category I assessment rate is developed for the quarter in which the institution moves to Risk Category II, III or IV.[64]

The opposite holds true for a small institution or a large institution subject to the financial ratios method when it moves from Risk Category I to Risk Category II, III or IV during a quarter. A new Risk Category I assessment rate is developed for the quarter in which the institution moves to Risk Category II, III or IV.[65]

The FDIC proposes that when a large institution subject to the large bank method or an insured branch of a foreign bank moves from Risk Category I to Risk Category II, III or IV during a quarter, a new Risk Category I assessment rate be developed for that quarter. That rate for the portion of the quarter that the institution was in Risk Category I would be determined as for any other institution in Risk Category I subject to the same pricing method, except that the rate would only apply for the portion of the quarter that the institution was actually in Risk Category I.

Since implementation of the 2006 assessments rule in 2007, several large institutions that were subject to the supervisory and debt ratings method have moved from Risk Category I to a Risk Category II or III. More than once, changes occurred in these institutions' debt ratings or CAMELS component ratings while the institution was in Risk Category I, but the institutions' assessment rates for the quarter did not reflect these changes. In one case, an institution received a debt rating downgrade early in the quarter, but, because it fell to Risk Category II on the 89th day of the quarter, this debt rating downgrade did not affect its assessment rate. The FDIC's proposal is intended to correct these outcomes and better ensure that an institution's assessment rate reflects the risk that it poses.

The FDIC is also proposing to amend its assessment regulations to correct technical errors and make clarifications to the regulatory language in several sections of Part 327 for the reasons set forth below.

A technical correction is proposed to the language of 12 CFR 327.3(a), the regulatory requirement that each depository institution pay an assessment to the Corporation. Language creating an exception ''as provided in paragraph (b) of this section'' was inadvertently retained in the initial clause of section 327.3(a) when the assessment regulations were amended in 2006. Formerly, paragraph (b) excepted newly insured institutions from payment of assessments for the semiannual period in which they became insured institutions; that exception was eliminated in 2006. Paragraph (b) now addresses quarterly certified statement invoices and payment dates. Accordingly, the FDIC proposes to amend section 327.3(a) to eliminate the reference to paragraph (b).

12 CFR 327.6(b)(1) addresses assessments for the quarter in which a terminating transfer occurs when the acquiring institution uses average daily balances to calculate its assessment base. In that situation, section 327.6(b)(1) provides that the terminating institution's assessment for that quarter is reduced by the percentage of the quarter remaining after the terminating transfer occurred, and calculated at the acquiring institution's assessment rate. Although it can be inferred that the terminating institution's assessment base for that quarter is to be used in the reduction calculation, the section is not explicit. Accordingly, the FDIC proposes to amend the section to clarify that the reduction calculation is accomplished by applying the acquirer's rate to the terminating institution's assessment base for that quarter.

12 CFR 327.8(i) defines *Long Term Debt Issuer Rating* as the ''current rating'' of an insured institution's long-term debt obligations by one of the named ratings companies. ''Current rating'' is defined in § 327.8(i) as ''one that has been confirmed or assigned within 12 months before the end of the quarter for which the assessment rate is being determined.'' The section also provides: ''If no current rating is available, the institution will be deemed to have no long-term debt issuer rating.'' The language of § 327.8(i) requires the FDIC to disregard a long-term debt issuer rating that is still in effect—that is, it has not been withdrawn and replaced by another rating—if it is greater than 12 months old when the FDIC calculates an institution's assessment rate. To remedy this, the FDIC proposes to amend § 327.8(i) to read as follows:

> (i) *Long-Term Debt Issuer Rating.* A long-term debt issuer rating shall mean a rating of an insured depository institution's long-term debt obligations by Moody's Investor Services, Standard & Poor's, or Fitch Ratings that has not been withdrawn before the end of the quarter being assessed. A withdrawn rating shall mean one that has been withdrawn by the rating agency and not replaced with another rating by the same agency. A long-term debt issuer rating does not include a rating of a company that controls an insured depository institution, or an affiliate or subsidiary of the institution.

Consistent with this amendment, the FDIC proposes to amend two references to long-term debt issuer rating, as defined in § 327.8(i), ''*in effect at the end of the quarter being assessed*'' that appear in 12 CFR 327.9(d) and 12 CFR 327.9(d)(2). The proposal is to amend these sections by deleting the phrase ''in effect at the end of the quarter being assessed'' and to add ''as defined in § 327.8(i)'' to section 327.9(d)(2) so that its construction parallels section 327.9(d).

12 CFR 327.8(l) and (m) define ''*New depository institution*'' and ''*Established depository institution.*'' The former is ''a bank or thrift that has not been chartered for at least five years as of the last day of any quarter for which it is being assessed''; the latter is ''a bank or thrift that has been chartered for at least

[64] 12 CFR 327.9(d)(5).

[65] 12 CFR 327.9(d)(1)(ii). In fact, the FDIC had provided in the preamble to the 2006 assessments rule that no new Risk Category I assessment rate would be determined for any large institution for the quarter in which it moved to Risk Category II, III or IV, but, as the result of a drafting inconsistency, this intention was not realized in the regulatory text. 71 FR 69,282, 69,293 (Nov. 30, 2006). The FDIC now believes that a new Risk Category I assessment rate should be determined for any large institution for the quarter in which it moves to Risk Category II, III or IV.

five years as of the last day of any quarter for which it is being assigned.'' In the FDIC's view, this regulatory language allows a previously uninsured institution to be treated as an established institution based on charter date. To remedy this, the FDIC proposes to amend sections 327.8(l) and (m) to read as follows:

(l) *New depository institution.* A new insured depository institution is a bank or thrift that has been federally insured for less than five years as of the last day of any quarter for which it is being assessed.

(m) *Established depository institution.* An established insured depository institution is a bank or thrift that has been federally insured for at least five years as of the last day of any quarter for which it is being assessed.

12 CFR 327.9(d)(7)(viii), which addresses rates applicable to institutions subject to the subsidiary or credit union exception, contains language making the section applicable ''[o]n or after January 1, 2010. * * *'' This language is redundant of language in section 327.9(d)(7)(i)(A) and the FDIC proposes to delete it.

**XIV. Effective Date**

The FDIC proposes that a final rule following this proposed rule would become effective on April 1, 2009, except for the proposed uniform increase of seven basis points to current assessment rates, which would take effect January 1, 2009, for the assessment for the first quarter of 2009 only.

**XV. Request for Comments**

The FDIC seeks comment on every aspect of this proposed rulemaking. In particular, the FDIC seeks comment on the issues set out below. The FDIC asks that commenters include reasons for their positions.

*Brokered Deposits*

1. Under the proposal, the definition of brokered deposits for purposes of both the adjusted brokered deposit ratio and the brokered deposit adjustment would include sweep accounts and deposits received through a network on a reciprocal basis that meet the statutory definition of a brokered deposit, but would exclude high cost deposits, including those received through a listing service and the Internet, that do not meet the statutory definition of a brokered deposit.

a. Should sweep accounts that meet the statutory definition of brokered deposits be excluded from the definition of brokered deposits for purposes of the adjusted brokered deposit ratio or the brokered deposit adjustment? If so, how?

b. Should deposits received through a network on a reciprocal basis that meet the statutory definition of brokered deposits be excluded from the definition of brokered deposits for purposes of the adjusted brokered deposit ratio or the brokered deposit adjustment? If so, how?

c. Should high cost deposits, including those received through a listing service and the Internet, that do not meet the statutory definition of a brokered deposit be included in the definition of brokered deposits for purposes of the adjusted brokered deposit ratio or the brokered deposit adjustment? If so, how?

*The Adjusted Brokered Deposit Ratio*

2. Should the proposed new adjusted brokered deposit ratio be included in the financial ratios method?

3. Under the proposal, only brokered deposits in excess of 10 percent of domestic deposits would be considered. Is this the proper amount or should the percentage be higher or lower?

4. Under the proposal, asset growth over the previous 4 years would have to be greater than 20 percent to potentially trigger the adjusted brokered deposit ratio.

a. Should this amount be higher or lower? Should a different time period be used?

b. Under the proposal, asset growth rates would be determined using data adjusted for mergers and acquisitions. An institution that acquires a new institution (one less than five years old) or that acquires branches from another institution would, in effect, be treated as if its assets had grown from internal growth (since its assets four years previously would not increase, but its current assets would).

i. Should asset growth rates be determined using data adjusted for mergers and acquisitions? An argument can be made that growth from mergers and acquisitions is still growth.

ii. Should growth arising from merger with or the acquisition of or by an institution with no assets four years previously be excluded from the asset growth determination?

iii. Should growth arising from the acquisition of branches from another institution be excluded from the asset growth determination? If so, how could this be done, given that institutions do not report branch acquisitions in the Call Report or TFR?

*The Large Bank Method*

5. Under the proposal, the assessment rate for a large institution with a long-term debt issuer rating would be determined using a combination of the institution's weighted average CAMELS component rating, its long-term debt issuer ratings (converted to numbers and averaged) and the financial ratios method assessment rate, each equally weighted.

a. Should the financial ratios method be incorporated in this manner?

b. Should the weight assigned to each of the three measures be equal, as proposed, or should different weights be assigned?

*The Large Bank Adjustment*

6. Under the proposal, the maximum large bank adjustment would be increased to one basis point. Should it be increased? Should it be increased further?

*The Unsecured Debt Adjustment—*

7. Under the proposal, an institution's base assessment rate could be lowered for the unsecured debt adjustment.

a. Should there be an unsecured debt adjustment?

b. For a large institution, the unsecured debt adjustment would be determined by multiplying the institution's long-term unsecured debts as a percentage of domestic deposits by 20 basis points.

i. Is this the proper way to calculate an unsecured debt adjustment for a large institution?

ii. Should other amounts be included in the unsecured debt adjustment?

iii. Should any amounts be excluded from the adjustment?

c. Are the proposed definitions of long-term unsecured debts the right definitions or should they be changed?

i. Should a long-term senior unsecured or subordinated debt that has put options or other provisions that would allow the holder to accelerate payment (for example, if capital fell below a certain level) be excluded from the definition? (Under the proposal, it would not be.)

d. Under the proposal, for senior unsecured or subordinated debt to be considered ''long-term,'' it must have a remaining maturity of at least one year. Should this period be longer? If so, how long should it be?

e. For a small institution, the unsecured debt adjustment would factor in qualified amounts of Tier 1 capital in addition to long-term unsecured debt. The amount of qualified Tier 1 capital would be the sum of one-half of the Tier 1 capital amount between 10 percent and 15 percent of adjusted average assets (for Call Report filers) or adjusted total assets (for TFR filers) and the full amount of Tier 1 capital amount

exceeding 15 percent of adjusted average assets (for Call Report filers) or adjusted total assets (for TFR filers).

i. Should Tier 1 capital be included in the unsecured debt adjustment for a small institution?

ii. Some may be concerned that this proposal might, in effect, establish new capital standards. An alternative would be to count some portion of all Tier 1 capital above 5 percent (the minimum amount needed for an institution to be well capitalized) in the unsecured debt adjustment for small institutions. Is this alternative preferable to the proposal? If so, what portion of Tier 1 capital above 5 percent should be included in the unsecured debt adjustment?

iii. Should the definition of qualified Tier 1 capital be otherwise expanded to include larger amounts of capital or reduced to exclude more capital?

iv. Should other amounts be included in the unsecured debt adjustment?

8. Under the proposal, any decrease in base assessment rates resulting from an unsecured debt adjustment would be limited to two basis points. Is this amount sufficient to encourage a significant number of institutions to issue additional subordinated debt or senior unsecured debt? Should the maximum possible adjustment be larger or smaller?

9. Under the proposal, the unsecured debt adjustment could lower an institution's rate below the minimum initial base assessment rate for its risk category. Should this be allowed?

*The Secured Liability Adjustment*

10. Under the proposal, an institution's base assessment rates could be increased by the secured liability adjustment.

a. Should there be a secured liabilities adjustment?

b. Should the 15 percent ratio of secured liabilities to domestic deposits be increased or decreased?

c. Should any increase in assessment rates resulting from the secured liability adjustment be limited to 50 percent or should another limit or no limit apply?

*Brokered Deposit Adjustment*

11. Under the proposal, an institution in Risk Category II, III or IV would also be subject to an adjustment for brokered deposits.

a. Should a brokered deposit adjustment be made?

b. Is the manner of calculating the adjustment appropriate or should it be changed?

i. Should the threshold ratio of brokered deposits to domestic deposits be 10 percent or some higher or lower amount?

ii. Should the multiplication factor be 25 basis points or some higher or lower amount?

c. Should the adjustment be limited to 10 basis points?

*Assessment Rates*

12. Under the proposal, effective April 1, 2009, the spread between minimum and maximum initial base assessment rates in Risk Category I would increase from the current 2 basis points to an initial range of 4 basis points. Is this the appropriate spread or should it be greater or less?

13. Under the proposal, effective April 1, 2009, based upon June 30, 2008 data, the percentage of both large and small established Risk Category I institutions subject to: (a) The minimum initial base assessment rate would be set at 25 percent; and (b) the maximum initial base assessment rate would be set at 15 percent. (These percentages would change over time as institution's risk measures change.) Are these the proper percentages or should they be higher or lower?

14. Under the proposal, effective April 1, 2009, initial base assessment rates would be as set forth in Table 17 below.

TABLE 17—PROPOSED INITIAL BASE ASSESSMENT RATES

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 10 | 14 | 20 | 30 | 45 |

*Initial base rates that were not the minimum or maximum rate would vary between these rates.

Should these be the initial base assessment rates or should they be decreased or increased?

15. Under the proposal, effective April 1, 2009, after applying all possible adjustments, total base assessment rates for each risk category would be as set out in Table 18 below.

TABLE 18—RANGE OF TOTAL BASE ASSESSMENT RATES*

| | Risk category I | Risk category II | Risk category III | Risk category IV |
|---|---|---|---|---|
| Initial base assessment rate | 10—14 | 20 | 30 | 45 |
| Unsecured debt adjustment | −2–0 | −2–0 | −2–0 | −2–0 |
| Secured liability adjustment | 0–7 | 0–10 | 0–15 | 0–22.5 |
| Brokered deposit adjustment | | 0–10 | 0–10 | 0–10 |
| Total base assessment rate | 8–21.0 | 18–40.0 | 28–55.0 | 43–77.5 |

*All amounts for all risk categories are in basis points annually. Initial base rates that were not the minimum or maximum rate would vary between these rates.

a. Are these the appropriate rates or should they be decreased or increased?

b. Is the maximum assessment rates applicable to Risk Categories III and IV so high that they might cause the failure of an institution that might not otherwise fail? Should rates for Risk Categories III or IV be capped at lower amounts? If so, what should the cap(s) be?

c. Under the proposal, an institution's initial base assessment rate would be

calculated and adjustments made in the following order: First, any large bank adjustment; second, any unsecured debt adjustment; third, any secured liability adjustment; and, finally, any brokered deposit adjustment. Is this the appropriate order or should it be changed?

16. The proposed rule would continue to allow the FDIC Board to adopt actual rates that were higher or lower than total base assessment rates without the necessity of further notice-and-comment rulemaking, provided that: (1) The Board could not thereafter increase or decrease rates from one quarter to the next by more than three basis points; and (2) cumulative increases and decreases could not be more than three basis points higher or lower than the adjusted base rates without further notice-and-comment rulemaking. Should the Board the FDIC should retain this authority to make changes within prescribed limits to assessment rates, as proposed, without the necessity of additional notice-and-comment rulemaking?

*Assessment Rates for the First Quarter of 2009*

17. Should the FDIC uniformly increase current assessment rates by seven basis points for the first quarter of 2009 as proposed? Should the increase be greater or less? Should any rate increase be postponed until the second quarter of 2009 when the proposed changes to the assessment system would take effect?

*Definition of well capitalized for assessment purposes*

18. Recently, some institutions have had to write down or write off the value of stock in Fannie Mae and Freddie Mac. If an institution is adequately or undercapitalized for assessment purposes, but would be well capitalized absent such a write-down or write-off, should it be treated as well capitalized for assessment purposes? If an institution is undercapitalized for assessment purposes, but would be adequately capitalized absent such a write-down or write-off, should it be treated as adequately capitalized for assessment purposes? If so, how would the institution receive such different capital treatment? Should it have to file a request for review with the FDIC?

## XVI. Regulatory Analysis and Procedure

*A. Solicitation of Comments on Use of Plain Language*

Section 722 of the Gramm-Leach-Bliley Act, Public Law 106–102, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites your comments on how to make this proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?
- What else could the FDIC do to make the regulation easier to understand?

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires that each federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the proposal and publish the analysis for comment.[66] Certain types of rules, such as rules of particular applicability relating to rates or corporate or financial structures, or practices relating to such rates or structures, are expressly excluded from the definition of ''rule'' for purposes of the RFA.[67] The proposed rule relates directly to the rates imposed on insured depository institutions for deposit insurance, and to the risk-based assessment system components that measure risk and weigh that risk in determining each institution's assessment rate, and includes proposed technical and other changes to the FDIC's assessment regulations. Nonetheless, the FDIC is voluntarily undertaking an initial regulatory flexibility analysis of the proposal and seeking comment on it.

As of June 30, 2008, of the 8,451 insured commercial banks and savings institutions, there were 4,758 small insured depository institutions as that term is defined for purposes of the RFA (i.e., those with $165 million or less in assets).

For purposes of this analysis, whether the FDIC were to collect needed assessments under the existing rule or under the proposed rule, the total amount of assessments collected would be the same. The FDIC's total assessment needs are driven by the statutory requirement that the FDIC adopt a restoration plan that provides that the fund reserve ratio reach at least 1.15 percent within five years (absent extraordinary circumstances) and by the FDIC's aggregate insurance losses, expenses, investment income, and insured deposit growth, among other factors. In this analysis, each institution's existing rate is increased uniformly so that total FDIC assessment revenue would equal that provided under the proposed rates. Therefore, beginning April 1, 2009, the proposed rule would merely alter the distribution of assessments among insured institutions compared to the adjusted existing rates. Using the data as of June 30, 2008, the FDIC calculated the total assessments that would be collected under the base rate schedule in the proposed rule.

The economic impact of the proposal on each small institution for RFA purposes (i.e., institutions with assets of $165 million or less) was then calculated as the difference in annual assessments under the proposed rule compared to the existing rule as a percentage of the institution's annual revenue and annual profits, assuming the same total assessments collected by the FDIC from the banking industry.[68] [69] [70]

Based on the June 2008 data, of the total of 4,758 small institutions, five percent would have experienced an increase in assessments equal to five percent or more of their total revenue. These figures do not reflect a significant economic impact on revenues for a substantial number of small insured institutions. Table 19 below sets forth the results of the analysis in more detail.

[66] See 5 U.S.C. 603, 604 and 605.

[67] 5 U.S.C. 601.

[68] Throughout this regulatory flexibility analysis (unlike the rest of the notice of proposed rulemaking), a ''small institution'' refers to an institution with assets of $165 million or less.

[69] An institution's total revenue is defined as the sum of its annual net interest income and non-interest income. An institution's profit is defined as income before taxes and extraordinary items, gross of loan loss provisions.

[70] The proposed rates for the first of 2009 would not alter the present distribution of rates, but would uniformly raise the rates for all institutions, including all small institutions for RFA purposes.

TABLE 19—PROPOSED ASSESSMENTS COMPARED TO A UNIFORM INCREASE IN ASSESSMENTS AS A PERCENTAGE OF INSTITUTION TOTAL REVENUE

| Change | Number of institutions | Percent of institutions |
|---|---|---|
| More than 10 percent lower | 142 | 2.98 |
| 5 to 10 percent lower | 1,150 | 24.17 |
| 0 to 5 percent lower | 2,975 | 62.53 |
| 0 to 5 percent higher | 253 | 5.32 |
| 5 to 10 percent higher | 167 | 3.51 |
| More than 10 percent higher | 71 | 1.49 |
| Total | 4,758 | 100.00 |

The FDIC performed a similar analysis to determine the impact on profits for small institutions. Based on June 2008 data, of those small institutions with reported profits, about 6 percent would have an increase in assessments equal to 10 percent or more of their profits. Again, these figures do not reflect a significant economic impact on profits for a substantial number of small insured institutions. Table 20 sets forth the results of the analysis in more detail.

TABLE 20—PROPOSED ASSESSMENTS COMPARED TO A UNIFORM INCREASE IN ASSESSMENTS AS A PERCENTAGE OF INSTITUTION PROFITS*

| Change | Number of institutions | Percent of institutions |
|---|---|---|
| More than 30 percent lower | 496 | 13.17 |
| 20 to 30 percent lower | 471 | 12.51 |
| 10 to 20 percent lower | 1,666 | 44.25 |
| 5 to 10 percent lower | 624 | 16.57 |
| 0 to 5 percent lower | 227 | 6.03 |
| 0 to 10 percent more | 63 | 1.67 |
| Greater than 10 percent | 218 | 5.79 |
| Total | 3,765 | 100.00 |

* Institutions with negative or no profit were excluded. These institutions are shown separately in Table 21.

Table 20 excludes small institutions that either show no profit or show a loss, because a percentage cannot be calculated. The FDIC analyzed the effect of the proposal on these institutions by determining the annual assessment change (either an increase or a decrease) that would result. Table 21 below shows that just over 6 percent (61) of the 991 small insured institutions with negative or no reported profits would have an increase of $20,000 or more in their annual assessments.

TABLE 21—PROPOSED ASSESSMENTS COMPARED TO A UNIFORM INCREASE IN ASSESSMENTS FOR INSTITUTIONS WITH NEGATIVE OR NO REPORTED PROFIT

| Change in assessments | Number of institutions | Percent of institutions |
|---|---|---|
| $20,000 decrease or more | 62 | 6.26 |
| $10,000–$20,000 decrease | 100 | 10.09 |
| $5,000–$10,000 decrease | 213 | 21.49 |
| $1,000–$5,000 decrease | 349 | 35.22 |
| $0–$1,000 decrease | 63 | 6.36 |
| $0–$10,000 increase | 89 | 8.98 |
| $10,000–$20,000 increase | 54 | 5.45 |
| $20,000 increase or more | 61 | 6.16 |
| Total | 991 | 100.0 |

The proposed rule does not directly impose any ''reporting'' or ''recordkeeping'' requirements within the meaning of the Paperwork Reduction Act. The compliance requirements for the proposed rule would not exceed existing compliance requirements for the present system of FDIC deposit insurance assessments, which, in any event, are governed by separate regulations.

The FDIC is unaware of any duplicative, overlapping or conflicting federal rules.

The initial regulatory flexibility analysis set forth above demonstrates that, if adopted in final form, the proposed rule would not have a significant economic impact on a substantial number of small institutions

within the meaning of those terms as used in the RFA.[71]

Commenters are invited to provide the FDIC with any information they may have about the likely quantitative effects of the proposal on small insured depository institutions (those with $165 million or less in assets).

**XVII. Paperwork Reduction Act**

No collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) are contained in the proposed rule.

*A. 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).

**List of Subjects in 12 CFR Part 327**

Bank deposit insurance, Banks, banking, Savings associations.

For the reasons set forth in the preamble, the FDIC proposes to amend chapter III of title 12 of the Code of Federal Regulations as follows:

## PART 327—ASSESSMENTS

1. The authority citation for part 327 continues to read as follows:

**Authority:** 12 U.S.C. 1441, 1813, 1815, 1817–1819, 1821; Sec. 2101–2109, Pub. L. 109–171, 120 Stat. 9–21, and Sec. 3, Pub. L. 109–173, 119 Stat. 3605.

2. Revise § 327.3(a)(1) to read as follows:

**§ 327.3 Payment of assessments.**

(a) *Required.* (1) *In general.* Each insured depository institution shall pay to the Corporation for each assessment period an assessment determined in accordance with this part 327.

* * * * *

3. Revise § 327.6(b)(1) to read as follows:

**§ 327.6 Terminating transfers; other terminations of insurance.**

* * * * *

(b) *Assessment for quarter in which the terminating transfer occurs*—(1) *Acquirer using Average Daily Balances.* If an acquiring institution's assessment base is computed using average daily balances pursuant to § 327.5, the terminating institution's assessment for the quarter in which the terminating transfer occurs shall be reduced by the percentage of the quarter remaining after the terminating transfer and calculated at the acquiring institution's rate and using the assessment base reported in the terminating institution's report of condition for that quarter.

* * * * *

4. Revise § 327.8(g), (h), (i), (l), and (m), and add paragraphs (o), (p), (q) and (r) to read as follows:

**§ 327.8 Definitions.**

* * * * *

(g) *Small Institution.* An insured depository institution with assets of less than $10 billion as of December 31, 2006 (other than an insured branch of a foreign bank or an institution classified as large for purposes of § 327.9(d)(8)) shall be classified as a small institution. If, after December 31, 2006, an institution classified as large under paragraph (h) of this section reports assets of less than $10 billion in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as small beginning the following quarter.

(h) *Large Institution.* An institution classified as large for purposes of § 327.9(d)(8) or an insured depository institution with assets of $10 billion or more as of December 31, 2006 (other than an insured branch of a foreign bank) shall be classified as a large institution. If, after December 31, 2006, an institution classified as small under paragraph (g) of this section reports assets of $10 billion or more in its reports of condition for four consecutive quarters, the FDIC will reclassify the institution as large beginning the following quarter.

(i) *Long-Term Debt Issuer Rating.* A long-term debt issuer rating shall mean a rating of an insured depository institution's long-term debt obligations by Moody's Investor Services, Standard & Poor's, or Fitch Ratings that has not been withdrawn before the end of the quarter being assessed. A withdrawn rating shall mean one that has been withdrawn by the rating agency and not replaced with another rating by the same agency. A long-term debt issuer rating does not include a rating of a company that controls an insured depository institution, or an affiliate or subsidiary of the institution.

* * * * *

(l) *New depository institution.* A new insured depository institution is a bank or thrift that has been federally insured for less than five years as of the last day of any quarter for which it is being assessed.

(m) *Established depository institution.* An established insured depository institution is a bank or thrift that has been federally insured for at least five years as of the last day of any quarter for which it is being assessed.

(1) *Merger or consolidation involving new and established institution(s).* Subject to paragraphs (m)(2), (3), (4), (5) of this section and § 327.9(d)(10)(ii), (iii), when an established institution merges into or consolidates with a new institution, the resulting institution is a new institution unless:

(i) The assets of the established institution, as reported in its report of condition for the quarter ending immediately before the merger, exceeded the assets of the new institution, as reported in its report of condition for the quarter ending immediately before the merger; and

(ii) Substantially all of the management of the established institution continued as management of the resulting or surviving institution.

(2) *Consolidation involving established institutions.* When established institutions consolidate into a new institution, the resulting institution is an established institution.

(3) *Grandfather exception.* If a new institution merges into an established institution, and the merger agreement was entered into on or before July 11, 2006, the resulting institution shall be deemed to be an established institution for purposes of this section.

(4) *Subsidiary exception.* Subject to paragraph (m)(5) of this section, a new institution will be considered established if it is a wholly owned subsidiary of:

(i) A company that is a bank holding company under the Bank Holding Company Act of 1956 or a savings and loan holding company under the Home Owners' Loan Act, and:

(A) At least one eligible depository institution (as defined in 12 CFR 303.2(r)) that is owned by the holding company has been chartered as a bank or savings association for at least five years as of the date that the otherwise new institution was established; and

(B) The holding company has a composite rating of at least ''2'' for bank holding companies or an above average or ''A'' rating for savings and loan holding companies and at least 75 percent of its insured depository institution assets are assets of eligible depository institutions, as defined in 12 CFR 303.2(r); or

(ii) An eligible depository institution, as defined in 12 CFR 303.2(r), that has been chartered as a bank or savings association for at least five years as of

[71] 5 U.S.C. 605.

the date that the otherwise new institution was established.

(5) *Effect of credit union conversion.* In determining whether an insured depository institution is new or established, the FDIC will include any period of time that the institution was a federally insured credit union.

* * * * *

(o) *Unsecured debt*—For purposes of the unsecured debt adjustment as set forth in § 327.9(d)(5), unsecured debt shall include senior unsecured liabilities and subordinated debt.

(p) *Senior unsecured liability*—For purposes of the unsecured debt adjustment as set forth in § 327.9(d)(5), senior unsecured liabilities shall be the unsecured portion of other borrowed money as reported on reports of condition (Call Reports and Thrift Financial Reports).

(q) *Subordinated debt*—For purposes of the unsecured debt adjustment as set forth in § 327.9(d)(5), subordinated debt shall be as defined in the report of condition for the reporting period; however, subordinated debt shall also include limited-life preferred stock as defined in the report of condition for the reporting period.

(r) *Long-term unsecured debt*—For purposes of the unsecured debt adjustment as set forth in § 327.9(d)(5), long-term unsecured debt shall be unsecured debt with at least one year remaining until maturity.

5. Revise §§ 327.9 and 327.10 to read as follows:

**§ 327.9 Assessment risk categories and pricing methods.**

(a) *Risk Categories.*—Each insured depository institution shall be assigned to one of the following four Risk Categories based upon the institution's capital evaluation and supervisory evaluation as defined in this section.

(1) *Risk Category I.* All institutions in Supervisory Group A that are Well Capitalized;

(2) *Risk Category II.* All institutions in Supervisory Group A that are Adequately Capitalized, and all institutions in Supervisory Group B that are either Well Capitalized or Adequately Capitalized;

(3) *Risk Category III.* All institutions in Supervisory Groups A and B that are Undercapitalized, and all institutions in Supervisory Group C that are Well Capitalized or Adequately Capitalized; and

(4) *Risk Category IV.* All institutions in Supervisory Group C that are Undercapitalized.

(b) *Capital evaluations.* An institution will receive one of the following three capital evaluations on the basis of data reported in the institution's Consolidated Reports of Condition and Income, Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks, or Thrift Financial Report dated as of March 31 for the assessment period beginning the preceding January 1; dated as of June 30 for the assessment period beginning the preceding April 1; dated as of September 30 for the assessment period beginning the preceding July 1; and dated as of December 31 for the assessment period beginning the preceding October 1.

(1) *Well Capitalized.* (i) Except as provided in paragraph (b)(1)(ii) of this section, a Well Capitalized institution is one that satisfies each of the following capital ratio standards: Total risk-based ratio, 10.0 percent or greater; Tier 1 risk-based ratio, 6.0 percent or greater; and Tier 1 leverage ratio, 5.0 percent or greater.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Well Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 108 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (b) of this section.

(2) *Adequately Capitalized.* (i) Except as provided in paragraph (b)(2)(ii) of this section, an Adequately Capitalized institution is one that does not satisfy the standards of Well Capitalized under this paragraph but satisfies each of the following capital ratio standards: Total risk-based ratio, 8.0 percent or greater; Tier 1 risk-based ratio, 4.0 percent or greater; and Tier 1 leverage ratio, 4.0 percent or greater.

(ii) For purposes of this section, an insured branch of a foreign bank will be deemed to be Adequately Capitalized if the insured branch:

(A) Maintains the pledge of assets required under § 347.209 of this chapter; and

(B) Maintains the eligible assets prescribed under § 347.210 of this chapter at 106 percent or more of the average book value of the insured branch's third-party liabilities for the quarter ending on the report date specified in paragraph (b) of this section; and

(C) Does not meet the definition of a Well Capitalized insured branch of a foreign bank.

(3) *Undercapitalized.* An undercapitalized institution is one that does not qualify as either Well Capitalized or Adequately Capitalized under paragraphs (b)(1) and (b)(2) of this section.

(c) *Supervisory evaluations.* Each institution will be assigned to one of three Supervisory Groups based on the Corporation's consideration of supervisory evaluations provided by the institution's primary federal regulator. The supervisory evaluations include the results of examination findings by the primary federal regulator, as well as other information that the primary federal regulator determines to be relevant. In addition, the Corporation will take into consideration such other information (such as state examination findings, as appropriate) as it determines to be relevant to the institution's financial condition and the risk posed to the Deposit Insurance Fund. The three Supervisory Groups are:

(1) *Supervisory Group ''A.''* This Supervisory Group consists of financially sound institutions with only a few minor weaknesses;

(2) *Supervisory Group ''B.''* This Supervisory Group consists of institutions that demonstrate weaknesses which, if not corrected, could result in significant deterioration of the institution and increased risk of loss to the Deposit Insurance Fund; and

(3) *Supervisory Group ''C.''* This Supervisory Group consists of institutions that pose a substantial probability of loss to the Deposit Insurance Fund unless effective corrective action is taken.

(d) *Determining Initial Base Assessment Rates for Risk Category I Institutions.* Subject to paragraphs (d)(2)(i), (4), (5), (6), (8), (9) and (10) of this section, an insured depository institution in Risk Category I, except for a large institution that has at least one long-term debt issuer rating, as defined in § 327.8(i), shall have its initial base assessment rate determined using the financial ratios method set forth in paragraph (d)(1) of this section. A large insured depository institution in Risk Category I that has at least one long-term debt issuer rating shall have its initial base assessment rate determined using the large bank method set forth in paragraph (d)(2) of this section (subject to paragraphs (d)(2)(i), (4), (5), (6), (8), (9) and (10) of this section). The initial base assessment rate for a large institution whose assessment rate in the prior quarter was determined using the large bank method, but which no longer has a long-term debt issuer rating, shall

be determined using the financial ratios method.

(1) *Financial ratios method.* Under the financial ratios method for Risk Category I institutions, each of six financial ratios and a weighted average of CAMELS component ratings will be multiplied by a corresponding pricing multiplier. The sum of these products will be added to or subtracted from a uniform amount. The resulting sum shall equal the institution's initial base assessment rate; provided, however, that no institution's initial base assessment rate shall be less than the minimum initial base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum initial base assessment rate in effect for Risk Category I institutions for that quarter. An institution's initial base assessment rate, subject to adjustment pursuant to paragraphs (d)(4), (5) and (6) of this section, as appropriate (which will produce the total base assessment rate), and adjusted for the actual assessment rates set by the Board under § 327.10(c), will equal an institution's assessment rate; provided, however, that no institution's total base assessment rate will be less than the minimum total base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum total base assessment rate in effect for Risk Category I institutions for that quarter. The six financial ratios are: Tier 1 Leverage Ratio; Loans past due 30—89 days/gross assets; Nonperforming assets/gross assets; Net loan charge-offs/gross assets; Net income before taxes/risk-weighted assets; and the Adjusted brokered deposit ratio. The ratios are defined in Table A.1 of Appendix A to this subpart. The ratios will be determined for an assessment period based upon information contained in an institution's report of condition filed as of the last day of the assessment period as set out in § 327.9(b). The weighted average of CAMELS component ratings is created by multiplying each component by the following percentages and adding the products: Capital adequacy—25%, Asset quality—20%, Management—25%, Earnings—10%, Liquidity—10%, and Sensitivity to market risk—10%. Appendix A to this subpart contains the initial values of the pricing multipliers and uniform amount, describes their derivation, and explains how they will be periodically updated.

(i) *Publication and uniform amount and pricing multipliers.* The FDIC will publish notice in the **Federal Register** whenever a change is made to the uniform amount or the pricing multipliers for the financial ratios method.

(ii) *Implementation of CAMELS rating changes*—(A) *Changes between risk categories.* If, during a quarter, a CAMELS composite rating change occurs that results in an institution whose Risk Category I assessment rate is determined using the financial ratios method moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the supervisory ratings in effect before the change and the financial ratios as of the end of the quarter, subject to adjustment pursuant to paragraphs (d)(4), (5), and (6) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(c). For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (d)(5), (6) and (7), shall be determined under the assessment schedule for the appropriate Risk Category. If, during a quarter, a CAMELS composite rating change occurs that results in an institution whose initial base assessment rate is determined using the financial ratios method moving from Risk Category II, III or IV to Risk Category I, the institution's initial base assessment rate for the portion of the quarter that it was in Risk Category I shall be determined using the financial ratios method, subject to adjustment pursuant to paragraphs (d)(4), (5), and (6) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(c). For the portion of the quarter that the institution was not in Risk Category I, the institution's initial base assessment rate, which shall be subject to adjustment pursuant to paragraphs (d)(5), (6) and (7), shall be determined under the assessment schedule for the appropriate Risk Category.

*(B) Changes within Risk Category I.* If, during a quarter, an institution's CAMELS component ratings change in a way that would change the institution's initial base assessment rate within Risk Category I, the initial base assessment rate for the period before the change shall be determined under the financial ratios method using the CAMELS component ratings in effect before the change. Beginning on the date of the CAMELS component ratings change, the initial base assessment rate for the remainder of the quarter shall be determined using the CAMELS component ratings in effect after the change.

(2) *Large bank method.* A large insured depository institution in Risk Category I that has at least one long-term debt issuer rating, as defined in § 327.8(i), shall have its initial base assessment rate determined using the large bank method. The initial base assessment rate under the large bank method shall be derived from three components, each given a 33⅓ percent weight: A component derived using the financial ratios method, a component derived using long-term debt issuer ratings, and a component derived using CAMELS component ratings. An institution's initial base assessment rate using the financial ratios method will be converted from the range of initial base assessment rates to a scale of from 1 to 3 by subtracting 8 from its initial base assessment rate (expressed in basis points) and dividing the result by 2. The quotient will equal an institution's financial ratios score. Its CAMELS component ratings will be weighted to derive a weighted average CAMELS rating using the same weights applied in the financial ratios method as set forth under paragraph (d)(1) of this section. Long-term debt issuer ratings will be converted to numerical values between 1 and 3 as provided in Appendix B to this subpart and the converted values will be averaged. The financial ratios score, the weighted average CAMELS rating and the average of converted long-term debt issuer ratings each will be multiplied by 1.764 (which shall be the pricing multiplier), and the products will be summed. To this result will be added 1.651 (which shall be a uniform amount for all institutions subject to the large bank method). The resulting sum shall equal the institution's initial base assessment rate; provided, however, that no institution's initial base assessment rate shall be less than the minimum initial base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum initial base assessment rate in effect for Risk Category I institutions for that quarter. An institution's initial base assessment rate, subject to adjustment pursuant to paragraphs (d)(4), (5), and (6) of this section, as appropriate (which will produce the total base assessment rate), and adjusted for the actual assessment rates set by the Board pursuant to § 327.10(c), will equal an institution's assessment rate; provided, however, that no institution's total base assessment rate will be less than the minimum total base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the

maximum total base assessment rate in effect for Risk Category I institutions for that quarter.

(i) *Implementation of Large Bank Method Changes between Risk Categories.* If, during a quarter, a CAMELS rating change occurs that results in an institution whose Risk Category I initial base assessment rate is determined using the large bank method or an insured branch of a foreign bank moving from Risk Category I to Risk Category II, III or IV, the institution's initial base assessment rate for the portion of the quarter that it was in Risk Category I shall be determined as for any other institution in Risk Category I whose initial base assessment rate is determined using the large bank method, subject to adjustments pursuant to paragraph (d)(4), (5), and (6) of this section, as appropriate, and adjusted for the actual assessment rates set by the Board under § 327.10(c). If, during a quarter, a CAMELS rating change occurs that results in a large institution with a long-term debt issuer rating or an insured branch of a foreign bank moving from Risk Category II, III or IV to Risk Category I, the institution's assessment rate for the portion of the quarter that it was in Risk Category I shall equal the rate determined under paragraphs (d)(2) (and (d)(4), (5), and (6)) or (d)(3) (and (d)(4), (5), and (6)) of this section, as appropriate.

(ii) *Implementation of Large Bank Method Changes within Risk Category I.* If, during a quarter, an institution whose Risk Category I initial base assessment rate is determined using the large bank method remains in Risk Category I, but the financial ratios score, a CAMELS component or a long-term debt issuer rating changes that would affect the institution's initial base assessment rate, or if, during a quarter, an insured branch of a foreign bank remains in Risk Category I, but a ROCA component rating changes that would affect the institution's initial base assessment rate, separate assessment rates for the portion(s) of the quarter before and after the change(s) shall be determined under paragraphs (d)(2) (and (d)(4), (5), and (6)) or (d)(3) (and (d)(4) , (5), and (6)) of this section, as appropriate.

(3) *Assessment rate for insured branches of foreign banks*—(i) Insured branches of foreign banks in Risk Category I. Insured branches of foreign banks in Risk Category I shall be assessed using the weighted average ROCA component rating, as determined under paragraph (d)(3)(ii) of this section.

(ii) *Weighted average ROCA component rating.* The weighted average ROCA component rating shall equal the sum of the products that result from multiplying ROCA component ratings by the following percentages: Risk Management—35%, Operational Controls—25%, Compliance—25%, and Asset Quality—15%. The weighted average ROCA rating will be multiplied by 5.291 (which shall be the pricing multiplier). To this result will be added 1.651 (which shall be a uniform amount for all insured branches of foreign banks). The resulting sum—the initial base assessment rate—subject to adjustments pursuant to paragraph (d)(4) of this section and adjusted for assessment rates set by the FDIC pursuant to § 327.10(c), will equal an institution's total base assessment rate; provided, however, that no institution's total base assessment rate will be less than the minimum total base assessment rate in effect for Risk Category I institutions for that quarter nor greater than the maximum total base assessment rate in effect for Risk Category I institutions for that quarter.

(iii) No insured branch of a foreign bank in any risk category shall be subject to the unsecured debt adjustment, the secured liability adjustment, or the brokered deposit adjustment.

(4) *Adjustment for large banks or insured branches of foreign banks*—(i) *Basis for and size of adjustment.* Within Risk Category I, large institutions and insured branches of foreign banks except new institutions as provided under paragraph (d)(9)(i)(A) of this section, are subject to adjustment of their initial base assessment rate. Any such large bank adjustment shall be limited to a change in assessment rate of up to one basis point higher or lower than the rate determined using the financial ratios method, the large bank method, or the weighted average ROCA component rating method, whichever is applicable. In determining whether to make this assessment rate adjustment for a large institution or an insured branch of a foreign bank, the FDIC may consider other relevant information in addition to the factors used to derive the risk assignment under paragraphs (d)(1), (2), or (3) of this section. Relevant information includes financial performance and condition information, other market or supervisory information, potential loss severity, and stress considerations, as described in Appendix C to this subpart.

(ii) *Adjustment subject to maximum and minimum rates.* No adjustment to the initial base assessment rate for large banks shall decrease any rate so that the resulting rate would be less than the minimum initial base assessment rate, or increase any rate above the maximum initial base assessment rate in effect for the quarter.

(iii) *Prior notice of adjustments*—(A) *Prior notice of upward adjustment.* Prior to making any upward large bank adjustment to an institution's initial base assessment rate because of considerations of additional risk information, the FDIC will formally notify the institution and its primary federal regulator and provide an opportunity to respond. This notification will include the reasons for the adjustment and when the adjustment will take effect.

(B) *Prior notice of downward adjustment.* Prior to making any downward large bank adjustment to an institution's initial base assessment rate because of considerations of additional risk information, the FDIC will formally notify the institution's primary federal regulator and provide an opportunity to respond.

(iv) *Determination whether to adjust upward; effective period of adjustment.* After considering an institution's and the primary federal regulator's responses to the notice, the FDIC will determine whether the large bank adjustment to an institution's initial base assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. The FDIC will evaluate the need for the adjustment each subsequent assessment period, until it determines that an adjustment is no longer warranted. The amount of adjustment will in no event be larger than that contained in the initial notice without further notice to, and consideration of, responses from the primary federal regulator and the institution.

(v) *Determination whether to adjust downward; effective period of adjustment.* After considering the primary federal regulator's responses to the notice, the FDIC will determine whether the large bank adjustment to an institution's initial base assessment rate is warranted, taking into account any revisions to weighted average CAMELS component ratings, long-term debt issuer ratings, and financial ratios, as well as any actions taken by the institution to address the FDIC's concerns described in the notice. Any downward adjustment in an institution's assessment rate will remain in effect for subsequent assessment periods until the FDIC determines that an adjustment is no longer warranted. Downward adjustments will be made

without notification to the institution. However, the FDIC will provide advance notice to an institution and its primary federal regulator and give them an opportunity to respond before removing a downward adjustment.

(vi) *Adjustment without notice.* Notwithstanding the notice provisions set forth above, the FDIC may change an institution's initial base assessment rate without advance notice under this paragraph, if the institution's supervisory or agency ratings or the financial ratios set forth in Appendix A to this subpart deteriorate.

(5) *Unsecured debt adjustment to initial base assessment rate for all institutions.* All institutions within all risk categories, except new institutions as provided under paragraph (d)(9)(i)(C) of this section and insured branches of foreign banks as provided under paragraph (d)(3)(iii) of this section, are subject to downward adjustment of their initial base assessment rates for unsecured debt, based on the ratio of long-term unsecured debt (and, for small institutions as defined in paragraph (d)(5)(ii) of this section, specified amounts of Tier 1 capital) to domestic deposits. Any such adjustment shall be made after any adjustment under paragraph (d)(4) of this section.

(i) *Large institutions*—The unsecured debt adjustment for large institutions shall be determined by multiplying the institution's ratio of long-term unsecured debt to domestic deposits by 20 basis points.

(ii) *Small institutions*—The unsecured debt adjustment for small institutions will factor in an amount of Tier 1 capital (qualified Tier 1 capital) in addition to any long-term unsecured debt: the amount of qualified Tier 1 capital will be the sum of one-half of the amount between 10 percent and 15 percent of adjusted average assets (for institutions that file Call Reports) or adjusted total assets (for institutions that file Thrift Financial Reports) and the full amount of Tier 1 capital exceeding 15 percent of adjusted average assets (for institutions that file Call Reports) or adjusted total assets (for institutions that file Thrift Financial Reports). The ratio of the sum of qualified Tier 1 capital and long-term unsecured debt to domestic deposits will be multiplied by 20 basis points to produce the unsecured debt adjustment for small institutions.

(iii) *Limitation*—No unsecured debt adjustment for any institution shall exceed two basis points.

(iv) *Applicable reports of condition*—Ratios for any given quarter shall be calculated from reports of condition (Call Reports and Thrift Financial Reports) filed by each institution as of the last day of the quarter. Until institutions separately report long-term senior unsecured liabilities and long-term subordinated debt in their reports of condition, the FDIC will use subordinated debt included in Tier 2 capital and will not include any amount of senior unsecured liabilities in calculating the unsecured debt adjustment.

(6) *Secured liabilities adjustment for all institutions.* All institutions within all risk categories, except insured branches of foreign banks as provided under paragraph (d)(3)(iii) of this section, are subject to upward adjustment of their initial base assessment rate based upon the ratio of their secured liabilities to domestic deposits. Any such adjustment shall be made after any applicable large bank adjustment or unsecured debt adjustment.

(i) *Secured liabilities for banks*—Secured liabilities for banks include Federal Home Loan Bank advances, securities sold under repurchase agreements, secured Federal funds purchased and other borrowings that are secured as reported in banks' quarterly Call Reports.

(ii) *Secured liabilities for thrifts*—Secured liabilities for thrifts include Federal Home Loan Bank advances as reported in quarterly thrift financial reports. Secured liabilities for thrifts also include securities sold under repurchase agreements, secured Federal funds purchased or other borrowings that are secured when those items are separately reported in thrift financial reports. Until that time, any of these secured amounts not reported separately from unsecured or other liabilities in the TFR will be imputed based on simple averages for Call Report filers as of June 30, 2008. As of that date, on average, 63.0 percent of the sum of Federal funds purchased and securities sold under repurchase agreements reported by Call Report filers were secured, and 49.4 percent of other borrowings were secured.

(iii) *Calculation*—An institution's ratio of secured liabilities to domestic deposits will, if greater than 15 percent, increase its assessment rate, but any such increase shall not exceed 50 percent of its assessment rate before the secured liabilities adjustment. For an institution that has a ratio of secured liabilities (as defined in paragraph (ii) above) to domestic deposits of greater than 15 percent, the institution's initial base assessment rate (after taking into account any adjustment under paragraphs (d)(5) or (6) of this section) will be multiplied by one plus the ratio of its secured liabilities to domestic deposits minus 0.15. Ratios of secured liabilities to domestic deposits shall be calculated from the report of condition filed by each institution as of the last day of the quarter.

(7) *Brokered Deposit Adjustment for Risk Categories II, III, and IV.* All institutions in Risk Categories II, III, and IV, except insured branches of foreign banks as provided under paragraph (d)(3)(iii) of this section, shall be subject to an initial base assessment rate adjustment for brokered deposits. Any such brokered deposit adjustment shall be made after any adjustment under paragraph (d)(5) or (6). A brokered deposit is as defined in Section 29 of the Federal Deposit Insurance Act (12 U.S.C. 1831f). The adjustment under this paragraph is limited to those institutions whose ratio of brokered deposits to domestic deposits is greater than 10 percent; asset growth rates do not affect the adjustment. The adjustment is determined by multiplying the difference between an institution's ratio of brokered deposits to domestic deposits and 0.10 by 25 basis points. The maximum brokered deposit adjustment will be 10 basis points. Brokered deposit ratios for any given quarter are calculated from the reports of condition filed by each institution as of the last day of the quarter.

(8) *Request to be treated as a large institution*—(i) *Procedure.* Any institution in Risk Category I with assets of between $5 billion and $10 billion may request that the FDIC determine its initial base assessment rate as a large institution. The FDIC will grant such a request if it determines that it has sufficient information to do so. The absence of long-term debt issuer ratings alone will not preclude the FDIC from granting a request. The initial base assessment rate for an institution without a long-term debt issuer rating will be derived using the financial ratios method, but will be subject to adjustment as a large institution under paragraph (d)(4) of this section. Any such request must be made to the FDIC's Division of Insurance and Research. Any approved change will become effective within one year from the date of the request. If an institution whose request has been granted subsequently reports assets of less than $5 billion in its report of condition for four consecutive quarters, the FDIC will consider such institution to be a small institution subject to the financial ratios method.

(ii) *Time limit on subsequent request for alternate method.* An institution whose request to be assessed as a large institution is granted by the FDIC shall

not be eligible to request that it be assessed as a small institution for a period of three years from the first quarter in which its approved request to be assessed as a large bank became effective. Any request to be assessed as a small institution must be made to the FDIC's Division of Insurance and Research.

(iii) An institution that disagrees with the FDIC's determination that it is a large or small institution may request review of that determination pursuant to § 327.4(c).

(9) *New and established institutions and exceptions*—(i) *New Risk Category I institutions*—(A) *Rule as of January 1, 2010.* Effective for assessment periods beginning on or after January 1, 2010, a new institution shall be assessed the Risk Category I maximum initial base assessment rate for the relevant assessment period, except as provided in § 327.8(m)(1), (2), (3), (4), (5) and paragraphs (d)(9)(ii) and (iii) of this section. No new institution in Risk Category I shall be subject to the large bank adjustment as determined under paragraph (d)(4) of this section.

(B) *Rule prior to January 1, 2010.* Prior to January 1, 2010, a new institution's initial base assessment rate shall be determined under paragraph (d)(1) or (2) of this section, as appropriate. Prior to January 1, 2010, a Risk Category I institution that has no CAMELS component ratings shall be assessed at two basis points above the minimum initial base assessment rate applicable to Risk Category I institutions until it receives CAMELS component ratings. The initial base assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from the reports of condition that have been filed, until the institution files four reports of condition.

(C) *Applicability of adjustments to new institutions prior to and as of January 1, 2010.* No new institution in any risk category shall be subject to the unsecured debt adjustment as determined under paragraph (d)(5) of this section. All new institutions in any Risk Category shall be subject to the secured liability adjustment as determined under paragraph (d)(6) of this section. All new institutions in Risk Categories II, III, and IV shall be subject to the brokered deposit adjustment as determined under paragraph (d)(7) of this section.

(ii) *CAMELS ratings for the surviving institution in a merger or consolidation.* When an established institution merges with or consolidates into a new institution, if the FDIC determines the resulting institution to be an established institution under § 327.8(m)(1), its CAMELS ratings for assessment purposes will be based upon the established institution's ratings prior to the merger or consolidation until new ratings become available.

(iii) *Rate applicable to institutions subject to subsidiary or credit union exception.* If an institution is considered established under § 327.8(m)(4) and (5), but does not have CAMELS component ratings, it shall be assessed at two basis points above the minimum initial base assessment rate applicable to Risk Category I institutions until it receives CAMELS component ratings. The assessment rate will be determined by annualizing, where appropriate, financial ratios obtained from all reports of condition that have been filed, until it receives a long-term debt issuer rating.

(iv) *Request for review.* An institution that disagrees with the FDIC's determination that it is a new institution may request review of that determination pursuant to § 327.4(c).

(10) *Assessment rates for bridge depository institutions and conservatorships.* Institutions that are bridge depository institutions under 12 U.S.C. 1821(n) and institutions for which the Corporation has been appointed or serves as conservator shall, in all cases, be assessed at the Risk Category I minimum initial base assessment rate, which shall not be subject to adjustment under paragraphs (d)(4), (5), (6) or (7) of this section.

**§ 327.10 Assessment rate schedules.**

(a) *Assessment Rate Schedule for First Quarter of 2009 and Initial Base Assessment Rate Schedule Beginning April 1, 2009.* The annual assessment rate for an insured depository institution for the quarter beginning January 1, 2009 shall be the rate prescribed in the following schedule:

TABLE 1 TO PARAGRAPH (A)—ASSESSMENT RATE SCHEDULE FOR FIRST QUARTER OF 2009

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 12 | 14 | 17 | 35 | 50 |

The annual initial base assessment rate for an insured depository institution beginning April 1, 2009, shall be the rate prescribed in the following schedule:

TABLE 2 TO PARAGRAPH (A)—INITIAL BASE ASSESSMENT RATE SCHEDULE BEGINNING APRIL 1, 2009

| | Risk category | | | | |
|---|---|---|---|---|---|
| | I* | | II | III | IV |
| | Minimum | Maximum | | | |
| Annual Rates (in basis points) | 10 | 14 | 20 | 30 | 45 |

* Initial base rates that are not the minimum or maximum rate will vary between these rates.

(1) *Risk Category I Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for all institutions in Risk Category I shall range from 10 to 14 basis points.

(2) *Risk Category II, III, and IV Initial Base Assessment Rate Schedule.* The annual initial base assessment rates for

Risk Categories II, III, and IV shall be 20, 30, and 45 basis points, respectively.

(3) All institutions in any one risk category, other than Risk Category I, will be charged the same initial base assessment rate, subject to adjustment as appropriate.

(b) *Total Base Assessment Rate Schedule after Adjustments.* For assessment periods beginning on or after April 1, 2009, the total base assessment rates after adjustments for an insured depository institution shall be the rate prescribed in the following schedule.

TABLE 1 TO PARAGRAPH (b)—TOTAL BASE ASSESSMENT RATE SCHEDULE (AFTER ADJUSTMENTS) *

| | Risk category I | Risk category II | Risk category III | Risk category IV |
|---|---|---|---|---|
| Initial base assessment rate | 10–14 | 20 | 30 | 45 |
| Unsecured debt adjustment | −2–0 | −2–0 | −2–0 | −2–0 |
| Secured liability adjustment | 0–7 | 0–10 | 0–15 | 0–22.5 |
| Brokered deposit adjustment | | 0–10 | 0–10 | 0–10 |
| Total base assessment rate | 8–21.0 | 18–40.0 | 28–55.0 | 43–77.5 |

* All amounts for all risk categories are in basis points annually. Total base rates that are not the minimum or maximum rate will vary between these rates.

(1) *Risk Category I Total Base Assessment Rate Schedule.* The annual total base assessment rates for all institutions in Risk Category I shall range from 8 to 21 basis points.

(2) *Risk Category II Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category II shall range from 18 to 40 basis points.

(3) *Risk Category III Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category III shall range from 28 to 55 basis points.

(4) *Risk Category IV Total Base Assessment Rate Schedule.* The annual total base assessment rates for Risk Category IV shall range from 43 to 77.5 basis points.

(c) *Total Base Assessment Rate Schedule adjustments and procedures*—(1) *Board Rate Adjustments.* The Board may increase or decrease the total base assessment rate schedule up to a maximum increase of 3 basis points or a fraction thereof or a maximum decrease of 3 basis points or a fraction thereof (after aggregating increases and decreases), as the Board deems necessary. Any such adjustment shall apply uniformly to each rate in the total base assessment rate schedule. In no case may such Board rate adjustments result in a total base assessment rate that is mathematically less than zero or in a total base assessment rate schedule that, at any time, is more than 3 basis points above or below the total base assessment schedule for the Deposit Insurance Fund, nor may any one such Board adjustment constitute an increase or decrease of more than 3 basis points.

(2) *Amount of revenue.* In setting assessment rates, the Board shall take into consideration the following:

(i) Estimated operating expenses of the Deposit Insurance Fund;

(ii) Case resolution expenditures and income of the Deposit Insurance Fund;

(iii) The projected effects of assessments on the capital and earnings of the institutions paying assessments to the Deposit Insurance Fund;

(iv) The risk factors and other factors taken into account pursuant to 12 U.S.C. 1817(b)(1); and

(v) Any other factors the Board may deem appropriate.

(3) *Adjustment procedure.* Any adjustment adopted by the Board pursuant to this paragraph will be adopted by rulemaking, except that the Corporation may set assessment rates as necessary to manage the reserve ratio, within set parameters not exceeding cumulatively 3 basis points, pursuant to paragraph (c)(1) of this section, without further rulemaking.

(4) *Announcement.* The Board shall announce the assessment schedules and the amount and basis for any adjustment thereto not later than 30 days before the quarterly certified statement invoice date specified in § 327.3(b) of this part for the first assessment period for which the adjustment shall be effective. Once set, rates will remain in effect until changed by the Board.

6. Revise Appendices A, B, and C to Subpart A of Part 327 to read as follows:

## Appendix A to Subpart A

### Method To Derive Pricing Multipliers and Uniform Amount

### I. Introduction

The uniform amount and pricing multipliers are derived from:

- A model (the Statistical Model) that estimates the probability that a Risk Category I institution will be downgraded to a composite CAMELS rating of 3 or worse within one year;
- Minimum and maximum downgrade probability cutoff values, based on data from June 30, 2008, that will determine which small institutions will be charged the minimum and maximum initial base assessment rates applicable to Risk Category I;
- The minimum initial base assessment rate for Risk Category I, equal to 10 basis points, and
- The maximum initial base assessment rate for Risk Category I, which is four basis points higher than the minimum rate.

### II. The Statistical Model

The Statistical Model is defined in equations 1 and 3 below.

*Equation 1*

$$\text{Downgrade}(0,1)_{i,t} = \beta_0 + \beta_1 \left(\text{Tier 1 Leverage Ratio}_T\right) + \beta_2 \left(\text{Loans past due 30 to 89 days ratio}_{i,t}\right) + \beta_3 \left(\text{Nonperforming asset ratio}_{i,t}\right) + \beta_4 \left(\text{Net loan charge-off ratio}_{i,t}\right) + \beta_5 \left(\text{Net income before taxes ratio}_{i,t}\right) + \beta_6 \left(\text{Adjusted brokered deposit ratio}_{i,t}\right) + \beta_7 \left(\text{Weighted average CAMELS component rating}_{i,t}\right)$$

where Downgrade$(0,1)_{i,t}$ (the dependent variable—the event being explained) is the incidence of downgrade from a composite rating of 1 or 2 to a rating of 3 or worse during an on-site examination for an institution i between 3 and 12 months after time t. Time t is the end of a year within the multi-year period over which the model was estimated (as explained below). The dependent variable takes a value of 1 if a downgrade occurs and 0 if it does not.

The explanatory variables (regressors) in the model are six financial ratios and a weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings. The six financial ratios included in the model are:

- Tier 1 leverage ratio
- Loans past due 30–89 days/Gross assets
- Nonperforming assets/Gross assets
- Net loan charge-offs/Gross assets
- Net income before taxes/Risk-weighted assets
- Brokered deposits/domestic deposits above the 10 percent threshold, adjusted for the asset growth rate factor

Table A.1 defines these six ratios along with the weighted average of CAMELS component ratings. The adjusted brokered deposit ratio ($B_{i,T}$) is calculated by multiplying the ratio of brokered deposits to domestic deposits above the 10 percent threshold by an assets growth rate factor that ranges from 0 to 1 as shown in Equation 2 below. The assets growth rate factor ($A_{i,T}$) is calculated by subtracting 0.2 from the four-year cumulative asset growth rate (expressed as a number rather than as a percentage), adjusted for mergers and acquisitions, and multiplying the remainder by 5. The factor cannot be less than 0 or greater than 1.

*Equation 2*

$$B_{i,T} = \left( \frac{Brokered\ Deposits_{i,T}}{Domestic\ Deposits_{i,T}} - 0.10 \right) * A_{i,T}$$

$$\text{where } A_{i,T} = \left[ \left( \frac{Assets_{i,T} - Assets_{i,T-4}}{Assets_{i,T-4}} - 0.2 \right) * 5 \right], \text{ subject to } 0 \le A_{i,T} \le 1 \text{ and } B_{i,T} \ge 0.$$

The component rating for sensitivity to market risk (the ''S'' rating) is not available for years prior to 1997. As a result, and as described in Table A.1, the Statistical Model is estimated using a weighted average of five component ratings excluding the ''S'' component. In addition, delinquency and non-accrual data on government guaranteed loans are not available before 1993 for Call Report filers and before the third quarter of 2005 for TFR filers. As a result, and as also described in Table A.1, the Statistical Model is estimated without deducting delinquent or past-due government guaranteed loans from either the loans past due 30–89 days to gross assets ratio or the nonperforming assets to gross assets ratio.

TABLE A.1—DEFINITIONS OF REGRESSORS

| Regressor | Description |
|---|---|
| Tier 1 Leverage Ratio (%) ..... | Tier 1 capital for Prompt Corrective Action (PCA) divided by adjusted average assets based on the definition for prompt corrective action. |
| Loans Past Due 30–89 Days/Gross Assets (%). | Total loans and lease financing receivables past due 30 through 89 days and still accruing interest divided by gross assets (gross assets equal total assets plus allowance for loan and lease financing receivable losses and allocated transfer risk). |
| Nonperforming Assets/Gross Assets (%). | Sum of total loans and lease financing receivables past due 90 or more days and still accruing interest, total nonaccrual loans and lease financing receivables, and other real estate owned divided by gross assets. |
| Net Loan Charge-Offs/Gross Assets (%). | Total charged-off loans and lease financing receivables debited to the allowance for loan and lease losses less total recoveries credited to the allowance to loan and lease losses for the most recent twelve months divided by gross assets. |
| Net Income before Taxes/Risk-Weighted Assets (%). | Income before income taxes and extraordinary items and other adjustments for the most recent twelve months divided by risk-weighted assets. |

TABLE A.1—DEFINITIONS OF REGRESSORS—Continued

| Regressor | Description |
|---|---|
| Adjusted Brokered Deposits/Domestic Deposits (%). | Brokered deposits divided by domestic deposits less 0.10 multiplied by the asset growth rate factor (four year cumulative asset growth rate (expressed as a number rather than as a percentage) divided by 5 less one). |
| Weighted Average of C, A, M, E and L Component Ratings. | The weighted sum of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' CAMELS components, with weights of 28 percent each for the ''C'' and ''M'' components, 22 percent for the ''A'' component, and 11 percent each for the ''E'' and ''L'' components. (For the regression, the ''S'' component is omitted.) |

The financial variable regressors used to estimate the downgrade probabilities are obtained from quarterly reports of condition (Reports of Condition and Income and Thrift Financial Reports). The weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings regressor is based on component ratings obtained from the most recent bank examination conducted within 24 months before the date of the report of condition.

The Statistical Model uses ordinary least squares (OLS) regression to estimate downgrade probabilities. The model is estimated with data from a multi-year period (as explained below) for all institutions in Risk Category I, except for institutions established within five years before the date of the report of condition.

The OLS regression estimates coefficients, $\beta_j$ for a given regressor j and a constant amount, $\beta_0$, as specified in equation 1. As shown in equation 3 below, these coefficients are multiplied by values of risk measures at time T, which is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed. The sum of the products is then added to the constant amount to produce an estimated probability, $d_{iT}$, that an institution will be downgraded to 3 or worse within 3 to 12 months from time T.

The risk measures are financial ratios as defined in Table A.1, except that the loans past due 30 to 89 days ratio and the nonperforming asset ratio are adjusted to exclude the maximum amount recoverable from the U.S. Government, its agencies or government-sponsored agencies, under guarantee or insurance provisions. Also, the weighted sum of six CAMELS component ratings is used, with weights of 25 percent each for the ''C'' and ''M'' components, 20 percent for the ''A'' component, and 10 percent each for the ''E,'' ''L,'' and ''S'' components.

*Equation 3*

$$\begin{aligned}\text{Downgrade}(0,1)_{iT} = {} & \beta_0 + \beta_1\left(\text{Tier 1 Leverage Ratio}_{iT}\right) + \\ & \beta_2\left(\text{Loans past due 30 to 89 days ratio}_{iT}\right) + \\ & \beta_3\left(\text{Nonperforming asset ratio}_{iT}\right) + \\ & \beta_4\left(\text{Net loan charge-off ratio}_{iT}\right) + \\ & \beta_5\left(\text{Net income before taxes ratio}_{iT}\right) + \\ & \beta_6\left(\text{Adjusted brokered deposit ratio}_{iT}\right) + \\ & \beta_7\left(\text{Weighted average CAMELS component rating}_{iT}\right)\end{aligned}$$

**III. Minimum and Maximum Downgrade Probability Cutoff Values**

The pricing multipliers are also determined by minimum and maximum downgrade probability cutoff values, which will be computed as follows:

- The minimum downgrade probability cutoff value will be the maximum downgrade probability among the twenty-five percent of all small insured institutions in Risk Category I (excluding new institutions) with the lowest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2008.[72] [73] The minimum downgrade probability cutoff value is approximately 2 percent.
- The maximum downgrade probability cutoff value will be the minimum downgrade probability among the fifteen percent of all small insured institutions in Risk Category I (excluding new institutions) with the highest estimated downgrade probabilities, computed using values of the risk measures as of June 30, 2008. The maximum downgrade probability cutoff value is approximately 15 percent.

**IV. Derivation of Uniform Amount and Pricing Multipliers**

The uniform amount and pricing multipliers used to compute the annual base assessment rate in basis points, $P_{iT}$, for any such institution i at a given time T will be determined from the Statistical Model, the minimum and maximum downgrade probability cutoff values, and minimum and maximum initial base assessment rates in Risk Category I as follows:

*Equation 4*

$$P_{iT} = \alpha_0 + \alpha_1 * d_{iT} \text{ subject to } Min \le P_{iT} \le Min + 4$$

[72] As used in this context, a ''new institution'' means an institution that has been chartered as a bank or thrift for less than five years.

[73] For purposes of calculating the minimum and maximum downgrade probability cutoff values, institutions that have less than $100,000 in domestic deposits are assumed to have no brokered deposits.

where $\alpha_0$ and $\alpha_1$ are a constant term and a scale factor used to convert $d_{iT}$ (the estimated downgrade probability for institution i at a given time T from the Statistical Model) to an assessment rate, respectively, and *Min* is the minimum initial base assessment rate expressed in basis points. ( $P_{iT}$ is expressed as an annual rate, but the actual rate applied in any quarter will be $P_{iT}/4$.) The maximum initial base assessment rate is 4 basis points above the minimum (*Min* + 4)

Solving equation 4 for minimum and maximum initial base assessment rates simultaneously,

*Equation 5*

$$\alpha_0 = Min - \frac{4 * 0.0181}{(0.1505 - 0.0181)} = Min - 0.547$$

and *Equation 6*

$$\alpha_1 = \frac{4}{(0.1505 - 0.0181)} = 30.211$$

Substituting equations 3, 5 and 6 into equation 4 produces an annual initial base assessment rate for institution i at time T, $P_{iT}$, in terms of the uniform amount, the pricing multipliers and the ratios and weighted average CAMELS component rating referred to in 12 CFR 327.9(d)(2)(i):

*Equation* 7

$$\begin{aligned} P_{iT} = {} & \left[(\text{Min} - 0.547) + 30.211 * \beta_0\right] + 30.211 * \left[\beta_1 \left(\text{Tier 1 Leverage Ratio}_T\right)\right] + \\ & 30.211 * \left[\beta_2 \left(\text{Loans past due 30 to 89 days ratio}_T\right)\right] + \\ & 30.211 * \left[\beta_3 \left(\text{Nonperforming asset ratio}_T\right)\right] + \\ & 30.211 * \left[\beta_4 \left(\text{Net loan charge-off ratio}_T\right)\right] + \\ & 30.211 * \left[\beta_5 \left(\text{Net income before taxes ratio}_T\right)\right] + \\ & 30.211 * \left[\beta_6 \left(\text{Weighted average CAMELS component rating}_T\right)\right] + \\ & 30.211 * \left[\beta_7 \left(\text{Brokered Deposit-AssetGrowth Interaction Term}_T\right)\right] \end{aligned}$$

again subject to $\text{Min} \leq P_{iT} \leq \text{Min} + 4$

where $(\text{Min} - 0.547) + 30.211 * \beta_0$ equals the uniform amount, $30.211 * \beta$ is a pricing multiplier for the associated risk measure j, and T is the date of the report of condition corresponding to the end of the quarter for which the assessment rate is computed.

**V. Updating the Statistical Model, Uniform Amount, and Pricing Multipliers**

The initial Statistical Model is estimated using year-end financial ratios and the weighted average of the ''C,'' ''A,'' ''M,'' ''E'' and ''L'' component ratings over the 1988 to 2006 period and downgrade data from the 1989 to 2007 period. The FDIC may, from time to time, but no more frequently than annually, re-estimate the Statistical Model with updated data and publish a new formula for determining initial base assessment rates—Equation 7—based on updated uniform amounts and pricing multipliers. However, the minimum and maximum downgrade probability cutoff values will not change without additional notice-and-comment rulemaking. The period covered by the analysis will be lengthened by one year each year; however, from time to time, the FDIC may drop some earlier years from its analysis.

**Appendix B to Subpart A**

NUMERICAL CONVERSION OF LONG-TERM DEBT ISSUER RATINGS

| Current long-term debt issuer rating | Converted value |
|---|---|
| Standard & Poor's: | |
| AAA | 1.00 |
| AA+ | 1.05 |
| AA | 1.15 |
| AA− | 1.30 |
| A+ | 1.50 |
| A | 1.80 |
| A− | 2.20 |
| BBB+ | 2.70 |
| BBB or worse | 3.00 |
| Moody's: | |
| Aaa | 1.00 |
| Aa[1] | 1.05 |
| Aa[2] | 1.15 |
| Aa[3] | 1.30 |
| A1 | 1.50 |
| A2 | 1.80 |
| A3 | 2.20 |
| Baa[1] | 2.70 |
| Baa[2] or worse | 3.00 |
| Fitch's: | |
| AAA | 1.00 |
| AA+ | 1.05 |
| AA | 1.15 |
| AA− | 1.30 |
| A+ | 1.50 |
| A | 1.80 |
| A− | 2.20 |
| BBB+ | 2.70 |
| BBB or worse | 3.00 |

**Appendix C to Subpart A**

ADDITIONAL RISK CONSIDERATIONS FOR LARGE RISK CATEGORY I INSTITUTIONS

| Information Source | Examples of associated risk indicators or information |
|---|---|
| Financial Performance and Condition Information. | Capital Measures (Level and Trend).<br>• Regulatory capital ratios.<br>• Capital composition.<br>• Dividend payout ratios.<br>• Internal capital growth rates relative to asset growth.<br>Profitability Measures (Level and Trend).<br>• Return on assets and return on risk-adjusted assets.<br>• Net interest margins, funding costs and volumes, earning asset yields and volumes.<br>• Noninterest revenue sources.<br>• Operating expenses.<br>• Loan loss provisions relative to problem loans.<br>• Historical volatility of various earnings sources.<br>Asset Quality Measures (Level and Trend).<br>• Loan and securities portfolio composition and volume of higher risk lending activities (e.g., sub-prime lending).<br>• Loan performance measures (past due, nonaccrual, classified and criticized, and renegotiated loans) and portfolio characteristics such as internal loan rating and credit score distributions, internal estimates of default, internal estimates of loss given default, and internal estimates of exposures in the event of default.<br>• Loan loss reserve trends.<br>• Loan growth and underwriting trends.<br>• Off-balance sheet credit exposure measures (unfunded loan commitments, securitization activities, counterparty derivatives exposures) and hedging activities.<br>Liquidity and Funding Measures (Level and Trend).<br>• Composition of deposit and non-deposit funding sources.<br>• Liquid resources relative to short-term obligations, undisbursed credit lines, and contingent liabilities. |
| Market Information | Interest Rate Risk and Market Risk (Level and Trend).<br>• Maturity and repricing information on assets and liabilities, interest rate risk analyses.<br>• Trading book composition and Value-at-Risk information.<br>• Subordinated debt spreads.<br>• Credit default swap spreads.<br>• Parent's debt issuer ratings and equity price volatility.<br>• Market-based measures of default probabilities.<br>• Rating agency watch lists.<br>• Market analyst reports. |
| **Information Source** | **Examples of associated risk indicators or information** |
| Stress Considerations | Ability to Withstand Stress Conditions.<br>• Internal analyses of portfolio composition and risk concentrations, and vulnerabilities to changing economic and financial conditions.<br>• Stress scenario development and analyses.<br>• Results of stress tests or scenario analyses that show the degree of vulnerability to adverse economic, industry, market, and liquidity events. Examples include:<br>i. An evaluation of credit portfolio performance under varying stress scenarios.<br>ii. An evaluation of non-credit business performance under varying stress scenarios.<br>iii. An analysis of the ability of earnings and capital to absorb losses stemming from unanticipated adverse events.<br>• Contingency or emergency funding strategies and analyses.<br>• Capital adequacy assessments.<br>Loss Severity Indicators. |

ADDITIONAL RISK CONSIDERATIONS FOR LARGE RISK CATEGORY I INSTITUTIONS—Continued

| Information Source | Examples of associated risk indicators or information |
|---|---|
| | • Nature of and breadth of an institution's primary business lines and the degree of variability in valuations for firms with similar business lines or similar portfolios.<br>• Ability to identify and describe discreet business units within the banking legal entity.<br>• Funding structure considerations relating to the order of claims in the event of liquidation (including the extent of subordinated claims and priority claims).<br>• Extent of insured institutions assets held in foreign units.<br>• Degree of reliance on affiliates and outsourcing for material mission-critical services, such as management information systems or loan servicing, and products.<br>• Availability of sufficient information, such as information on insured deposits and qualified financial contracts, to resolve an institution in an orderly and cost-efficient manner. |

Dated at Washington, DC, this 7th day of October, 2008.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Valerie Best,**

*Assistant Executive Secretary.*

## Appendix 1

### Uniform Amount and Pricing Multipliers for Large Risk Category I Institutions Where Long-Term Debt Issuer Ratings Are Available

The uniform amount and pricing multipliers for large Risk Category I institutions with long-term debt issuer ratings were derived from:

- The average long-term debt issuer rating, converted into a numeric value (the long-term debt score) ranging from 1 to 3;
- The weighted average CAMELS rating, as defined in Appendix A;
- The assessment rate calculated using the financial ratios method described in Appendix A, converted to a value ranging from 1 to 3 (the financial ratios score);
- Minimum and maximum cutoff values for an institution's score (the average of the long-term debt score, weighted average CAMELS rating and financial ratios score), based on data from June 30, 2008, which was used to determine the proportion of large banks charged the minimum and maximum initial base assessment rates applicable to Risk Category I; and
- Minimum and maximum initial base assessment rates for Risk Category I

The financial ratios assessment rate ($A_f$) calculated using the pricing multipliers and uniform amount described in Appendix A was converted to a financial ratios score ($S_f$), with a value ranging from 1 to 3 as shown in Equation 1:

Equation 1

$$S_f = \left(A_f - 8\right) * 0.5$$

Each institution's score ($S_i$) was calculated by dividing its weighted average CAMELS rating ($S_w$), long-term issuer score ($S_d$) and financial ratios score ($S_f$) by 1/3 each, and summing the resulting values as shown in Equation 2:

Equation 2

$$S_i = (1/3) * S_{w,i} + (1/3) * S_{d,i} + (1/3) * S_{f,i}$$

The pricing multipliers were determined by minimum and maximum score cutoff values, which were computed as follows:

- The minimum score cutoff value is the maximum score among the twenty-five percent of all large insured institutions in Risk Category I (excluding new institutions) with the lowest scores, computed as of June 30, 2008.[74] The minimum score cut-off value is 1.578.
- The maximum score cutoff value is the minimum score among the fifteen percent of all large insured institutions in Risk Category I (excluding new institutions) with the highest scores, computed as of June 30, 2008. The maximum score cut-off value is 2.334.

The uniform amount and pricing multipliers used to compute the annual base assessment rate in basis points, $P_{iT}$, for a large institution *i* (with a long-term debt rating) at a given time T were determined based on the minimum and maximum score cut-off values, and the minimum and maximum initial base assessment rates in Risk Category I as follows:

Equation 3

$$P_{i,T} = \alpha_0 + \alpha_1 * S_{i,T} \text{ subject to } Min \le P_{i,T} \le Min + 4$$

where $\alpha_0$ and $\alpha_1$ are, respectively, a constant term and a scale factor used to convert $_{i,T}$ (an institution's score at time T) to an assessment rate, and *Min* is the minimum initial base assessment rate expressed in basis points. (Under the proposal, the minimum initial base assessment rate is 10 basis points, so *Min* equals 10.)

Substituting minimum and maximum score cutoff values (1.578 and 2.334, respectively) for $S_{i,T}$ and minimum and maximum initial base assessment rates (*Min* and *Min* + 4, respectively) for $P_{i,T}$ in equation 3 produces equations 4 and 5 below.

Equation 4

$$Min = \alpha_0 + \alpha_1 * 1.578$$

Equation 5

$$Min + 4 = \alpha_0 + \alpha_1 * 2.334$$

Solving both equations simultaneously results in:

Equation 6

$$\alpha_0 = Min - \frac{4 * 1.578}{(2.334 - 1.578)} = Min - 8.349$$

Equation 7

$$\alpha_1 = \frac{4}{(2.334 - 1.578)} = 5.291$$

[74] As used in this context, a ''new institution'' means an institution that has been chartered as a bank or thrift for less than five years.

Substituting equations 6 and 7 into equation 2 produces the following equation for $P_{iT}$

Equation 8

$$P_{i,T} = (Min - 8.349) + 5.291 * \left\lfloor (1/3) * S_{w,iT} + (1/3) * S_{d,iT} + (1/3) * S_{f,iT} \right\rfloor$$
$$= (Min - 8.349) + 1.764 * S_{w,iT} + 1.764 * S_{d,iT} + 1.764 * S_{f,iT}$$

where *Min* − 8.349 is the uniform amount and 1.764 is a pricing multiplier. Since *Min* equals 10 under the proposal, the uniform amount equals 1.651.

## Appendix 2

### Unsecured Debt Adjustment for a Small Institution

The unsecured debt adjustment for a small institution would be calculated based on the sum of the institution's long-term senior unsecured debt, long-term subordinated debt and qualified Tier 1 capital as a percentage of total domestic deposits.

Qualified Tier 1 capital depends on the institution's Tier 1 capital and adjusted average or total assets and would be calculated in one of two ways. If the institution's Tier 1 leverage ratio were greater than 15 percent, qualified Tier 1 capital would be calculated as:

*Equation 1*

$$Q_i = C_i - \left(G_i * 0.125\right), \text{ subject to } Q_i > 0$$

where Q is qualified Tier 1 capital, C is total Tier 1 capital and G is the adjusted average or total assets for an institution *i*. If the institution's Tier 1 leverage ratio were greater than 10 percent but less than 15 percent, then qualified Tier 1 capital would be calculated as:

*Equation 2*

$$Q_i = 0.5 * \left[C_i - \left(G_i * 0.10\right)\right], \text{ subject to } Q_i > 0$$

The unsecured debt adjustment would then be calculated as:

*Equation 3*

$$Adj_i = \left(\frac{U_i + S_i + Q_i}{D_i}\right) * 20\ basis\ points, \text{ subject to } Adj_i \le 2\ basis\ points$$

where Adj is the unsecured debt adjustment, U is long-term unsecured senior debt, S is long-term subordinated debt and D is domestic deposits for institution *i*.

## Appendix 3

### Analysis of the Projected Effects of the Payment of Assessments on the Capital and Earnings of Insured Depository Institutions

*I. Introduction*

This analysis estimates the effect in 2009 of proposed deposit insurance assessments on the equity capital and profitability of all insured institutions, assuming that the Board adopts the proposed rule.[75] The analysis assumes that each institution's pre-tax, pre-assessment income in 2009 is equivalent to the amount reported over the four quarters ending in June 2008. Each institution's rate under the proposed rate schedule is based on data as of June 30, 2008.[76] In addition, the projected use of one-time credits authorized under the Reform Act is taken into consideration in determining the effective assessment for an institution.

*II. Analysis of the Projected Effects on Capital and Earnings*

While deposit insurance assessment rates generally will result in reduced institution profitability and capitalization compared to the absence of assessments, the reduction will not necessarily equal the full amount of the assessment. Two factors can mitigate the effect of assessments on institutions' profits and capital. First, a portion of the assessment may be transferred to customers in the form of higher borrowing rates, increased service fees and lower deposit interest rates. Since information is not readily available on the extent to which institutions are able to share assessment costs with their customers, however, this analysis assumes that institutions bear the full after-tax cost of the assessment. Second, deposit insurance assessments are a tax-deductible operating expense; therefore, the assessment expense can lower taxable income. This analysis considers the effective after-tax cost of assessments in calculating the effect on capital.[77]

An institution's earnings retention and dividend policies also influence the extent to which assessments affect equity levels. If an institution maintains the same dollar amount of dividends when it pays a deposit insurance assessment as when it does not, equity (retained earnings) will be less by the full amount of the after-tax cost of the assessment. This analysis instead assumes that an institution will maintain its dividend

[75] Beginning April 1, 2009, initial minimum base assessment rates would range from 10 to 45 basis points under the proposal. After adjustments to the base rates, total base rates would range from 8 to 77.5 basis points. For the first quarter of 2009, assessment rates would range from 12 to 50 basis points.

[76] For purposes of this analysis, the assessment base (like income) is not assumed to increase, but is assumed to remain at June 2008 levels. All income statement items used in this analysis were adjusted for the effect of mergers. Institutions for which four quarters of earnings data were unavailable, including insured branches of foreign banks, were excluded from this analysis.

[77] The analysis does not incorporate any tax effects from an operating loss carry forward or carry back.

rate (that is, dividends as a fraction of net income) unchanged from the weighted average rate reported over the four quarters ending June 30, 2008. In the event that the ratio of equity to assets falls below 4 percent, however, this assumption is modified such that an institution retains the amount necessary to achieve a 4 percent minimum and distributes any remaining funds according to the dividend payout rate.

The equity capital of insured institutions as of June 30, 2008 was $1.35 trillion.[78] Based on the assumptions for earnings described above, year-end 2009 equity capital is projected to equal $1.373 trillion if the recommended assessment rates are adopted. In the absence of an assessment, total equity would be an estimated $5 billion higher. Alternatively, total equity would be an estimated $2 billion higher if current rates remained in effect.

Table A.1 shows the distribution of the effects of assessments (net of credits) on 2009 equity capital levels across the banking industry compared to no assessments. On an industry weighted average basis, projected total assessments in 2009 would result in capital that is 0.3 percent less than in the absence of assessments. Table A.2 shows the distribution of the effects of the proposed increase in assessments on 2009 equity capital levels across the banking industry. On an industry weighted average basis, the projected increases in assessments in 2009 would result in capital that is 0.1 percent less than if current assessment rates remained in effect.

The analysis indicates that assessments would cause 6 institutions whose equity-to-assets ratio would have exceeded 4 percent in the absence of assessments to fall below that percentage and 5 institutions to have below 2 percent equity-to-assets that otherwise would not have. Alternatively, compared to current assessments, the proposed increase in assessments would cause 3 institutions whose equity-to-assets ratio would otherwise have exceeded 4 percent to fall below that threshold and 1 institution to fall below 2 percent equity-to-assets.

TABLE A.1—PERCENTAGE REDUCTION IN EQUITY CAPTAL DUE TO ASSESSMENTS

[$ in billions]

| Reduction in capital (percent) | Number of institutions | Percent of institutions (percent) | Total assets | Percent of assets |
|---|---|---|---|---|
| 0.0–0.1 | 785 | 9 | 2,527 | 19 |
| 0.1–0.2 | 835 | 10 | 1,191 | 9 |
| 0.2–0.3 | 914 | 11 | 1,253 | 9 |
| 0.3–0.4 | 928 | 11 | 4,617 | 35 |
| 0.4–0.5 | 896 | 11 | 620 | 5 |
| 0.5–1.0 | 2,770 | 33 | 1,573 | 12 |
| >1.0 | 1,210 | 15 | 1,515 | 11 |
| Total | 8,338 | 100 | 13,296 | 100 |

TABLE A.2—PERCENTAGE REDUCTION IN EQUITY CAPITAL DUE TO PROPOSED INCREASES IN ASSESSMENTS

[$ in billions]

| Reduction in capital (percent) | Number of institutions | Percent of institutions (percent) | Total assets | Percent of assets (percent) |
|---|---|---|---|---|
| 0.0–0.1 | 1,893 | 23 | 4,348 | 33 |
| 0.1–0.2 | 2,427 | 29 | 5,662 | 43 |
| 0.2–0.3 | 1,940 | 23 | 995 | 7 |
| 0.3–0.4 | 956 | 11 | 954 | 7 |
| 0.4–0.5 | 444 | 5 | 580 | 4 |
| 0.5–1.0 | 547 | 7 | 436 | 3 |
| > 1.0 | 131 | 2 | 322 | 2 |
| Total | 8,338 | 100 | 13,296 | 100 |

11 insured branches of foreign banks and 113 institutions having less than 4 quarters of reported earnings were excluded from this analysis. Equity capital referred to in this analysis is the same as defined under Generally Accepted Accounting Principles.

The effect of assessments on institution income is measured by deposit insurance assessments as a percent of income before assessments, taxes, and extraordinary items (hereafter referred to as ''income''). This income measure is used in order to eliminate the potentially transitory effects of extraordinary items and taxes on profitability. Table A.3 shows that, under the proposed rate schedule, approximately 56 percent of profitable institutions are projected to owe assessments that are less than 8 percent of income in 2009. The median projected reduction in income for profitable institutions under the recommended rates is 7.3 percent, while the weighted average reduction for the same institutions is 4.4 percent. For the industry as a whole (including profitable and unprofitable institutions), assessments in 2009 would reduce income by 11 percent.

Table A.4 shows that the proposed increase in assessments from current levels exceeds 5 percent of income in 2009 for approximately 33 percent of profitable institutions. The median projected reduction in income for profitable institutions from the proposed increase in rates under the proposal is 3.6 percent, while the weighted average reduction for the same institutions is 2.2 percent. For the industry as a whole (including profitable and unprofitable institutions), the increase in assessments in 2009 would reduce income by 5.6 percent compared to current rates.

[78] This excludes equity for those mentioned in the note to Tables A.1 and A.2.

TABLE A.3—ASSESSMENTS AS A PERCENT OF INCOME FOR PROFITABLE INSTITUTIONS

[$ in billions]

| Assessments as pct. of income | Number of profitable institutions | Percent of institutions (percent) | Assets of profitable institutions | Percent of assets (percent) |
|---|---|---|---|---|
| 0.0–4.0 | 1,036 | 15 | 4,021 | 42 |
| 4.0–6.0 | 1,618 | 23 | 1,293 | 13 |
| 6.0–8.0 | 1,303 | 18 | 2,367 | 25 |
| 8.0–10.0 | 768 | 11 | 336 | 3 |
| 10.0–12.0 | 475 | 7 | 396 | 4 |
| 12.0–15.0 | 497 | 7 | 311 | 3 |
| 15.0–20.0 | 428 | 6 | 274 | 3 |
| > 20.0 | 1,001 | 14 | 621 | 6 |
| Total | 7,126 | 100 | 9,618 | 100 |

TABLE A.4—PROPOSED INCREASES IN ASSESSMENTS AS A PERCENT OF INCOME FOR PROFITABLE INSTITUTIONS

[$ in billions]

| Assessments as pct. of income | Number of profitable institutions | Percent of institutions (percent) | Assets of profitable institutions | Percent of assets (percent) |
|---|---|---|---|---|
| 0.0–0.5 | 126 | 2 | 723 | 8 |
| 0.5–1.0 | 87 | 1 | 573 | 6 |
| 1.0–2.0 | 768 | 11 | 2,529 | 26 |
| 2.0–3.0 | 1,702 | 24 | 1,185 | 12 |
| 3.0–4.0 | 1,345 | 19 | 2,616 | 27 |
| 4.0–5.0 | 754 | 11 | 437 | 5 |
| 5.0–10.0 | 1,382 | 19 | 919 | 10 |
| > 10.0 | 962 | 13 | 636 | 7 |
| Total | 7,126 | 100 | 9,618 | 100 |

Income is defined as income before taxes, extraordinary items, and deposit insurance assessments. Assessments are adjusted for the use of one-time credits. Unprofitable institutions are defined as those having negative merger-adjusted income (as defined above) over the 4 quarters ending June 30, 2008, and, by assumption, in 2009. There were 1212 unprofitable institutions excluded from Tables A.3 and A.4. 11 insured branches of foreign banks and 113 institutions having less than 4 quarters of reported earnings were excluded from this analysis. Figures may not sum to totals due to rounding.

Dated at Washington DC, this 7th day of October, 2008.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Valerie J. Best,**

*Assistant Executive Secretary.*

[FR Doc. E8–24186 Filed 10–8–08; 4:15 pm]

**BILLING CODE 6714–01–P**

# Notices

Federal Register
Vol. 73, No. 201
Thursday, October 16, 2008

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.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Federal Deposit Insurance Corporation Restoration Plan

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Establishment of Federal Deposit Insurance Corporation Restoration Plan

### Federal Deposit Insurance Corporation Restoration Plan

The recent failures of a large institution and other smaller ones have significantly increased the Deposit Insurance Fund's (the DIF or the fund) loss provisions, resulting in a decline in the reserve ratio. As of June 30, 2008, the reserve ratio stood at 1.01 percent, 18 basis points below the reserve ratio as of March 31, 2008. This is the lowest reserve ratio for a combined bank and thrift insurance fund since March 31, 1995. The FDIC expects a higher rate of insured institution failures in the next few years compared to recent years; thus, the reserve ratio may continue to decline. Because the fund reserve ratio has fallen below 1.15 percent and is expected to remain below 1.15 percent, the FDIC is required to establish and implement a restoration plan to restore the reserve ratio to 1.15 percent within five years.

In FDIC's view, to restore the reserve ratio to 1.15 percent within five years will require higher assessment rates. Since the current rates are already 3 basis points uniformly above the base rate schedule established in the 2006 assessments rule, a new rulemaking is required. The FDIC is concurrently publishing a notice of proposed rulemaking that would raise rates and make other changes to the assessment system.

Pursuant to section 7(b)(3)(E) (12 U.S.C. 1817(b)(3)(E)), the FDIC establishes the following restoration plan on October 7, 2008.

1. The accompanying NPR is published elsewhere in this issue of the **Federal Register** as soon as possible. Based upon the projections contained in the NPR, the assessment rates proposed in the NPR will return the Deposit Insurance Fund reserve ratio to at least 1.15 percent. Absent extraordinary circumstances, the reserve ratio must be returned to at least 1.15 percent no later than five years after establishment of the plan. To determine whether the reserve ratio has returned to the statutory range, the FDIC will rely on the December 31, 2013, reserve ratio, which is the first date after October 7, 2013, for which the reserve ratio will be known.

2. Before the FDIC adopts a final rule following the NPR, it will update its loss and income projections for the fund and, if needed to ensure that the fund reserve ratio reaches 1.15 percent within the five-year period, will adopt higher assessment rates than those proposed in the NPR. If consistent with the fund reserve ratio reaching 1.15 percent within the five-year period, the FDIC may also adopt lower assessment rates.

3. At least semiannually thereafter, the FDIC will update its loss and income projections for the fund and, if needed to ensure that the fund reserve ratio reaches 1.15 percent within the five-year period, will increase assessment rates, following notice-and-comment rulemaking if required. If consistent with the fund reserve ratio reaching 1.15 percent within the five-year period, the FDIC may also lower assessment rates, again following notice-and-comment rulemaking if required.

4. Institutions may continue to use assessment credits without additional restriction (other than those imposed by law) during the term of the Restoration Plan, since the few remaining credits should have only a minimal effect on fund revenue.

5. This Restoration Plan shall be implemented immediately upon establishment by the FDIC.

Dated at Washington, DC, this 7th day of October, 2008.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

**Valerie J. Best,**

*Assistant Executive Secretary.*

[FR Doc. E8–24185 Filed 10–15–08; 8:45 am]

**BILLING CODE 6714–01–P**

Federal Register

Thursday,
October 16, 2008

## Part VI

# Department of Agriculture

**Forest Service**

**National Trail Classification System, FSM 2350 and FSH 2309.18; Notice**

## DEPARTMENT OF AGRICULTURE

### Forest Service

**RIN 0596–AC47**

### National Trail Classification System, FSM 2350 and FSH 2309.18

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of issuance of interim final directives and public comment period.

**SUMMARY:** The Forest Service is issuing these interim final directives as an amendment to Forest Service Manual 2350, Trail, River, and Similar Recreation Opportunities, and Forest Service Handbook 2309.18, the Trail Management Handbook, to incorporate revisions to the agency's national trail classification system (TCS), consisting of the Trail Classes and Design Parameters. Chapters 30 and 40 in the Trail Management Handbook have not been included in these interim final directives because these chapters do not relate directly to the TCS and Design Parameters and because the agency plans to update them significantly. The comments on these chapters will be addressed in preparation of final directives. The agency is providing a 60-day public comment period on these interim final directives and will review timely comments in developing final directives.

Trail Classes are general categories reflecting trail development scale, arranged along a continuum. Managed Uses are the modes of travel that are actively managed and appropriate on a trail, based on its design and management. Designed Use is the Managed Use of a trail that requires the most demanding design, construction, and maintenance parameters and that, in conjunction with the applicable Trail Class, determines which Design Parameters will apply to a trail. The Design Parameters are technical guidelines for the survey, design, construction, maintenance, and assessment of a trail, based on its Designed Use and Trail Class.

**DATES:** These interim final directives are effective October 16, 2008.

**ADDRESSES:** The interim final directives and this **Federal Register** notice are available electronically on the World Wide Web at *http://www.fs.fed.us/recreation/*. The record for these interim final directives is available for inspection and copying at the office of the Director, Recreation, Heritage, and Volunteer Resources Staff, USDA Forest Service, 4th Floor Central, Sidney R. Yates Federal Building, 1400 Independence Avenue, SW., Washington, DC, from 8:30 a.m. to 4 p.m., Monday through Friday, except holidays. Those wishing to inspect the record are encouraged to call Jonathan Stephens at (202) 205–1701 beforehand to facilitate access into the building.

**FOR FURTHER INFORMATION CONTACT:** Jonathan Stephens, Recreation, Heritage, and Volunteer Resources Staff, USDA Forest Service, (202) 205–1701.

**SUPPLEMENTARY INFORMATION:**

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## 1. Background and Need for the Interim Final Directives

The Forest Service is responsible for managing 193 million acres of National Forest System (NFS) lands. On these lands, approximately 144,000 miles of NFS trails are managed by the Forest Service. An NFS trail is a forest trail other than a trail which has been authorized by a legally documented right-of-way held by a State, county, or other local public road authority (36 CFR 212.1). A forest trail is a trail wholly or partly within or adjacent to and serving the NFS that the Forest Service determines is necessary for the protection, administration, and utilization of the NFS and the use and development of its resources (36 CFR 212.1). Design, construction, operation, and maintenance of NFS trails fall under the authority of Forest and Grassland Supervisors.

Since at least 1991, the directives have included three categories for classifying NFS trails based on their difficulty level. These categories, which are enumerated in the Forest Service Handbook (FSH), are most difficult, more difficult, and easiest. In addition, since 1991, the FSH has contained technical guidelines, called trail guides, for specific types of uses, including hiking and pack and saddle use. For each of the three difficulty levels, each trail guide contains design, construction, and maintenance guidelines for the physical characteristics of trails. The physical characteristics include maximum pitch grade and length, clearing width and height, tread width, and surface. The difficulty levels in the trail guides encompass trails ranging from the least developed, which are typically steep or narrow, to the most highly developed, which are typically wide with minimal grades.

Trail management and use were (and still are) based on the management intent for the trail, as determined by the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction. When local managers identified a trail's management and use, they identified the applicable difficulty level. Once managers determined the applicable trail management and use and difficulty level, applicable technical guidelines from the appropriate trail guide could be identified.

In 1994, the Forest Service implemented a trails database module that included numerous trail attributes, including the three difficulty levels of most difficult, more difficult, and easiest, and the three trail classes of way, secondary, and, mainline. However, the classes of way, secondary, and mainline incorporated into the database did not correlate directly with the difficulty levels in the FSH.

In 1998, the Forest Service determined that a more uniform and integrated national trail classification system would improve inventory and on-the-ground management. Consequently, in 1999 the Forest Service transitioned from the three trail classes of way, secondary, and mainline to the five Trail Classes in effect today. The five Trail Classes are keyed more precisely to the physical characteristics of NFS trails and more accurately stratify them for various purposes, including database inventory, development of land management planning objectives, visitor information, and assessment of costs. In general, the five Trail Classes encompass many of the attributes and characteristics of the

previous way, secondary, and mainline trail categories.

In 2000, the Forest Service launched a national effort to enhance its trail program, including improving inventory, tracking of trail condition and needs, and accuracy and accountability of costs; minimizing confusion and inconsistency in terminology and interpretation of guidance; and improving the communication, quality, and utility of trail data. As a result, the agency refined five concepts that are now collectively known as the ''Trail Fundamentals,'' including Trail Type, Trail Class, Managed Use, Designed Use, and Design Parameters. The Trail Fundamentals provide an updated and more effective means for consistently recording and communicating the guidelines for trail design, construction, maintenance, survey, and assessment.

The Trail Fundamentals integrate the five Trail Classes with technical guidelines, called Design Parameters, for the design, construction, maintenance, survey, and assessment of NFS trails. The Design Parameters, which were implemented in 2004, superseded the technical parameters in the Trail Guides in the FSH. When the agency shifted from the Trail Guides to the Design Parameters, the design, construction, and maintenance guidelines changed in minor, technical ways with no effect on how trails were managed on the ground.

The following provides a description of Trail Class, Managed Use, and Designed Use, the three Trail Fundamentals that were most critical to development of the TCS and Design Parameters.

**Trail Class**

The current Trail Classes range from Minimal/Undeveloped (Trail Class 1) to Fully Developed (Trail Class 5):

Trail Class 1: Minimal/Undeveloped Trail

Trail Class 2: Simple/Minor Development Trail

Trail Class 3: Developed/Improved Trail

Trail Class 4: Highly Developed Trail

Trail Class 5: Fully Developed Trail

Each Trail Class has descriptors for the physical characteristics of trails, including tread and traffic flow, obstacles, constructed features and tread elements, signs, and typical recreational environment and experience.

*Managed Use*

A Managed Use is a mode of travel that is actively managed and appropriate on a trail, considering its design and management. There may be more than one Managed Use per trail or trail segment. As indicated by use of the word ''actively,'' the term ''Managed Use'' reflects a management decision or intent to accommodate a particular use through trail design, maintenance, and management. As with the previous classification system, the applicable Managed Uses of a trail are based on a trail's management intent. A trail's management intent is determined by the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction.

The concepts of Trail Class and Managed Use are interdependent. Determining the desired development scale or Trail Class requires consideration of the Managed Uses of a trail. Likewise, determining the Managed Uses of a trail requires consideration of the development scale of the trail. Therefore, the applicable Trail Class is usually identified in conjunction with the Managed Uses of a trail.

*Designed Use*

The Designed Use is the Managed Use of a trail that requires the most demanding design, construction, and maintenance parameters. The Designed Use, in conjunction with the applicable Trail Class, determines which Design Parameters will apply to a trail.

While there may be more than one Managed Use, there can be only one Designed Use per trail or trail segment. For example, if a trail has a Managed Use of Hiker/Pedestrian and Pack and Saddle, Pack and Saddle would be the Designed Use or design driver because it requires more stringent trail design, construction, and maintenance parameters.

Once the Trail Class, Managed Uses, and Designed Use are determined for a trail or trail segment, the corresponding set of technical guidelines or Design Parameters can be applied.

*Design Parameters*

The Design Parameters are technical guidelines for the survey, design, construction, maintenance, and assessment of a trail, based on its Designed Use and Trail Class. They reflect the dominant physical criteria that most define the geometric shape of a trail, including tread width, surface, grade, cross slope, clearing width and height, and turning radius. In some instances, a specific value for these factors is identified in the Design Parameters, while in others, a range of values is identified. In the latter case, managers narrow the range, selecting the specific value that best reflects the management intent for the trail.

The Design Parameters do not indicate the types of uses that can occur or are allowed on NFS trails, but rather establish general guidelines for the design, construction, maintenance, survey, and assessment of NFS trails, based on their physical characteristics and Designed Use, as determined by preexisting management decisions. All nonmotorized uses are allowed on any NFS trail unless specifically prohibited (motor vehicle use is covered by 36 CFR part 212, subpart B). In addition, local deviations from any Design Parameter may be established based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

**2. Public Comments on the Proposed Directives and Agency Response**

*Overview of Comments*

On July 3, 2006, the Forest Service published the proposed revisions to the TCS, including Design Parameters, in the **Federal Register** (71 FR 127) for a 60-day public comment period. The proposed revisions were also posted on the Forest Service Web site at *http://www.fs.fed.us/recreation/.*

The Forest Service received 122 letters or electronic messages in response to the proposed revisions. Each respondent was grouped into one of the following categories:

Trail Interests—118

State Agencies—2

Individuals (unaffiliated or unidentifiable)—2

No comments were received on any section of the directives that is not listed below.

*Response to General Comments*

The TCS

*Comment.* One respondent stated that the Trail Fundamentals and revisions to the TCS appear to be ''well conceived and could provide useful guidance.'' Another respondent stated that the Design Parameters and Trail Classes seem reasonable and in tune with what is on the ground.

*Response.* The agency agrees that the TCS is an effective trail management tool that provides valuable guidance for the planning, design, construction, maintenance, assessment, and management of NFS trails. The TCS is resulting in improved consistency, communication, and quality of trail inventory, prescription, condition, and cost data.

*Comment.* Two respondents were pleased with the clear definition and application of Managed Use, which

recognize that there can be more than one Managed Use for a trail.

*Response.* The Forest Service agrees that Managed Use is an important and very useful trail management concept and continues to strive for a clear understanding and consistent interpretation of this concept through issuance of these directives, training, and other reference material.

*Comment.* Two respondents expressed support for the definition and application of Designed Use, based on the belief that this concept, in conjunction with the concept of Managed Use, promotes multiple trail uses on sufficiently designed, constructed, and maintained trails.

*Response.* The agency agrees that Designed Use is an important trail management concept and that Designed Use, in conjunction with Managed Use, allows managers to communicate clearly the intended uses of a trail and to specify the design, construction, and maintenance parameters needed to accommodate those uses.

*Comment.* One respondent believed that the TCS appears to take into account the impacts of nonpedestrian trail uses on resources and other trail users and to direct motorized and pedestrian use to trails that are capable of sustaining those uses.

*Response.* The Forest Service agrees that the TCS and the interim final directives provide improved guidance regarding sustainable development, management, and use of NFS trails.

*Comment.* One respondent asserted that application of the TCS should not result in a net reduction of trail miles on NFS lands and that trails closed for habitat protection should be rerouted.

*Response.* The application of the TCS does not result in changes in availability or management on NFS trails. Rather, the TCS is a tool for improving consistency in tracking and summarizing trail inventory and communicating trail design, construction, and maintenance parameters. Decisions regarding adding or removing NFS trails from the forest transportation system are subject to applicable land management plan direction, travel management planning, and trail-specific planning and are beyond the scope of these directives.

*Comment.* Two respondents asserted that there should be full funding for periodic, scheduled trail maintenance. One respondent recommended that any new standards or guidelines focus on appropriate scheduling of reconstruction, repair, and maintenance, as well as development of alternative funding sources to maximize trail appropriations and to fully fund trail work.

*Response.* The Forest Service recognizes that there is a need for adequate funding for trail maintenance. Consequently, the agency has an even greater need for effective approaches for assessing and tracking NFS trail inventory, conditions, and maintenance needs and prioritizing needed trail maintenance. Implementation of the TCS is a key step in agency efforts to improve efficiency, consistency, and credibility in the identification and reporting of maintenance needs agency-wide and in the prioritization and implementation of maintenance work to be completed with limited resources. The TCS also facilitates identification, communication, and implementation of trail repair and maintenance conducted by contractors, Forest Service crews, and thousands of volunteers across the country.

The interim final directives provide general guidance in FSH 2309.18, section 18, exhibit 01, for determining appropriate schedules for recurring and other trail work. However, the determination of trail-specific maintenance schedules depends on a variety of factors, including current management priorities and available resources. While the agency strives to increase contributions from volunteers and to leverage funding for trail work, these activities are beyond the scope of these directives.

*Comment.* One respondent stated that the proposed directives fail to provide context by not including guidance regarding the mission, vision, and goals of the TCS.

*Response.* The interim final directives contain statements regarding the goals of the TCS in FSM 2353.02, paragraph 1, and 2353.12, as well as FSH 2309.18, section 20.2, paragraph 1.

*Comment.* One respondent requested that the agency simplify the text of the proposed directives on the grounds that it is too bureaucratic, arcane, and difficult to understand.

*Response.* The primary intended audience for this direction is Forest Service employees charged with administering the agency's trails program. The agency acknowledges that some of the TCS materials are technical and therefore require a certain level of technical training and expertise to understand. To facilitate clear communication and consistent interpretation, the agency is incorporating revisions throughout the interim final directives to improve clarity to the extent possible, including several new or revised definitions.

*Comment.* Two respondents questioned the need for directives on the TCS and expressed concern that the Forest Service is spending time on paper and process, rather than accomplishing trail work in the field.

*Response.* The Forest Service believes that sufficient and credible information for trail inventory and prescriptions is essential for effective management of the agency's trail program, including the determination of needed field work and efficient application of limited resources to accomplish that work. This information is used annually to report to Congress regarding annual accomplishments, the work needed to meet the National Quality Standards for Trails, and the cost of that work.

Multi-Use Trails

*Comment.* Some respondents stated that identification of one Designed Use per trail or trail segment would be too limiting and would not accommodate multiple uses on a trail. These respondents expressed concern that identification of a single Designed Use would be based on the most intensive use on a trail, even if that use represented only a small percentage of use occurring on the trail. These respondents contended that this approach to Designed Use could result in the displacement or exclusion of trail uses. Some respondents stated that there needs to be a mixed-use trail category that would permit trails to remain available for multiple uses. Two respondents contended that in most cases there is no single Designed Use and that the TCS should include a single multi-use nonmotorized Designed Use for these situations.

*Response.* The majority of NFS trails are managed for multiple modes of travel, including various combinations of Managed Uses. Implementation of the TCS does not change this approach to trail management. For example, many NFS trails are managed for hiker/pedestrian, bicycle, and pack and saddle use, and many others are managed for all-terrain vehicle (ATV) and motorcycle use, with numerous other uses allowed on these trails.

The TCS does not determine the Managed Uses of NFS trails. Rather, local trail managers determine the Managed Uses for each NFS trail, based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. This direction is based on consideration of current trail uses and their volume, relative levels, and seasons of use; potential or existing use conflicts; desired distances and challenge levels; topography; estimated

development and maintenance costs; and other factors.

Identification of the Designed Use from among the Managed Uses of a trail helps managers to ensure that the design, construction, and maintenance parameters for the trail are adequate to accommodate all the Managed Uses of that trail. To clarify this point, the interim final directives state that when determining the Designed Use from among the Managed Uses identified for a trail, managers should assess any essential or limiting geometry for the Managed Uses of the trail or trail segment to determine whether any trail-specific adjustments are necessary to the applicable Design Parameters (FSH 2309.18, sec. 14.4, para. 3).

*Comment.* One respondent expressed concern that the requirement to identify one Designed Use per trail or trail segment does not apply to multi-season trails.

*Response.* Many NFS trails have varying combinations of Managed Uses during different seasons of the year. Implementation of the Design Parameters does not change these determinations. To the contrary, both the proposed directives (FSH 2309.18, section 2.03) and the interim final directives (FSH 2309.18, section 14.4) state that when determining the Designed Use and Design Parameters of an NFS trail or trail segment, local managers should ''consider all Managed Uses that occur during all seasons of use of the trail or trail segment.'' Determination of the appropriate Designed Use from among the Managed Uses of a trail helps managers to ensure that the design, construction, and maintenance parameters for the trail are adequate to accommodate all of its Managed Uses during all of its seasons of use and on various Trail Types (such as when a Standard Terra Trail overlaps a Snow Trail).

*Comment.* One respondent recommended developing Trail Management Objectives (TMOs) specific to multi-use trails that would allow less intensive nonmotorized uses, as well as more intensive motorized uses.

*Response.* TMOs are developed at the local level, are trail-specific, are based on applicable management direction, and include the identification of several factors, including the applicable Trail Class, Managed Uses, the Designed Use, and corresponding Design Parameters for the trail or trail segment. The TCS provides guidance for development of trail-specific TMOs for all NFS trails, including those with various combinations of motorized and nonmotorized Managed Uses. The development of trail-specific TMOs helps managers to identify the Managed Uses, including motorized and nonmotorized uses, and the corresponding intensity of use for a particular trail or trail segment.

Concerns Regarding Unnecessary Improvement and Maintenance

*Comment.* Several respondents expressed concern that implementation of the TCS would lead to unnecessary improvement and maintenance of trails to a higher standard, resulting in wider, more urban trails and detracting from the rugged, challenging, natural quality of the trail experience on NFS lands. Two respondents expressed concern that implementation of the proposed Design Parameters would be elaborate, excessive, and costly, resulting in trails that would no longer have the wild, rugged character that many seek. Several respondents expressed concern that adoption of the proposed Design Parameters would result in mixed-use trails that look more like highly developed suburban trails.

*Response.* Implementation of the TCS and Design Parameters will not cause any changes in trail prescriptions or on-the-ground management of trails. The TCS and Design Parameters are applied by local managers based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction to develop trail-specific TMOs and trail prescriptions. Managers strive to provide a variety of trail opportunities for experiencing diverse environments and modes of travel, ranging from primitive and semiprimitive to roaded natural and urban, consistent with the role of recreation in the NFS and the capability of the land (FSM 2302, 2303, and 2350, sec. 03, para. 2).

The national Trail Classes encompass a full spectrum of trail development, ranging from minimally developed, extremely rugged, and highly challenging trails in Trail Class 1 to fully developed, minimally challenging, and often accessible trails in Trail Class 5. The agency views each of the five Trail Classes as a valuable component of the range of NFS trail opportunities. In the interim final directives, the agency has included additional guidance on the Design Parameters regarding the level of challenge associated with various combinations of Trail Class and Designed Use, as shown in section 3 of this preamble, Table 7, ''Changes to the Trail Class Matrix,'' under Obstacles, and in Tables 8 through 14, under Design Surface Protrusions and Obstacles.

*Comment.* One respondent expressed concern that trail maintenance and upgrades are determined by the use with the most impact, potentially resulting in undesired and costly development of higher-end trails.

*Response.* The TCS does not dictate trail maintenance or upgrades. Under the TCS, trail prescriptions, including maintenance and improvement, are based on a trail's TMOs, which include identification of the intended Trail Class, Managed Uses, Designed Use, and Design Parameters for the trail or trail segment. Local managers are responsible for making these determinations based on the applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. This direction is based on consideration of current trail uses; their volume, relative levels, and seasons of use; potential or existing use conflicts; desired distances and challenge levels; topography; estimated development and maintenance costs; and other factors. Under the TCS, management intent drives the level of development of a trail, as reflected in the applicable Trail Class and Design Parameters, rather than the allowed uses of a trail. Therefore, the level of trail development under the TCS is desired and appropriate.

Nonmotorized Use

*Comment.* Some respondents strongly supported the open-unless-closed Forest Service trails policy regarding nonmotorized use of NFS trails and believed that the following statement should remain in the TCS directives: ''All nonmotorized uses are allowed on any NFS trail unless specifically prohibited.''

*Response.* All trail uses, not just nonmotorized uses, are allowed on NFS trails unless specifically prohibited. Therefore, the agency is retaining the following statement in the final interim directives: ''The Managed Uses for a trail are usually a small subset of all the allowed uses on the trail, that is, uses that are allowed unless specifically prohibited.'' (FSH 2309.18, sec. 14.3, para. 4).

*Comment.* Some respondents expressed concern regarding potential displacement of nonmotorized trail use by motorized trail use as a result of implementation of the TCS. Many of these respondents expressed concern that the Designed Use and subsequent maintenance parameters would be determined by the most intensive or motorized use, which would encourage more of the Designed Use and displace less intensive, nonmotorized uses.

Several respondents expressed concern that adoption of higher trail standards would encourage motorized use, shifting the emphasis from nonmotorized to motorized use and promoting the exclusion of nonmotorized uses. Specifically, these respondents were concerned that all trails where motorcycles are not prohibited would be designed and maintained for motorcycle use, even if 95 percent of the use of these trails were nonmotorized.

*Response.* The TCS does not cause a shift in the Managed Uses or in the balance of motorized and nonmotorized uses of NFS trails, nor will the implementation of the TCS result in adoption of higher trail standards. Trail managers are responsible for applying the TCS to reflect the management intent for each NFS trail, which derives from applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. This direction is based on consideration of current trail uses; their volume, relative levels, and seasons of use; potential or existing use conflicts; desired distances and challenge levels; topography; estimated development and maintenance costs; and other factors.

The agency is sensitive to potential displacement of trail uses as use patterns and technology change. The agency believes that the TCS enhances managers' ability to implement the management intent for NFS trails and to provide desired trail opportunities, experiences, and challenge levels for nonmotorized and motorized uses, individually or in combination.

Coordination With Travel Management

*Comment.* One respondent requested clarification of how the TCS integrates with travel management, in particular, with designation of routes for motor vehicle use.

*Response.* Once a trail is designated for motor vehicle use, the trail's TMOs should reflect that designation. Directives are being finalized for implementation of the travel management rule at 36 CFR part 212, subpart B. The proposed travel management directives state that TMOs should reflect applicable travel management decisions. In addition, a trail's TMOs include identification of the applicable Trail Class, Managed Uses, Designed Use, and Design Parameters.

*Comment.* Several respondents expressed concern that the proposed revisions to the TCS were not coordinated with, are inconsistent with, and do not reflect the subtleties of the Forest Service's new travel management rule. Some respondents recommended that the TCS be reviewed by travel management program coordinators and be made consistent with the travel management rule with respect to designation of trail loops, establishment of trail cutoffs, and conversion of closed roads to trails

*Response.* The Forest Service is working on final travel management directives to implement the travel management rule, which requires each administrative unit or Ranger District to designate those NFS roads, NFS trails, and areas on NFS lands that are open to motor vehicle use by vehicle class and, if appropriate, by time of year. The managers of the national trail program and travel management program have consulted extensively in the development of their directives to ensure consistency in terminology and appropriate program integration. Designation of trails for motor vehicle use and consideration of conversion of NFS roads to NFS trails are within the scope of the travel management directives and beyond the scope of the TCS directives.

*Comment.* Two respondents expressed concern about the cost of new federal requirements to upgrade trails and recommended that the upgrading be postponed until after the travel management directives are finalized.

*Response.* The TCS does not require any specific actions with regard to design, construction, and maintenance of NFS trails, including upgrading their condition. Rather, the TCS is a tool used by trail managers to improve consistency in tracking and summarizing inventory and communicating design, construction, and maintenance parameters for NFS trails. Therefore, issuance of the interim final directives will not affect the cost of trail maintenance.

Recreation Opportunity Spectrum

*Comment.* Some respondents commented that the proposed directives treat NFS trails solely as recreational facilities, with Design Parameters and maintenance cycles linked to classes in the Recreation Opportunity Spectrum (ROS) or Wilderness ROS, rather than as multi-function transportation facilities with no linkage to ROS or Wilderness ROS classes.

*Response.* The objectives in FSM 2353.02 for management of NFS trails remain largely unchanged. These objectives include the provision of ''trail-related recreation opportunities that serve public needs and meet land management and recreation policy objectives,'' the provision of ''trail recreation opportunities that emphasize the natural setting of national forests and grasslands and are consistent with land capability,'' and the provision of ''trail access for resource management and protection.'' The agency believes that implementation of the TCS furthers all three of these objectives because it is based on the scale of trail development and applied, along with the Design Parameters, so as to reflect the management intent for each NFS trail.

ROS and Wilderness ROS classes are used by the agency to identify social, physical, and managerial settings in the NFS and to ensure NFS trails offer a suitable diversity of outdoor recreation opportunities (FSM 2353.13). There is no direct correlation between the five Trail Classes and ROS and Wilderness ROS classes, although some combinations occur more commonly than others. To clarify the lack of a direct correlation in the interim final directions, the agency has added a footnote to the Trail Class Matrix that states: ''The Trail Class Matrix shows combinations of Trail Class and Recreation Opportunity Spectrum (ROS) or Wilderness Recreation Opportunity Spectrum (WROS) settings that commonly occur, although trails in all Trail Classes may and do occur in all settings'' (FSH 2309.18, sec. 14.2, ex. 01). Managed Uses reflect various modes of travel, each of which may occur on trails managed for recreational use, on trails managed for recreational and nonrecreational use, or both. The TCS enhances managers' ability to develop prescriptions for the design, construction, and maintenance needed to accommodate the Managed Uses of each NFS trail.

National Scenic and National Historic Trails

*Comment.* Some respondents said that it is unclear how National Historic and National Scenic Trails fit into the proposed TCS. These respondents expressed concern that none of the proposed Trail Classes includes guidelines for preserving National Historic Trails and that a one-size-fits-all approach is not appropriate for these trails.

*Response.* The TCS applies to all NFS trails, including National Historic and National Scenic Trails. The TCS does not provide guidance on preservation of National Historic Trails. Rather, with regard to trail maintenance, the purpose of the TCS is to provide managers with a tool for consistently and effectively inventorying NFS trails and identifying and communicating their condition and the work needed to maintain them to their prescribed standard.

*Comment.* One respondent expressed concern that the proposed Trail Classes vary with regard to the standards for trail marking and that signing and marking (even in wilderness areas) for National Historic and National Scenic Trails need to be consistent.

*Response.* The Trail Class Matrix provides general guidelines regarding the appropriate level and type of signage by Trail Class. The agency has incorporated several clarifications regarding signing at junctions and route markers into the Trail Class Matrix (FSH 2309.18, sec. 14.2, ex. 01), as shown in Table 7, ''Changes to the Trail Class Matrix,'' in section 4 of this preamble. See ''Sign and Poster Guidelines for the Forest Service'' (EM–7100–15) for guidance on trail signing and marking, including sign design and placement for various modes of travel and at various locations, including wilderness areas and NFS trails.

*Comment.* One respondent stated that the proposed Trail Classes must not change the intended or allowed recreational uses on National Scenic and National Historic Trails.

*Response.* The Trail Classes do not dictate the intended or allowed uses of NFS trails. Trail Classes reflect the development scale of NFS trails and are applied, along with their applicable Design Parameters, so as to reflect the management intent for each NFS trail. Determination of a trail's management intent is based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. Decisions about which modes of travel are allowed on NFS trails, including National Scenic and National Historic Trails, are made by the responsible official at the local level, consistent with applicable law, including the National Trails System Act.

*Comment.* One respondent expressed concern that application of the TCS could unintentionally alter well-established practices for construction, maintenance, and management of the Appalachian National Scenic Trail and its facilities. This respondent assumed that the stewardship manual for the Appalachian National Scenic Trail would continue to provide guidance with respect to polices applicable to that trail. This respondent expressed hope that the TCS would reduce, rather than increase, misunderstandings regarding appropriate development of the trail, its side trails, and its facilities.

*Response.* Implementation of the TCS will not change on-the-ground management of the Appalachian National Scenic Trail. The TCS gives managers a standardized tool for inventorying trails, identifying and communicating the condition of trails, and identifying the work needed to maintain them to their prescribed standard. The TCS will not supersede the stewardship manual for the Appalachian National Scenic Trail. The agency believes that implementation of the TCS will improve communication between the Forest Service and its trail partners, including those who work on the Appalachian National Scenic Trail.

Management of Trails Based on Their Current Condition

*Comment.* Two respondents asserted that Forest Service personnel surveying trails for the proposed TCS were instructed to determine the applicable Trail Class based on a trail's current condition and expressed concern about this practice. One respondent contended that this practice has resulted in reduction of the Trail Class for many trails that have had minimal or no maintenance over the past 30 years. The other respondent contended that in many cases a trail's inventoried condition differs considerably from its TMOs and that this discrepancy needs to be rectified.

In addition, this respondent expressed concern that management of trails based on their current condition is inappropriate in wilderness areas and provided recommendations for assessing a trail's current condition in terms of whether the trail meets its desired condition. This respondent stated that establishment of trail objectives should be guided by the intent and purposes of the Wilderness Act, scientifically sound data on the capability of the ecosystem to withstand various types and varying intensity of use, and the need to preserve opportunities for primitive travel experiences and solitude, including transport by pack and saddle.

This respondent also believed that trails in wilderness areas should maximize opportunities for primitive travel and camping, solitude, and aesthetic experiences unique to wilderness areas. This respondent contended that the agency should track the degree to which the condition of trails in wilderness areas reflects their management intent, as follows: (a) Meeting their management intent; (b) if they do not meet their management intent, being improved to meet it, if funding permits; (c) if funding does not permit improving them to meet their management intent, maintaining their current condition; or (d) continuing to deteriorate and further deviate from their management intent.

*Response.* Forest Service trail managers are not instructed to classify NFS trails in accordance with their current condition. Forest Service training and reference materials instruct trail managers to identify the applicable Trail Class, Managed Uses, and Design Parameters for each NFS trail based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. Trail managers are instructed to document the applicable Trail Class, Managed Uses, and applicable Design Parameters in TMOs, which are defined in the interim final directives as ''documentation of the intended purpose and management of an NFS trail based on management direction, including access objectives'' (FSM 2353.05 and FSH 2309.18, sec. 05). When determining the applicable Trail Class, managers are instructed to ''choose the one that most closely reflects the management intent of the trail,'' as stated in the introductory paragraph to the Trail Class Matrix (FSH 2309.18, sec. 14.2, ex. 01). For further clarification, the agency has revised the interim final directives at FSH 2309.18, section 14.2, paragraph 7, to state: ''Apply the Trail Class that most closely reflects the management intent for the trail or trail segment, which may or may not reflect the current condition of the trail.''

Managers are instructed to apply the same management approach to NFS trails inside and outside wilderness areas. In wilderness areas, management intent for NFS trails is also contained in the applicable enabling legislation and wilderness management plan. Application of this management approach, which is based on the management intent for NFS trails, will not result in reduction of the Trail Class for NFS trails that have not received the desired level of maintenance.

Training

*Comment.* One respondent recommended that the Forest Service consider some form of internal and external educational outreach to explain the TCS, as well as the Interagency Trail Data Standards (ITDS), the Forest Service Trail Accessibility Guidelines (FSTAG), and the Forest Service Outdoor Recreation Accessibility Guidelines (FSORAG).

*Response.* The Forest Service presents numerous training sessions each year on these topics. While the majority of these training sessions are for Forest Service employees at the national, regional, and local levels, the agency has also provided dozens of related training sessions for participants from other

federal agencies, state and local agencies, and many trail organizations. With the increasing need for budget efficiency, the agency is also providing expanded opportunities for online training for Forest Service employees on these topics. The agency also continues to improve and disseminate its related reference and training materials and is planning to make them available via an external Web site, which is currently under development.

Need for Change

*Comment.* Several respondents questioned the need for revision of the TCS and contended that the agency insufficiently explained and supported the need for the changes in the proposed directives. Some respondents requested that the Forest Service's trail classification system and Trail Guides remain the same as they are in the current directives.

*Response.* As explained in the preamble to the proposed and interim final directives, the Forest Service's trail classes of way, secondary, and mainline did not correlate directly with the difficulty levels in FSH 2309.18, section 2.32c, exhibit 01. The five Trail Classes, in contrast, are keyed more precisely to the physical characteristics of NFS trails and more accurately stratify NFS trails for purposes of inventory, land management planning, visitor information, and assessment of maintenance and construction costs. The five Trail Classes are also incorporated into each set of Design Parameters.

The Design Parameters, which superseded the technical parameters in the Trail Guides in the FSH, incorporate the design, construction, and maintenance guidelines in the Trail Guides, with only minor, technical changes that have no effect on how trails are managed on the ground. In some cases, the Design Parameters expand the range of values in a category. In contrast to the Trail Guides, each set of Design Parameters includes a standardized set of factors (e.g., Design Tread Width, Target Grade, and Short Pitch Maximum). These factors are defined in the interim final directives to enhance consistency in their application (FSM 2353.05 and FSH 2309.18, sec. 05).

The Forest Service transitioned to the five Trail Classes in 1999 and began using the Design Parameters in 2004. These inventory and trail management tools have been integrated throughout the agency's trail database, TMOs, and related management tools. The TCS and Design Parameters have resulted in improved consistency and quality of trail inventory, condition assessments, prescriptions reflecting the work needed to meet the National Quality Standards for Trails, and corresponding cost estimates. Therefore, it would not be cost-effective or productive to return to the earlier system.

2353.05—Definitions

*Comment.* Some respondents supported a clearer distinction between nonmotorized bicycles and motor vehicles such as motorcycles.

*Response.* The Forest Service agrees and in the interim final directives has added a definition that defines a bicycle as ''a pedal-driven, human-powered device with two wheels attached to a frame, one behind the other.'' In addition, the agency has removed the definition for ''trail vehicle,'' defined as ''vehicles designed for trail use, such as bicycles, snowmobiles, trail bikes, trail scooters, and all terrain vehicles (ATV).''

*Comment.* One respondent expressed concern that replacing the term ''trail guides'' with ''Design Parameters'' lends the impression that they contain requirements, rather than guidelines, with little room for variance due to local situations. This respondent recommended using the term ''design parameter guidelines'' or revising FSH 2309.18, section 14.5, paragraph 1, to state that the Design Parameters are only guidelines, not requirements.

*Response.* The definition of Design Parameters included in FSM 2353.05 and FSH 2309.18, section 05, and the introductory paragraph included with each set of Design Parameters state that the Design Parameters are technical guidelines. To clarify this point further, the agency has revised the introductory paragraph in each set of Design Parameters to state that the Design Parameters are technical guidelines for determining the parameters reflecting the management intent for each NFS trail. In addition, the agency has clarified the introductory paragraph in each set of Design Parameters to state that local deviations to any Design Parameter may be established based on specific trail conditions, topography, and other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

*Comment.* One respondent recommended changing the definition for Trail Class to ''a word description and numerical identifier of the trail development that represents the intended design and management standards of the trail.'' This respondent expressed concern that the definition in the proposed directives, ''The prescribed scale of trail development, representing the intended design and management standards of the trail,'' would give the impression that the Trail Class assigns the appropriate level of development, rather than reflecting its management intent.

*Response.* The agency believes that the definition of Trail Class in the proposed directives is effective and succinct and is therefore not changing it in the interim final directives. After nearly 10 years of use, agency managers and technicians are familiar with this term as currently defined and, as a result, understand that determination of the appropriate Trail Class for each NFS trail or trail segment is based on the management intent for the trail as reflected in the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction, which may or may not reflect the current condition of the trail.

*Comment.* One respondent recommended changing the definition for four-wheel drive way to ''a National Forest System Trail commonly used for four-wheel drive vehicles.''

*Response.* In the interim final directives, the agency has replaced the term ''four-wheel drive way'' with the term ''four-wheel drive vehicle greater than 50 inches in width'' and its corresponding definition in FSM 2353.05 and FSH 2309.18, section 05. Defining the vehicle, rather than the type of trail used by the vehicle, is consistent with the concept of Managed Use, which is based on modes of travel, rather than trail categories defined by use type. Direction relating to four-wheel drive vehicles greater than 50 inches in width will be provided in the final travel management directives at FSM 2353, 7700, and 7710 and FSH 7709.55. The agency has deleted FSM 2352, ''Four-Wheel Drive Ways,'' from the interim final directives because the concept of four-wheel drive ways is no longer used by the agency.

*Comment.* Two respondents recommended defining the term ''trailheads'' to distinguish between a constructed parking area at a designated trailhead that has a hard surface and that is periodically maintained and a parking area with a natural or perhaps user-created surface. These respondents contended that this distinction is especially important when determining the applicability of the FSTAG between a trailhead and a trail.

*Response.* The agency has revised the definition for ''trailhead'' in the interim final directives to include a related sub-definition of a trailhead for purposes of the FSTAG (FSM 2353.05).

2353.3—Difficulty Levels

*Comment.* One respondent suggested requiring difficulty levels in FSM 2353.3 for pack and saddle and hiker/pedestrian uses that indicate the elevation and severity of a trail. This respondent stated that often when hikers share trails with equestrians, it can be dangerous for the riders and horses. This respondent recommended requiring posting of advice or warnings on trails with dangerous sections for inexperienced riders, such as a trail with rock bluffs and unsure footing and no areas in which to turn around.

*Response.* The Forest Service does not believe that it would be appropriate to require posting of trail elevations, severity, or warnings on all NFS trails managed or designed to accommodate hiker/pedestrian and pack and saddle use. This approach would not be consistent with management of NFS trails for other uses. Moreover, consistent with the FSTAG, the agency is no longer identifying difficulty levels for trails with a Designed Use of Hiker/Pedestrian. Instead, for trails in Trail Classes 4 and 5 with a Designed Use of Hiker/Pedestrian, the agency is requiring posting at trailheads the typical and maximum trail grade, typical and maximum cross slope, typical and minimum tread width, surface type and firmness, and obstacles. Managers have the discretion to post this information at trailheads for other Hiker/Pedestrian trails and NFS trails with other Managed or Designed Uses.

**FSH 2309.18**

*Zero Code*

05—Definitions

The agency received the same comments on the definitions in FSM 2353 and FSH 2309.18. Therefore, the agency is incorporating here by reference the response to comments on the definitions in FSM 2353.

FSH 2309.18, Chapter One (Recoded to Chapter 10 in the Interim Final Directives)

Section 1.2—Planning (Recoded to Section 12 in the Interim Final Directives)

*Comment.* Two respondents supported field manager discretion in trail design and requested that this discretion be retained. Several respondents requested that the agency add flexibility to the proposed directives by basing Managed Uses and Design Parameters on practical concerns, instead of the proposed sets of overly rigorous Design Parameters. Several respondents requested that the agency give managers and resource specialists the discretion they need to design and maintain trails to retain their primitive and undeveloped character across all Trail Classes and Designed Uses. One respondent commented that the proposed directives should state that the determination of the appropriate Trail Class is not discretionary with the trail manager and should not reflect a trail's existing condition.

*Response.* The agency believes that local managers need discretion to apply the TCS so as to reflect the management intent for NFS trails, which may or may not be consistent with their current condition. Accordingly, the proposed and interim final directives give local managers a considerable amount of discretion in identifying a trail's TMOs (including the applicable Trail Class, Managed Uses, Designed Use, and Design Parameters) based on the management intent for that trail. Flexibility is also built into the Design Parameters, providing a range for trail attributes such as tread width.

Additionally, the Design Parameters allow for local deviations based on specific trail conditions, topography, and other factors, including desired setting, challenge levels, and experience opportunities, provided that the deviations are consistent with the general intent of the applicable Trail Class. To clarify this point, the agency has modified the Trail Class Matrix to reflect more clearly the range of ROS and WROS classes for each Trail Class (see Table 7 in section 4 of this preamble). In addition, the agency has added a footnote to the Trail Class Matrix stating that it displays commonly occurring combinations of Trail Class and ROS or WROS settings, although trails in all Trail Classes may and do occur in all settings (FSH 2309.18, sec. 14.2, ex. 01).

*Comment.* Some respondents expressed concern that application of the TCS and Design Parameters would result in the closure or reduction of trails open to pack and saddle use and requested the opportunity to provide public input before any trails are reclassified, declassified, or closed. Several respondents stated that the agency should consider availability of funding, labor, materials, and time when making decisions about trail management and that lack of these factors should not result in reduction in the Trail Class.

*Response.* The proposed and interim final directives do not provide for reduction in the Trail Class of any NFS trails, closure of any NFS trails, or removal of any NFS trails from the forest transportation system because of inability to maintain the trails to the applicable standard. To the contrary, the applicable Trail Class and Design Parameters of an NFS trail are based on its management intent, as reflected in applicable direction.

In the interim final directives, the agency has revised FSH 2309.18, sections 14.2 and 14.3, to state more clearly that determination of the Trail Class and Managed Uses of a trail is based on its management intent, as shown in the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction, which may or may not reflect the current condition of the trail.

FSH 2309.18, section 18, identifies several factors to be considered when establishing priorities and requirements for trail management, including funding for labor and materials and scheduling of work. The directives include the National Quality Standards for Trails, which describe outcomes that trail users can expect to encounter and the level of quality the Forest Service plans to provide on NFS trails managed at a full-service level (FSH 2309.18, sec. 15). These standards establish the baseline for estimating the total cost of providing the quality opportunities visitors expect.

*Comment.* Several respondents requested that the Forest Service develop a system for tracking consistency of TMOs with Forest Service planning documents that meet the requirements of NEPA and NFMA. One of these respondents stated that section 1.2, paragraph 2, of the proposed directives should clearly state that follow-up analysis needed to determine specific standards for a trail must comply with the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) and be subject to appropriate public involvement. Another respondent believed that the proposed directives must include provisions for public input on determination of all trail classifications, maintenance needs, and design parameters.

*Response.* TMOs must be consistent with the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction issued in compliance with NEPA. The agency believes that it is not necessary to establish a separate process for tracking consistency of TMOs with the applicable land management plan and other applicable direction.

In addition, application of the TCS and Design Parameters does not trigger the public involvement requirements in

NEPA and NFMA. Application of the TCS and Design Parameters is based on a trail's management intent, as reflected in direction that has been issued in compliance with NEPA and NFMA. Therefore, further environmental analysis and public involvement are not required. See *Back Country Horsemen of America* v. *Johanns*, No. 05–0960 (D.D.C. Mar. 29, 2006), slip op. at 15–20.

During required public involvement for trail-related direction and in general, trail managers work with the public and trail groups to obtain their input regarding the status and management of trails they use. Changes in the management intent of NFS trails as reflected in the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction are subject to the direction in FSH 2309.18, section 11, including the direction regarding compliance with NEPA.

Section 1.42—Trail Classes (Recoded to Section 14.2 in the Interim Final Directives)

*Comment.* One respondent disagreed that there is a direct relationship between Trail Class and Managed Uses, that is, that one cannot be determined without consideration of the other. This respondent acknowledged that they were related, but believed that the determination of Managed Uses is always made before the determination of the applicable Trail Class.

*Response.* Generally, the determination of Managed Uses cannot be made before the determination of the applicable Trail Class and vice versa. Trail Class and Managed Uses are interdependent because the appropriate scale of development of a trail depends on the types of uses that are actively managed on the trail, and the reverse is also true. To clarify that this interdependence is not an absolute, the interim final directives state: ''There is a direct relationship between Managed Uses and Trail Class: generally, one cannot be determined without consideration of the other.''

Section 1.42, Exhibit 01—Trail Class Matrix (Recoded to Section 14.2, Exhibit 01, in the Interim Final Directives)

*Comment.* Several respondents stated that the three previous trail classes of mainline (easy), secondary (more difficult), and way (most difficult) and the Pack and Saddle Trail Guide adequately accommodated pack and saddle use in all ROS and WROS classes. Some respondents requested that the proposed directives state that trails in Trail Classes 1 through 3 are appropriate in primitive and semiprimitive settings, both inside and outside wilderness areas. One respondent expressed concern that application of the TCS with regard to ROS and WROS classes would result in changes in management of wilderness areas and the uses that are accommodated in wilderness areas.

*Response.* The agency believes that the Trail Classes and Design Parameters are better tools for managing NFS trails, including NFS trails with a Designed Use of Pack and Saddle in all ROS and WROS settings, than the previous three difficulty levels and Trail Guides. In comparison with the previous three categories, the five Trail Classes are keyed more precisely to the physical characteristics of NFS trails and more accurately stratify NFS trails for purposes of inventory, land management planning, visitor information, and establishment of maintenance and construction costs.

When the agency shifted from the Trail Guides to the Design Parameters in 2004, the design, construction, and maintenance guidelines in the Trail Guides, including the Pack and Saddle Trail Guide, changed in only minor, technical ways with no effect on how trails are managed on the ground. In contrast to the Trail Guides, which did not correlate with the trail classes of mainline, secondary, and way in the agency's database, the Design Parameters track the five Trail Classes. In addition, the Design Parameters refine and clarify the categories and values in the Trail Guides.

The agency does not believe it is appropriate to state categorically that trails in Trail Classes 1 through 3 are appropriate in primitive and semiprimitive settings, both inside and outside wilderness areas. However, the agency has clarified in a new footnote 3 to the Trail Class Matrix (FSH 2309.18, section 14.2, exhibit 01, in the interim final directives) that the matrix shows commonly occurring combinations of Trail Class and ROS and WROS settings, but that trails in all Trail Classes may and do occur in all settings. The new footnote 3 also refers managers to FSM 2310 and 2353 and FSH 2309.18 for guidance on application of the ROS and WROS.

Application of the TCS does not change management of wilderness areas or the uses that are accommodated in wilderness areas. Land management planning establishes ROS and WROS classes. The TCS merely provides managers with a tool for more consistently and effectively inventorying trails and identifying and communicating trail conditions and the work needed to maintain trails to their prescribed standard.

*Comment.* Several respondents requested that the proposed directives give local managers the discretion to use treated round or dimensional timber for the construction and maintenance of water bars, puncheon, turnpike, and bridge components in Trail Classes 1 through 3 where it will not detract from the desired experience of a typical user. These respondents also requested that the proposed directives give local managers the discretion to use laminated and steel components in the construction and maintenance of trail structures in Trail Class 3.

One respondent objected to the guidance to use only native materials for the surface of trails in Trail Classes 1 and 2 and typically native materials for the surface of trails in Trail Class 3 on the grounds that this guidance would impose unnecessary costs. This respondent recommended that use of treated materials not be precluded or discouraged for the surface of trails in Trail Classes 1 through 3 when use of those materials would not detract from the desired user experience.

*Response.* The Trail Class Matrix provides guidance, rather than direction, to local trail managers in identification of the applicable Trail Class based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. The Trail Class Matrix clearly states that local deviations from any Trail Class descriptor may be established based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

To address these respondents' concerns and to enhance clarity, the agency has made several modifications to the Trail Class Matrix, as shown in Table 7 in section 4 of this preamble. Specifically, the agency has modified the Tread and Traffic Flow descriptors from ''Native materials only'' to ''Predominantly native materials'' for Trail Class 1; from ''Native materials'' to ''Typically native materials'' for Trail Class 2; and from ''Typically native materials'' to ''Native or imported materials'' for Trail Class 3.

The agency has modified the descriptors for Constructed Features and Trail Elements to remove references to the material type for structures, other than a reference to native materials for natural fords in Trail Class 1; a reference to native materials for structures and natural fords in Trail Class 2; and a

reference to structures being typically constructed of imported materials and a reference to constructed or natural fords in Trail Class 3. To minimize confusion, the agency has removed the reference in Trail Class 3 to generally native materials being used in wilderness areas.

*Comment.* Several respondents requested that local managers be given the discretion to use a bridge to cross any stream that meets the criteria in proposed FSH 2309.18, section 2.31, paragraph b, regardless of Trail Class.

*Response.* FSH 2309.18, section 2.31, paragraph b, in the proposed directives provided guidance on trail bridges constructed to accommodate pack and saddle use. The agency has retained this guidance, except for expanding the guidance regarding minimum bridge widths of 48 inches to include minimum bridge railing heights and a reference to the corresponding guidance in FSH 7709.56b, section 7.69, exhibit 01, Trail Bridge Design Criteria. In addition, the agency has added guidance to the Pack and Saddle Design Parameters regarding the minimum width of bridges with and without handrails for each of the Trail Classes managed for pack and saddle use (Trail Classes 2 through 4), as shown in Table 9 in section 4 of this preamble.

The Trail Class Matrix in the proposed directives provided guidance in Trail Classes 3 through 5 regarding use of bridges where they are determined to be needed and appropriate and, by allowing for deviations, provided the discretion to use bridges in Trail Classes 1 through 2 where they are determined to be necessary. In the Trail Class Matrix in the interim final directives, the agency has removed ''no constructed bridges or foot crossings'' from the descriptors in Trail Class 1; replaced ''primitive foot crossings and fords'' with ''bridges as needed for resource protection and appropriate access'' in Trail Class 2; and made minor, nonsubstantive edits to the references to bridges in Trail Classes 3 through 5 (see Table 7 in section 4 of this preamble).

*Comment.* Several respondents requested that the Trail Class Matrix provide for minimum signing at all NFS trail junctions and encourage marking along all NFS trails.

*Response.* The agency agrees that the Trail Class Matrix needs to contain additional guidance on signing at NFS trail junctions and marking along NFS trails. Accordingly, the agency has modified the Trail Class Matrix, as shown in Table 7 in section 4 of this preamble, to include guidance regarding signing at trail junctions and route markers for all Trail Classes and has added a footnote referencing additional applicable guidance and direction in the Sign and Poster Guidelines for the Forest Service (EM–7100–15).

*Comment.* One respondent believed that by specifying that trails in Trail Class 4 would rarely occur in wilderness areas, the agency would be relegating pack and saddle use in wilderness areas to the hazards or obstacles associated with the lower Trail Classes that were not encountered by long pack strings when the Wilderness Act was passed, thereby redefining the character of wilderness areas.

*Response.* In the interim final directives, the agency has removed this language and replaced it with language stating that the WROS class typically includes WROS Transition or Portal classes. Trails that were previously classified as mainline now fall into Trail Class 2, Trail Class 3, or Trail Class 4. Trails in Trail Classes 2 and 3 are commonly found in wilderness areas, while trails in Trail Class 4 that occur in wilderness areas are typically limited to access routes and routes connecting wilderness to nonwilderness areas.

Tables 1 through 6 in section 3 of this preamble show that the range of trails covered by the Pack and Saddle Trail Guide equates with the range of trails covered by the Pack and Saddle Design Parameters. The Design Parameters provide guidance, rather than direction, based on the management intent for a trail and its Trail Class. The Design Parameters state that local deviations from any Design Parameter may be established based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class. Therefore, the Design Parameters do not cause changes in on-the-ground management of NFS trails.

*Comment.* Two respondents stated that four-wheel drive motor vehicles do not fit neatly into the paradigm established for all other trail uses outlined in section 1.42, Exhibit 01, of the proposed directives and that trails for four-wheel drive motor vehicles should be designed to provide a more challenging experience. These respondents provided a revised version of the Trail Class Matrix entitled, ''Trail Classes, Four-Wheel Drive Motor Vehicles Only.'' The proposed matrix included the five Trail Classes ranging from least developed to most developed, but reversed the corresponding level of challenge, so that trails in Trail Class 1 would be the least developed and least challenging, and trails in Trail Class 5 would be the most developed and most challenging. The respondents' proposed trail class matrix for four-wheel drive motor vehicles included descriptors for each trail class attribute.

*Response.* The Forest Service does not believe that this proposed approach to four-wheel drive motor vehicles is appropriate. The five Trail Classes reflect the scale of development, arranged along a continuum, for all NFS trails, regardless of their Managed Uses, with the level of challenge decreasing with the level of development. The agency does not believe that it would be productive or appropriate to develop a set of Trail Classes specific to only one Managed Use. In addition, it would be counter-intuitive to reverse the level of challenge associated with the scale of development, since as trails become more developed, they become less challenging. The agency believes that trails that are managed for four-wheel drive motor vehicles are encompassed by the Trail Class Matrix. In addition, four-wheel drive motor vehicles are covered by the chart addressing the potential appropriateness of the five Trail Classes for the Managed Uses of NFS trails and are addressed in their own set of Design Parameters in the interim final directives.

*Comment.* One respondent expressed concern about removing the four sets of additional criteria included with the Trail Class Matrix. This respondent believed that this information serves a useful purpose and provides additional guidance. However, this respondent noted that removal of this information from the Trail Class Matrix would be acceptable if it were adequately covered elsewhere in the directives.

*Response.* The agency has incorporated the information contained in the four sets of additional criteria included with the Trail Class Matrix into the corresponding sets of Design Parameters. Therefore, the agency believes that removal of the additional criteria from the Trail Class Matrix is appropriate.

Section 1.45—Design Parameters (Recoded to Section 14.5 in the Interim Final Directives)

*Comment.* Several respondents expressed concern that the Design Parameters are overly rigorous and would be costly and impractical to implement.

*Response.* The agency disagrees that the Design Parameters are overly rigorous or will be costly or impractical to implement. The Design Parameters are technical guidelines, rather than requirements, for trail survey, design, construction, maintenance, and assessment. Local deviations from any

Design Parameter may be established based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class. In addition, in contrast to the Trail Guides, the Design Parameters provide greater consistency and precision for all Managed Uses, which will enhance local managers' ability to effectively and efficiently develop trail prescriptions that reflect the management intent for each NFS trail.

Section 1.6, Exhibit 01—Trail Operation and Maintenance Considerations

*Comment.* Two respondents proposed a set of ''Trail Operation and Maintenance Considerations for Four-Wheel Drive Motor Vehicle Trails Only,'' based on the respondents' proposed version of the Trail Class Matrix, where trails in Trail Class 1 would be the least developed and least challenging, and trails in Trail Class 5 would be the most developed and most challenging.

*Response.* The agency does not believe that it is necessary to provide a set of Trail Operation and Maintenance Considerations specific to one Managed Use, nor does the agency believe that it is appropriate to reverse the level of challenge associated with the scale of development. In addition, trails managed for four-wheel drive motor vehicles are covered by the Trail Operation and Maintenance Considerations, which apply to all NFS trails.

**Chapter 2—Trail Development (Recoded to Chapter 20 in the Interim Final Directives)**

Section 2.23a—Trailhead Location (Recoded as Section 22.41 in the Interim Final Directives)

*Comment.* Two respondents expressed concern that the statement in proposed section 2.23a, paragraph 1, regarding locating trailheads so as to allow access to the greatest number and types of trails could eliminate trailheads serving trails with only one type of use and could lead to use conflicts and illegal use of trails.

*Response.* The agency has clarified this paragraph in the interim final directives at FSH 2309.18, section 22.41, to provide for locating trailheads so as to allow access to trails with the same Managed Use or with multiple Managed Uses, depending on the combination of uses, relative use levels, and potential for use conflicts. In addition, this provision states that the development scale and size of the trailhead facility should match the carrying capacity of the area and the Trail Classes of the trails to be served.

Section 2.23c—Pack and Saddle Trailheads (Recoded as Section 22.43 in the Interim Final Directives)

*Comment.* One respondent believed that the section on pack and saddle trailheads had not yet been written and wanted to know when this section would be developed and how the respondent could comment on it.

*Response.* FSH 2309.18, section 2.23c, in the current directives provides guidance regarding development and management of pack and saddle trailheads. The agency has not proposed any substantive changes to this section.

*Comment.* One respondent requested that the Forest Service increase access for horsetrailers and trucks for horse camping and staging near NFS trails. One respondent wanted to use stock trailers and trucks on NFS lands to access trails and to engage in dispersed camping, without being confined to designated staging areas or designated access routes.

*Response.* The interim final directives provide local managers with tools for more consistently and effectively inventorying trails and identifying and communicating trail conditions and the work needed to maintain trails to their prescribed standard. The interim final directives have no effect on motor vehicle access to NFS lands. Designation of routes for motor vehicle use by vehicle class, and if appropriate, by time of year is governed by 36 CFR part 212, subpart B. The agency is finalizing separate directives implementing 36 CFR part 212, subpart B.

The Forest Service recognizes the importance of providing adequate access for equestrians at trailheads accessing pack and saddle trails. The agency will continue to provide facilities for staging, loading, and unloading pack and saddle stock. The Forest Service is designating those NFS roads, NFS trails, and areas on NFS lands that are open to motor vehicle use pursuant to 36 CFR part 212, subpart B. In designating routes, responsible officials may include the limited use of motor vehicles within a specified distance of certain designated routes for dispersed camping.

*Comment.* One respondent questioned the adequacy of trailhead parking in Trail Class 3 for pack and saddle stock and cited design and location concerns with specific trailheads in the Southwestern Region. This respondent stressed the need for adequate space and visibility for parking stock trucks and trailers and proper directional orientation of parking lines. This respondent also raised safety concerns regarding placement of a step-over gate near a culvert that horses could step into, locating parking along a curve in a road, and the speed of traffic along roads paralleling access trails. This respondent also recommended drainage improvement and expansion of a particular trailhead.

*Response.* The proposed directives identified general design considerations for pack and saddle trailheads. The interim final directives at FSH 2309.18, section 22.43, address some of the respondent's concerns by pointing out that the needs of pack and saddle trail users vary based on the type of vehicle used to transport pack and saddle stock. The respondent's concerns about a specific trailhead will be best addressed if they are brought to the attention of the appropriate District Ranger's or Forest or Grassland Supervisor's Office.

Section 2.24—Facilities and Associated Constructed Features Along Trails (Recoded as Section 22.5 in the Interim Final Directives)

Section 2.24, paragraph 2b—Trail Shelters or Lean-Tos With Three Walls in a GFA (Recoded as Section 22.5, Paragraph 2b, in the Interim Final Directives)

*Comment.* One respondent noted that it is impossible to use a wheelchair at snowmobile warming and safety shelters in the State of Wyoming due to their remote location and requested clarification regarding accessibility requirements at snowmobile warming and safety shelters.

*Response.* All people, including people with disabilities, can and do access remote areas by horse, sit-ski, snowmobile, or their own wheelchair. The Architectural Barriers Act requires facilities that are constructed, altered, or leased by, for, or on behalf of a federal agency to be in compliance with the accessibility guidelines in effect at the time of construction. Remote facilities such as three-sided shelters and pit toilets are changed very little by incorporation of applicable accessibility guidelines.

For example, a door on a pit toilet must be at least 32 inches wide. If the pit toilet consists simply of a riser with no walls, the only requirement for accessibility is that the riser be 17 to 19 inches above the ground, with adjacent clear space. To be accessible, the open side of a three-sided shelter must have a floor that is no higher than 17 to 19 inches above the ground to allow for transfer from a wheelchair. Each of these accessibility requirements is

reasonable and blends into the structure, ensuring that everyone can use the facility without changing its natural setting.

Section 2.25—Wilderness Considerations (Recoded as Section 22.6 in the Interim Final Directives)

*Comment.* One respondent recommended that a different set of standards be developed for trails in wilderness areas. In support of this recommendation, this respondent stated that unlike trails in nonwilderness areas, trails in wilderness areas are not always designed for a variety of uses and that trails and related structures in wilderness areas are subject to a specific, narrower standard, i.e., the minimum required to protect wilderness.

*Response.* The Trail Class Matrix and Design Parameters are national guidelines that are applied and adapted by local managers in wilderness areas to reflect the management intent of NFS trails, based on the applicable land management plan and wilderness management plan and consistent with wilderness management direction in FSM 2320. The Design Parameters provide a full range of values that can be applied in the development of trail-specific prescriptions that reflect the management intent for NFS trails in wilderness areas. All of the Design Parameters give local managers discretion to develop trail-specific prescriptions to meet applicable management direction and site-specific needs.

Section 2.3—Design Parameters (Recoded as Section 23 in the Interim Final Directives)

*Comment.* One respondent believed that it would not be feasible to meet the guidelines for trail grades in the Rocky Mountain Region.

*Response.* The agency believes that the range of trail grades in the Design Parameters reflects the topography of NFS lands nationwide and generally covers all NFS trails. There are thousands of miles of NFS trails in the Rocky Mountain Region with trail grades that match those in the Design Parameters. Moreover, as illustrated in Tables 5 and 6 in section 3 of this preamble, the trail grades included in the Design Parameters are generally consistent with the trail grades in the Trail Guides.

Section 2.31a—Hiker/Pedestrian Design Parameters (Recoded as Section 23.11 in the Interim Final Directives)

*Comment.* Some respondents recommended adding a set of Design Parameters for runners, on the grounds that runners have distinct needs and objectives that are different from and in some cases conflict with the needs and objectives of the uses covered by the existing Design Parameters.

*Response.* Each set of Design Parameters is based on a mode of travel. The mode of travel for hikers, pedestrians, and runners is on foot. The Hiker/Pedestrian Design Parameters reflect a wide range of desired experience and challenge levels for runners. Local managers determine the Managed Uses, Designed Use, and Design Parameters of an NFS trail based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. This direction is based on consideration of current trail uses and their volume, relative levels, and seasons of use; potential or existing use conflicts; desired distances and challenge levels; topography; estimated development and maintenance costs; and other factors.

*Comment.* Several respondents believed that the Hiker/Pedestrian Design Parameters should apply to trails that have not historically accommodated pack and saddle use or to trails on which pack and saddle use is prohibited.

*Response.* The Hiker/Pedestrian Design Parameters were derived from the Hiker and Barrier-Free Trail Guides. Like hiker and barrier-free trails, NFS trails managed for hiker/pedestrian use span the widest range of development scale of any NFS trails, ranging from minimally developed, very rugged and challenging trails in Trail Class 1 to fully developed, minimally challenging, high-use, and often accessible trails in Trail Class 5 (see Tables 1 and 3 in section 3 of this preamble). This broad range of trails is a well-established and legitimate Managed Use on many NFS trails.

Many NFS trails are actively managed for both hiker/pedestrian and pack and saddle use, in which case the Designed Use would be Pack and Saddle. There are other instances, however, where NFS trails are actively managed for hiker/pedestrian use and pack and saddle use, although allowed, is not actively managed. In these situations, the Hiker/Pedestrian Design Parameters would apply. Local managers determine the Managed Uses and Designed Use of a trail, based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction.

*Comment.* One respondent requested clarification of proposed section 2.31a, paragraph 3, regarding measurement of tread width for structures across wet areas in the Hiker/Pedestrian Design Parameters. Specifically, this respondent asked whether the tread on a puncheon of two planks placed 2 to 4 inches apart is measured from the outer edge of one plank to the outer edge of the other, or whether the tread is measured as the width of each plank.

*Response.* In the interim final directives, the agency has revised section 2.31a regarding trail crossings at wet areas or streams to track the guidelines in the Design Parameters regarding the minimum tread width for trail structures. Specifically, section 23.11, paragraph 3, in the interim final directives states that stepping stones generally should be at least 12 to 18 inches wide, depending on the Trail Class of the trail and its management intent, and should be set no more than 24 inches apart. Additionally, as shown in Table 8 in section 4 of this preamble, the agency has added the attribute of minimum width of trail structures to the Design Parameters to provide better guidance regarding the minimum usable tread width on trail structures such as puncheon, bridges, and turnpike.

*Comment.* Another respondent recommended eliminating Design Parameters and guidance in the proposed directives that would undermine the primitive character of hiker/pedestrian trails. Specifically, the respondent suggested removing specific guidance in FSH 2309.18, section 2.31b, paragraph 3, regarding location of turns and section 2.31a, paragraphs 2 and 4, regarding a minimum tread width on structures across wet areas, the maximum spacing between stepping stones, and adequate design of bridges.

*Response.* The agency does not believe that any Design Parameters or guidance in the proposed directives needs to be removed to preserve the primitive character of hiker/pedestrian trails. The guidance recommended for removal is needed to design trails that can accommodate hiker/pedestrian use safely and adequately. Local managers and technicians have the discretion to determine the appropriate turn for specific locations, based on the interim final directives and their experience, training, and judgment.

Section 2.31a, paragraph 4, of the proposed directives does not require installation of bridges, but rather provides useful guidance regarding adequate design once a determination has been made that a bridge is needed. Therefore, the agency has retained this guidance in the interim final directives.

2.31a, Exhibit 01—Hiker/Pedestrian Design Parameters (Recoded as Section 23.11, Exhibit 01, in the Interim Final Directives)

*Comment.* One respondent assumed that most of the Appalachian National Scenic Trail would be classified as Trail Class 2 or 3 and only in limited circumstances as Trail Class 4 or 5, where the trail passes through developed areas. This respondent was unsure whether portions of the trail passing through a wilderness area would be classified as Trail Class 1. If so, the respondent was concerned that this classification would preclude historical camping practices, including installation of shelters and improved campsites. This respondent expressed appreciation for provisions in the Trail Class Matrix that would accommodate these practices.

*Response.* Local managers determine the applicable Trail Class of a National Scenic Trail or trail segment based on the comprehensive plan for the trail, applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction.

The classification of an NFS trail does not determine whether improvements along the trail are appropriate. The applicable Trail Class represents the development scale of the trail itself. Improvements adjacent to the trail should be consistent with the applicable land management plan or other management direction for the trail and surrounding area.

Section 2.31b—Pack and Saddle Design Parameters (Recoded as Section 23.12, Exhibit 01, in the Interim Final Directives)

*Comment.* Some respondents expressed concern that the changes to the Design Parameters would discriminate against pack and saddle use and represent an attempt by the Forest Service to eliminate pack and saddle access to NFS trails. One respondent expressed concern that the proposed Pack and Saddle Design Parameters would prevent an older person with disabilities from accessing the backcountry on horseback. One respondent requested that there continue to be unlimited access for horses to all NFS lands.

Two other respondents requested no reduction in the trail miles currently open to pack and saddle use. Some respondents expressed concern that implementation of the Design Parameters would result in NFS trails inside and outside wilderness areas being classified to a lower Trail Class, removed from the forest transportation system, or being no longer available for pack and saddle stock use. Several respondents expressed concern that the TCS reduces the spectrum of recreation opportunities and possibly the number of trails available for pack and saddle use in wilderness and nonwilderness areas. One respondent stated that there should be no reduction in the scope of existing trail classification or maintenance standards anywhere on NFS lands. Other respondents were concerned that implementation of the Design Parameters would result in camping areas no longer being available for pack and saddle use.

Several respondents requested that recreational pack and saddle use be accommodated in each wilderness area and in each portion of a wilderness area that had a history of pack and saddle use when the area was designated, and that historical access to equestrian trails in wilderness areas be maintained, unless a subsequent decision has been made to the contrary to preserve the area's wilderness character. One respondent expressed concern that implementation of the Design Parameters would primarily affect wilderness areas and that restriction of wilderness access would have a broad impact on equestrian use and expressed particular interest in the effect of implementation of the TCS on equestrian access to wilderness areas in the Mark Twain National Forest.

*Response.* The Design Parameters do not reduce the range of recreation opportunities or the number of trails available for pack and saddle use, including the miles of NFS trails available to riders for accessing the backcountry or wilderness areas. Application of the Design Parameters will not cause on-the-ground changes or preclude access to any trail users, nor will it cause reclassification of NFS trails, removal of NFS trails from the forest transportation system, or a reduction in NFS trails managed for any uses, including pack and saddle use.

To the contrary, the Pack and Saddle Design Parameters encompass the full range of trails covered by the Pack and Saddle Trail Guide and in fact cover more trails in the upper end of Trail Class 4 than the Pack and Saddle Trail Guide (see Tables 5 and 6 in section 3 of this preamble). Moreover, the Pack and Saddle Design Parameters are either identical or functionally equivalent to the Pack and Saddle Trail Guide or reflect an expansion of a category (see Tables 5 and 6 in section 3 of this preamble).

Implementation of the Design Parameters will not affect on-the-ground management of NFS trails, including pack and saddle trails, because local managers determine the applicable Design Parameters of a trail or trail segment based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. In addition, the Design Parameters give managers the flexibility to deviate from their guidelines based on specific trail conditions, topography, and other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

Determinations regarding continuation, addition, or reduction of trail access on NFS lands are subject to applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. Substantive changes in the management intent for NFS trails are subject to the direction in FSH 2309.18, section 11, including the direction regarding compliance with NEPA.

Local managers apply and adapt the Trail Class Matrix and Design Parameters in wilderness areas to reflect the management intent of NFS trails, based on the applicable land management plan and wilderness management plan and consistent with wilderness management direction in FSM 2320. All of the Design Parameters give local managers discretion to develop trail-specific prescriptions to meet applicable wilderness management direction.

The Design Parameters do not apply to developed sites, such as campgrounds. Therefore, application of the Design Parameters will not affect the availability of developed sites, including campgrounds, for pack and saddle use.

The Forest Service has long recognized and continues to recognize the value and role of pack and saddle use as a mode of travel and recreation opportunity on NFS trails. The interim final directives refine the agency's trail inventory, planning, and management tools, resulting in enhanced clarity, quality, and consistency in management of all uses of NFS trails, including pack and saddle use.

*Comment.* Two respondents requested that the historical importance of pack and saddle use be considered in determining the appropriate level of trail maintenance for pack and saddle trails.

*Response.* Consistent with the Forest Service's multiple-use mission under the Multiple Use-Sustained Yield Act, 16 U.S.C. 528–531, the agency strives

not to elevate any use of the NFS above any other. The agency endeavors to manage the NFS for a variety of uses, including a variety of trail uses.

The Design Parameters establish guidelines for maintenance of NFS trails. The Trail Operation and Maintenance Considerations provide additional guidance on maintenance of NFS trails. The Pack and Saddle Design Parameters and the portion of the Trail Operation and Maintenance Considerations that apply to the Designed Use of Pack and Saddle provide appropriate guidelines for maintenance of NFS trails with a Designed Use of Pack and Saddle. Specifically, the Pack and Saddle Design Parameters provide guidance regarding adequate tread width, grades, cross slope, clearing limits, and turning radius. In addition, the Trail Operation and Maintenance Considerations Matrix provides guidance regarding maintenance indicators and the frequency and intensity of routine maintenance.

*Comment.* One respondent asked the agency to eliminate Design Parameters and guidance that would undermine the primitive character of pack and saddle trails and identified several specific items that should be removed on that basis.

*Response.* The agency does not believe that application of any of the Design Parameters or guidelines in the proposed directives would undermine the primitive character of pack and saddle trails. The Pack and Saddle Design Parameters, including the items recommended for removal, are needed to design trails that can accommodate pack and saddle use safely and adequately. The agency believes that the requested changes would preclude pack and saddle use or would result in pack and saddle trails that are poorly designed, that are not sustainable, and that adversely affect the safety of equestrians. For example, section 23.12, paragraph 1, in the interim final directives distinguishes between day use and long-term use, which is important information to consider when identifying the applicable Design Parameters for clearing limits, including the need for pack clearances. Consequently, the agency has declined to adopt the respondent's recommendation regarding elimination of guidelines in the Pack and Saddle Design Parameters and the considerations for their application in the interim final directives.

*Comment.* One respondent commented on the apparent inconsistency between the minimum turning radius of 5 feet for pack and saddle trails in section 2.31b, paragraph 3, of the current directives and the turning radius of 4 to 5 feet for Trail Class 2 in the Pack and Saddle Design Parameters in the proposed directives. This respondent stated that since the Forest Service is attempting to provide some diversity within Trail Classes, section 2.31b, paragraph 3, should be changed to reflect the 4-to-5-foot range for turning radius in the Design Parameters.

*Response.* The Design Turn attribute in the Design Parameters refers to turns in general, including switchbacks and climbing turns, whereas the guidance regarding the 5-foot turning radius in section 2.31b, paragraph 3, in the current directives refers specifically to switchbacks. The 4-to-5-foot range in the Design Parameters is appropriate for turns in general.

To enhance clarity, the agency has added a definition for ''Design Turn'' in FSH 2309.18, section 05, in the interim final directives. The agency has also modified section 2.31b, paragraph 3 in the proposed directives (section 23.12, paragraph 3, in the interim final directives), to provide specific guidance regarding a 4-foot minimum radius for climbing turns, in addition to the existing guidance regarding a 5-foot minimum radius for switchbacks. In addition, section 23.12, paragraph 3, in the interim final directives provides for consideration of the applicable Trail Class and site-specific conditions when determining the appropriate radii for climbing turns and switchbacks.

*Comment.* One respondent pointed out that the section pertaining to the Pack and Saddle Design Parameters in the proposed directives was improperly designated as section 2.31c, instead of section 2.3b.

*Response.* The agency has correctly designated the section pertaining to the Pack and Saddle Design Parameters (section 23.12) in the interim final directives.

*Comment.* One respondent observed that section 2.31b, paragraph 4, in the current directives provides guidance regarding measurement and provision of pack clearances, but that the Pack and Saddle Design Parameters in the proposed directives make no reference to this guidance.

*Response.* The Forest Service appreciates this respondent's observation and has added guidance regarding pack clearances to the Pack and Saddle Design Parameters, as shown in Table 9 in section 4 of this preamble.

*Comment.* One respondent commented that section 2.31b, paragraph 5, in the current directives mentions providing a clearance of 48 to 60 inches along precipices, but that the accompanying Design Parameters in the proposed directives provide for a clearance of 60 inches along precipices for Trail Classes 3 and 4. This respondent recommended that the intent regarding the 60-inch clearance in the Design Parameters be more specifically enumerated or that the range for the corresponding clearance be deleted from section 2.31b, paragraph 5.

*Response.* The guidance in the Pack and Saddle Design Parameters applies to trails designed for day use, equestrians with loaded pack strings, and combinations of both. Section 2.31b, paragraph 5, of the current directives provides additional guidance specific to trails managed for use by pack strings by referring to accommodation ''of pack clearance on trails cut through solid rock on steep sidehills'' and stating that ''along a precipice or other hazardous area, the trail base should be at least 48 inches to 60 inches wide to be safe for both animal and rider.''

The Pack and Saddle Design Parameters in the proposed directives provide for tread widths of up to 48 inches at switchbacks, turnpikes, fords and steep side slopes for Trail Classes 2 through 4 and up to 60 inches along precipices for Trail Classes 3 and 4. The statements for Design Tread Width in the Pack and Saddle Design Parameters of ''may be to 48 inches,'' rather than ''at least 48 inches,'' along steep side slopes and ''up to 60 inches,'' rather than ''at least 60 inches,'' along precipices, provides clear guidance while allowing for exercise of local managers' discretion in determining the appropriate tread width, including consideration of the topography and whether the trail is managed for day rides or loaded pack strings. This approach provides guidance to local managers without requiring application of a specific tread width that might be appropriate in some situations, but might result in unnecessary or undesirable overdevelopment in others.

When the Design Parameters include a range of values or a minimum or maximum value for any given attribute, FSH 2309.18, section 14.5, paragraph 3, of the interim final directives instructs managers to identify a single value that reflects the management intent for the trail. Moreover, as the respondent noted, local deviations from any Design Parameter may be established based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

However, the agency agrees that the guidance regarding tread widths in the Pack and Saddle Design Parameters could be clarified. Accordingly, the agency has clarified the text regarding tread widths along steep side slopes and precipices and has specified tread widths of 48 to 60 inches or greater along precipices in Trail Class 2. In addition, the agency has replaced the Design Tread Width for Trail Class 3 and Trail Class 4 of ''up to 60 inches along precipices'' with ''48 to 60 inches or greater along precipices'' to clarify the minimum appropriate tread width and to state more clearly that tread widths greater than 60 inches may be appropriate when deemed necessary (see Table 9 in section 4 of this preamble).

2.31b, Exhibit 01—Pack and Saddle Design Parameters (Recoded as Section 23.12, Exhibit 01, in the Interim Final Directives)

*Comment.* Several respondents requested that the agency incorporate into the Pack and Saddle Design Parameters for Trail Classes 1 through 3 the continuum of trail opportunities provided by mainline (easiest), secondary (more difficult), and way (most difficult) trails and their corresponding standards in the Pack and Saddle Trail Guides.

One respondent expressed concern that trails in Trail Class 2 would not be maintained for pack and saddle use. Another respondent believed that the Pack and Saddle Design Parameters for Trail Class 2 were inadequate to accommodate pack and saddle use.

Several respondents expressed concern that trails in Trail Class 1 would not be designed or maintained to accommodate pack and saddle use. Several respondents expressed concern that some trails where equestrian use is allowed, both inside and outside wilderness areas, would be classified as Trail Class 1 and would no longer be available for equestrian use, including equestrian use conducted by outfitters and guides.

*Response.* In developing the TCS, the agency transitioned from three to five trail classes. Thus, the TCS is more refined than the previous trail classification system in terms of the development scale reflected in the Trail Classes and the technical guidelines in the Design Parameters.

With respect to the Trail Class Matrix, the range of NFS trails managed for pack and saddle use falls within the broader range of NFS trails managed for hiker/pedestrian use, which encompasses the least developed and most developed NFS trails (see Tables 1 through 4 in section 3 of this preamble). The Forest Service has incorporated the full range of trail opportunities and corresponding standards from the Pack and Saddle Trail Guides into Trail Classes 2 through 4 of the Pack and Saddle Design Parameters. The agency believes that trails in Trail Classes 2 through 4, which range from moderately developed to highly developed, accurately reflect the development scale of NFS trails managed for pack and saddle use.

Trails in Trail Class 1 are the least developed and most challenging and are typically very or extremely rugged and often very steep, with little or no defined tread or clearing and many or even continuous obstacles. Therefore, the agency does not believe that Trail Class 1, which includes the least developed NFS trails, is appropriate for pack and saddle use, which requires more development to provide adequate and safe clearance for riders and animals. This approach to the most challenging trails in the Trail Class Matrix is consistent with the approach to the most difficult trails in the Pack and Saddle Trail Guide, which stated: ''Assume pack animals normally are not accommodated on most difficult trails, so less clearing width is needed. Same holds true for day-use horse trails.'' (FSH 2309.18, sec. 2.31b, ex. 01, footnote 1, in the current directives).

The Pack and Saddle Design Parameters provide guidelines for survey, design, construction, maintenance, and assessment of pack and saddle trails, which span Trail Classes 2 through 4. The Pack and Saddle Design Parameters encompass the full range of trails covered by the Pack and Saddle Trail Guide and in fact cover more trails in the upper end of Trail Class 4 than the Pack and Saddle Trail Guide (see Tables 5 and 6 in section 3 of this preamble). Moreover, the Pack and Saddle Design Parameters are either identical or functionally equivalent to the Pack and Saddle Trail Guide or reflect an expansion of a category (see Tables 5 and 6 in section 3 of this preamble). The Design Parameters give managers the flexibility to deviate from their guidelines based on specific trail conditions, topography, and other factors, provided that the exceptions are consistent with the general intent of the applicable Trail Class. In addition, the agency has revised the Pack and Saddle Design Parameters to enhance clarity and accommodation of pack and saddle use (see Table 9 in section 4 of this preamble).

Implementation of the Design Parameters will not affect on-the-ground management of pack and saddle trails because local managers determine the applicable Design Parameters of a trail or trail segment based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. Moreover, where pack and saddle use is allowed on NFS trails, it may continue, even if it is not a Managed Use or the Designed Use of those trails.

*Comment.* One respondent expressed concern about the Design Clearing Height of 6 feet and Design Clearing Width of potentially less than 24 inches for Trail Class 1 in the proposed Pack and Saddle Design Parameters. This respondent recommended a Design Clearing Height of 10 feet and a Design Clearing Width of 8 feet to accommodate riders and pack horses.

One respondent stated that the 3- to 4-foot Design Clearing Width for Trail Class 2 in the proposed Pack and Saddle Design Parameters was adequate for bridle paths, but inadequate for pack and saddle access, and thus potentially limited the number of trails available for pack and saddle use. Another respondent expressed concern that 36 inches, the lowest value in the proposed range for Design Clearing Limits for Trail Classes 2 through 4, was insufficient to provide clearance for a pack animal. Instead of a range, this respondent recommended a Design Clearing Width of 96 inches, 48 inches on either side of the center line of a trail, for all pack and saddle trails.

*Response.* It appears that the first of these respondents was inadvertently referring to the Design Clearing Height and Width for Trail Class 1 in the Hiker/Pedestrian Design Parameters. As shown in Tables 5 and 6 in section 3 of this preamble, the Pack and Saddle Design Parameters encompass the full range of trails covered by the Pack and Saddle Trail Guide. Moreover, the Design Clearing Widths in the Pack and Saddle Design Parameters match or encompass the clearing widths in the Pack and Saddle Trail Guide. For example, the clearing width is 3 to 4 feet for the most difficult trails in the Pack and Saddle Trail Guide and for Trail Class 2 in the Pack and Saddle Design Parameters. The clearing width is 8 feet for the easiest trails in the Pack and Saddle Trail Guide and 6 to 8 feet for Trail Class 4 in the Pack and Saddle Design Parameters.

While a clearing width of 3 feet may barely provide clearance for an equestrian, a clearing width of 3 feet is generally insufficient for passage by pack and saddle stock and is clearly insufficient for passage by loaded pack and saddle stock. Therefore, in the

interim final directives, the agency has revised the Design Clearing Width in the Pack and Saddle Design Parameters to provide for a minimum of 6 feet for Trail Class 2 and a minimum of 8 feet for Trail Class 4. The agency has declined to accept the respondent's recommendation for an 8-foot Design Clearing Limit across Trail Classes 2 through 4, as this width may be too broad in some situations to reflect the desired range of experiences and challenge levels associated with these Trail Classes.

*Comment.* Some respondents recommended that the guidelines for Trail Class 2 in the Pack and Saddle Design Parameters be adopted for Trail Class 1.

*Response.* The agency does not believe it would be appropriate to adopt the same guidelines for Trail Classes 1 and 2 in the Pack and Saddle Design Parameters. The guidelines for each Trail Class in the Design Parameters need to be consistent with the development scale for that Trail Class. Therefore, the guidelines for Trail Classes 1 and 2 need to vary to reflect their different levels of development.

*Comment.* One respondent expressed concern that a trail segment classified as Trail Class 1 or Trail Class 2 could eliminate pack and saddle use on a trail that is generally classified as Trail Class 3 or Trail Class 4.

*Response.* Local trail managers apply the Trail Classes and corresponding Design Parameters to an NFS trail or trail segment, based on the management intent of the trail. If consistent with the trail's management intent, a trail segment could be classified as Trail Class 1 or Trail Class 2, and the remainder of the trail could be classified as Trail Class 3 or Trail Class 4. Trails in Trail Classes 2 through 4 are potentially appropriate for pack and saddle use. Therefore, classification of a trail segment as Trail Class 1 or Trail Class 2 would not preclude pack and saddle use on the rest of the trail if it is classified as Trail Class 3 or Trail Class 4. In fact, pack and saddle use may be appropriate on the trail segment, if it is classified as Trail Class 2. Even if the trail segment is not managed for pack and saddle use, that use is allowed unless it is prohibited on the trail segment.

*Comment.* Several respondents expressed concern that the Design Clearing Width of 5 to 6.5 feet for Trail Class 3 in the Pack and Saddle Design Parameters would not allow less-skilled riders to access wilderness areas and would increase the risk of accidents for riders with moderate skills. These respondents recommended a Design Clearing Width of 8 feet for Trail Class 3.

*Response.* The agency agrees that additional clearing width is needed for Trail Class 3 in the Pack and Saddle Design Parameters and has increased the Design Clearing Width for Trail Class 3 in the Pack and Saddle Design Parameters from 5 to 6.5 feet to 6 to 8 feet.

*Comment.* Several respondents contended that under the proposed TCS, standards associated with mainline pack and saddle trails (comparable, according to the respondents, to trails in Trail Class 4) would no longer or rarely be appropriate in wilderness areas.

*Response.* Trails that were classified as mainline trails will now fall into Trail Class 2, Trail Class 3, or Trail Class 4. Trails in Trail Classes 2 and 3 are commonly found in wilderness areas. Trails in Trail Class 4 are less common but still occur in wilderness areas as access routes and routes connecting wilderness and nonwilderness areas.

*Comment.* One respondent expressed concern that many trails are deteriorating and not adequately maintained for equestrian use. This respondent questioned whether the inadequate maintenance was due to insufficient funding, the poor quality of field work, reduced interest in and awareness of equestrian needs on the part of Forest Service employees and the public, or changes in design standards. This respondent believed that emphasis should be placed on adequate trail maintenance, rather than on reclassification of trails.

*Response.* The agency acknowledges and is concerned about deterioration of all types of NFS trails, not just equestrian trails. Trail maintenance backlogs are due to funding and staffing constraints, rather than insufficient field work, reduced interest in and awareness of equestrian needs, or changes in design guidelines for trails. The TCS assists the agency with identifying the work needed to maintain trails to their intended condition and prioritizing that work. The TCS also helps the agency more accurately estimate and communicate the funding needed to complete the work. Thus, the TCS helps local managers prioritize limited resources.

*Comment.* Several respondents requested that the Pack and Saddle Design Parameters provide discretion to use full bench construction, i.e., construction of the trail bed entirely on undisturbed material, on side slopes (both inside and outside wilderness areas) as necessary to protect trails and to provide safe passage for their intended uses. These respondents also recommended an increase in the Design Tread Width from 12 to 18 inches to 24 to 36 inches for Trails Class 3 and Trail Class 4 and from 12 to 18 inches to 12 to 24 inches for Trail Class 2 to accommodate benched construction where needed. These respondents stated that a Design Tread Width of 24 inches would obviate the need to use fill to compensate for narrowing of the trail bed during construction.

*Response.* The Design Parameters generally do not dictate specific methods of construction, including whether full bench construction should be used on a trail segment. The Design Parameters provide technical guidance for determinations made by local trail technicians and managers regarding the most appropriate trail prescriptions and construction methods for particular trail segments. The Pack and Saddle Design Parameters do not preclude the use of full bench construction in any Trail Class, either inside or outside wilderness areas.

The Design Parameters do not dictate tread widths, as the respondents suggest, but rather provide nationally standardized guidance to be applied in the determination of trail-specific prescriptions. These prescriptions may include deviations from the Design Parameters based on trail-specific conditions, topography, or other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class. For further clarification, the agency has defined ''Design Tread Width'' in the interim final directives as ''the tread width determined to be appropriate for accommodating the Managed Uses of a trail'' (FSH 2309.18, sec. 05).

The proposed Pack and Saddle Design Parameters stated that the Design Tread Width in wilderness areas may be increased to 48 inches along steep side slopes for Trail Classes 2 through 4 and to 60 inches along precipices for Trail Classes 3 and 4. The Pack and Saddle Design Parameters in the interim final directives provide for a Tread Width of up to 60 inches along precipices for Trail Class 2. In addition, the agency has increased the Design Tread Width for single-lane trails in Trail Class 3 in wilderness areas from 12 to 24 inches to 18 to 24 inches to reflect appropriate tread widths for pack and saddle stock on typical trails in Trail Class 3 (see Table 9 in section 4 of this preamble).

The Design Tread Width for single-lane trails in Trail Class 4 in wilderness areas remains 24 inches. This width is consistent with the guidance for wilderness areas in both the current and interim final directives (FSH 2309.18, sec. 2.24, para. 8 (current), and sec. 22.6,

para. 2h (interim final)), which provides that trail treads should not exceed 24 inches in width in wilderness areas. The Design Tread Width for single-lane trails in Trail Class 2 trails in wilderness areas remains 6 to 18 inches, which the agency believes reflects an appropriate range of tread widths for pack and saddle stock on these typically more challenging, narrower, and less developed trails.

Local deviations to any Design Parameter may be established based on trail-specific conditions, topography, and other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

*Comment.* Several respondents contended that the proposed cross slopes of 5 to 10 percent for Trail Class 2 and 5 percent for Trail Classes 3 and 4 in the Pack and Saddle Design Parameters were unrealistic in steep, mountainous areas of the west and requested that these guidelines be revised to meet the design criteria in place since at least 1935.

*Response.* The Forest Service has modified the guidance regarding Design Cross Slope in the interim final directives to reflect more clearly appropriate cross slopes on trails managed for pack and saddle use (see Table 9 in section 4 of this preamble). The agency has revised the Target Cross Slope for Trail Class 3 from 5 percent to 3 to 5 percent and the Target Cross Slope for Trail Class 4 from 5 percent to 0 to 5 percent. The values identified for Trail Class 4 more aptly reflect Target Cross Slopes on more highly developed trails. These trails are often designed to accommodate higher levels of use and have smoother surfaces, where steeper cross slopes may not be as functional or appropriate and where other types of drainage probably need to be employed.

In addition, the agency has decreased the Maximum Cross Slope in Trail Class 2 from natural ground to 10 percent, based on the recognition that continuous cross slopes of more than 10 percent can strain stock, to minimize trail tread expansion down slope due to pack and saddle stock traffic. The agency has reduced the Maximum Cross Slope for Trail Class 3 from 10 to 8 percent. In addition, the agency has decreased the Cross Slope for Trail Class 4 from 10 to 5 percent. Tread cross slopes greater than 5 percent tend to move trail tread down slope due to lateral erosion, especially on trails in Trail Class 4, which typically have higher levels of use and are smoother, with a less natural surface.

Section 2.31c—Bicycle Design Parameters [Reserved] (Recoded as Section 23.13 in the Interim Final Directives)

*Comment.* Some respondents offered assistance in developing FSH 2309.18, section 2.31c, which was reserved for development of guidance regarding the Bicycle Design Parameters.

*Response.* Development of the TCS, including guidance on the Design Parameters, is subject to public notice and comment requirements under NFMA. *Back Country Horsemen of America* v. *Johanns,* No. 05–0960 (D.D.C. Mar. 29, 2006), slip op. at 8–14. Pursuant to those requirements, the agency is requesting public comment on the proposed Bicycle Design Parameters, along with the rest of the interim final directives. The agency will consider timely comments in development of final directives.

*Comment.* Some respondents requested guidance similar to that contained in FSH 2309.18, section 2.31a, paragraph 5, of the current directives, which helps differentiate between trails in Trail Class 1 in the Hiker/Pedestrian Design Parameters and user-created routes, trails designed for mountain bicycle use, and bicycle motor-cross (BMX) routes with jumps and berms.

*Response.* This suggestion will be considered when this section of the directives is developed.

2.31c, Exhibit 01—Bicycle Design Parameters (Recoded as Section 23.13, Exhibit 01, in the Interim Final Directives)

*Comment.* Some respondents expressed their belief that the revised TCS fairly addresses management of mountain bicycle trails and expressed appreciation that mountain bicycling is categorized as nonmotorized, allowed in applicable Trail Classes, and distinct from motorized uses.

*Response.* The Forest Service agrees with this comment.

*Comment.* Two respondents commended the Forest Service for clearly managing mountain bicycle use separately from off-highway vehicle use. These respondents specifically supported the agency's treatment of mountain bicycles as a nonmotorized use, rather than as a motorized use.

*Response.* The Forest Service recognizes that bicycles, including mountain bicycles, are a nonmotorized use that does not fall under the agency's definition of off-highway vehicles. The agency further recognizes that the design considerations for trails managed for bicycle use are different from the design considerations for trails managed for motorized uses and that trails managed for bicycle use therefore require a different set of Design Parameters. For clarity, the agency has included definitions for ''bicycle,'' ''motor vehicle,'' and ''off-highway vehicle'' and removed the definition for ''trail vehicle'' in the interim final directives.

*Comment.* Some respondents supported identifying mountain bicycles as potentially appropriate in all five Trail Classes.

*Response.* The Forest Service agrees that mountain bicycles are potentially appropriate in all five Trail Classes and has reflected that assessment in the chart showing the potential appropriateness of the Trail Classes for the Managed Uses of NFS trails.

*Comment.* One respondent stated that all sets of Design Parameters, including the Bicycle Design Parameters, may not adequately provide for environmentally sustainable trails. However, this respondent believed that this issue should not be addressed unless all sets of Design Parameters, not just the Bicycle Design Parameters, were taken into account.

*Response.* The concept of sustainability has long been incorporated into Forest Service trail design and construction guidance, publications, and training materials. The Design Parameters provide general guidelines for survey, assessment, design, construction, and maintenance of NFS trails. These national guidelines include minimum values, maximum values, or ranges of values for various trail attributes for each Trail Class. The Design Parameters serve as a general reference for development of trail-specific prescriptions at the local level, based on the management intent for each NFS trail. Local managers identify trail-specific Design Parameters based upon consideration of site-specific factors, including soils, hydrological conditions, use levels, erosion potential, and other factors contributing to surface stability and overall trail sustainability, as indicated in a footnote to each set of Design Parameters.

For example, it may be possible to design a sustainable hiker/pedestrian trail in Trail Class 2 across slick rock with a Target Grade of up to 15 percent and a Short Pitch Maximum of up to 25 percent (see FSH 2309.18, section 05, for a definition of ''Target Grade'' and ''Short Pitch Maximum''), whereas a hiker/pedestrian trail in Trail Class 2 across fragile, organic soils may require a Target Grade of less than 8 percent and a Short Pitch Maximum of less than 15 percent.

The agency has modified the footnote referenced above to communicate the concept of sustainability more clearly and has incorporated the concept of sustainability in FSH 2309.18, section 20.2, paragraph 2. In addition, the agency has revised various descriptors, attribute values, and footnotes in all sets of Design Parameters to clarify the intended design, construction, and maintenance of sustainable trails (see Tables 8 through 14 in section 4 of this preamble).

*Comment.* Some respondents proposed several specific changes to the Bicycle Design Parameters in the proposed directives. These changes included increasing the range for Design Tread Width for one-lane trails in Trail Class 2 from 12 to 24 inches to 6 to 24 inches and for one-lane trails in Trail Class 3 from 18 to 30 inches to 18 to 36 inches, and increasing the range for Design Tread Width for two-lane trails in Trail Class 3 from 48 to 60 inches to 36 to 48 inches and for two-lane trails in Trail Class 4 from 60 to 84 inches to 48 to 84 inches.

In addition, these respondents recommended changing the value for Obstacles for Trail Class 1 from a range of 6 to 12 inches to an upper limit of 24 inches; increasing the value for Obstacles for Trail Class 2 from 6 to 12 inches; increasing the value for Obstacles for Trail Class 3 from 3 to 6 inches; and changing the range for Obstacles for Trail Class 4 from 1 to 2 inches to 2 to 3 inches.

These respondents recommended increasing the range for Design Target Grade for Trail Class 1 from 15 to 18 percent to less than or equal to 18 percent; increasing the range for Design Target Grade for Trail Class 3 from less than or equal to 10 percent to less than or equal to 12 percent; and increasing the range for Design Target Grade for Trail Class 4 from less than or equal to 8 percent to less than or equal to 10 percent.

These respondents also recommended changing the range for Design Clearing Width for Trail Class 2 from 36 to 48 inches to 24 to 36 inches and providing in the descriptor for Design Clearing Width for Trail Class 3 and Trail Class 4 for clearing beyond the edge of the trail tread and removing trees when the trail tread is at least 24 inches wide.

*Response.* The Forest Service is revising the Bicycle Design Parameters as shown in Table 10 in section 4 of this preamble. The revisions incorporate the recommended adjustments to the values for Design Tread Width for one-lane trails in Trail Class 3 and for two-lane trails in Trail Class 3 and Trail Class 4.

However, the agency does not believe that the lower limit for the Design Tread Width for Trail Class 2 should be reduced from 12 inches to 6 inches. When combined with the most challenging values for the other attributes for Trail Class 2 in the Bicycle Design Parameters, the level of challenge would no longer be consistent with the development scale for Trail Class 2 and would more appropriately be covered under Trail Class 1. For example, a trail crossing steep side slopes with a sustained Trail Grade of 12 percent and a Tread Width of only 6 inches would generally exceed the level of challenge expected on trails in Trail Class 2 and would more appropriately fit under the parameters of Trail Class 1.

Upon further review of the Design Tread Widths, the agency believes that it is appropriate to identify values for double-lane trails in Trail Class 1 and Trail Class 2 in the Bicycle Design Parameters and has incorporated those values, as shown in Table 10 in section 4 of this preamble.

In addition, to enhance clarity, the agency has split Obstacles in each set of Design Parameters into two categories: Obstacles and Protrusions. The agency has also adjusted the tolerances under Obstacles and Protrusions in all sets of Design Parameters, as shown in Tables 8 through 14 in section 4 of this preamble.

The agency has adjusted the values for Design Target Grade to identify a range for each Trail Class, as applicable. The agency believes that incorporation of a lower limit better reflects the minimum grade typically necessary to provide adequate drainage on sustainable trails. The agency has identified a lower or flatter minimum Design Target Grade for trails in Trail Class 4 and Trail Class 5, which typically include compacted tread surfaces that can more readily provide adequate drainage on segments with flatter grades than trails with a rougher, native surface that are more often encountered in Trail Classes 1 through 3.

The agency has not increased the Design Target Grade for Trail Class 3 and Trail Class 4, as suggested by the respondents, because these changes, combined with the most challenging values for the other attributes in those Trail Classes, would result in a level of challenge that is not consistent with the development scale for Trail Class 3 and Trail Class 4. Trail Class 3 is geared to accommodate mountain bicycle riders with intermediate skills. These trail users can generally ride sustained grades of 10 percent, but sustained grades of 12 percent frequently require dismounting and walking. The level of challenge proposed by the respondents for Trail Class 3 would more appropriately be covered under Trail Class 2. Similarly, the suggested change in the Design Target Grade for Trail Class 4 would make trails in this Trail Class too difficult for many beginner and lower intermediate riders.

The agency has revised the ranges for Design Clearing Width to clarify the minimum clearing width and has added guidance regarding clearance of bicycle pedal bumpers under the new category of Shoulder Clearance.

Mountain bicycle handlebars are generally 26 inches wide. The agency did not adopt the respondents' suggestion to reduce the minimum Design Clearing Width for Trail Class 2 to 24 inches because this level of challenge would not be consistent with the development scale for Trail Class 2 and would more appropriately be covered under Trail Class 1. In the interim final directives, the lower limit in the range of 36 to 48 inches for the Design Clearing Width in Trail Class 2 accommodates typical handlebar widths, with approximately 6 inches on both sides of the bicycle frame. The range for the Design Clearing Width in Trail Class 1 remains 24 to 36 inches.

*Comment.* Some respondents expressed concern that the proposed directives included Bicycle Design Parameters for Trail Class 1, even though bicycle use is prohibited in wilderness areas as a mechanized use. These respondents asserted that bicycle use is inconsistent with the Wilderness Act and that the TCS should not provide for bicycle use on trails in Trail Class 1, which occur in wilderness areas.

*Response.* Application of the TCS does not affect whether certain modes of travel are allowed on a trail. The five Trail Classes represent the development scale of NFS trails. The Design Parameters are guidelines for survey, design, construction, maintenance, and assessment of NFS trails, based on their applicable Trail Class and management intent. From among the allowed uses of each NFS trail, local managers determine its Managed Uses and Designed Use, which in turn determines the applicable Design Parameters for that trail. The modes of travel allowed on a trail in a wilderness area must be consistent with the Wilderness Act, the authorizing statute for the wilderness area, and the applicable wilderness management plan.

*Comment.* One respondent stated that trails in Trail Class 1 should not be actively managed for bicycle use unless they are subject to a special use permit.

Otherwise, this respondent believed that bicycle use should merely be allowed at the user's risk on trails in Trail Class 1. Another respondent questioned whether the agency really wants mountain bicycles on trails in Trail Class 1. Two respondents expressed interest in development of Design Parameters for BMX use with berms, jumps, and steep grades.

*Response.* The agency believes that Trail Class 1, which reflects the most challenging and minimally developed NFS trails, can be actively managed for bicycle use. Trails in Trail Class 1 are typically extremely rugged and often very steep, with narrow tread and clearing limits and many or continuous obstacles. The Forest Service believes that in certain locations and situations, trails in Trail Class 1 can be and are developed and managed to provide appropriately challenging, enjoyable, and sustainable mountain bicycle opportunities.

The agency understands that there is increasing interest in challenge courses for mountain bicycling. The agency provides NFS trails for a wide variety of users with various skill levels. In general, the Forest Service does not design challenge courses, which may raise safety and sustainability concerns. The agency works with trail groups to provide an appropriate range of NFS trails managed for bicycle use, including incorporation of natural obstacles, as deemed appropriate, to provide challenging trail opportunities. The Forest Service encourages those interested in development of mountain bicycle challenge courses to work with members of the private sector regarding provision of these types of recreation opportunities, which may be more appropriate on nonNFS lands.

Section 2.32—Standard/Terra Motorized Trails (Recoded as Section 23.2 in the Interim Final Directives)

*Comment.* One respondent recommended modifying all sections of the FSM and FSH regarding motorized use of trails to include language similar to the provisions in proposed section 2.35b, paragraph 4, regarding avoidance of sensitive wildlife and habitat and the inappropriateness of motorized use in wilderness study areas, inventoried roadless areas, and habitat protection areas unless they can be adequately protected.

*Response.* The travel management rule at 36 CFR part 212, subpart B, requires each administrative unit or Ranger District of the Forest Service to designate those NFS roads, NFS trails, and areas on NFS lands that are open to motor vehicle use by vehicle class and, if appropriate, by time of year. The travel management rule requires the responsible official to consider the effects of designating NFS trails for motor vehicle use on various resources, with the objective of minimizing those effects. These effects include (1) damage to soil, watershed, vegetation, and other forest resources and (2) harassment of wildlife and significant disruption of wildlife habitats. The travel management rule also requires consideration of general criteria in designating trails for motor vehicle use, including effects on natural and cultural resources. The agency is finalizing directives implementing the travel management rule that also address these criteria. The agency does not believe that it is necessary to duplicate these requirements in the TCS directives.

Section 2.32a—Motorcycle Design Parameters (Recoded as Section 23.21 in the Interim Final Directives)

*Comment.* Some respondents supported the proposed change in the title of these Design Parameters from ''Bike Design Parameters'' to ''Motorcycle Design Parameters'' to distinguish clearly between bicycle and motorcycle uses.

*Response.* The Forest Service agrees with this comment and has created the Bicycle Design Parameters and the Motorcycle Design Parameters.

*Comment.* Several respondents expressed concern regarding the direction in proposed FSH 2309.18, section 2.32a, paragraph 3, to designate suitable closed roads as NFS trails open to motorcycle use and requested that this provision be removed from the directives, rather than shifted to the All-Terrain Vehicle or Four-Wheel Drive Design Parameters.

*Response.* The agency has removed the provision in proposed section 2.32a, paragraph 3, regarding designation of suitable closed roads as NFS trails open to motorcycle use entirely from the interim final directives. Designation of roads, trails, and areas for motor vehicle use is conducted pursuant to the travel management rule at 36 CFR part 212, subpart B, and its implementing directives, not the TCS directives.

*Comment.* One respondent expressed concern about the reference in proposed section 2.32a, paragraph 6, to user needs and variety of distances and recommended removing this language from the interim final directives. If this language is not removed from this section, the respondent requested that comparable language be added to the guidance regarding application of each set of Design Parameters.

*Response.* The agency has revised this provision in the interim final directives to state that a variety of distances and recreation experiences may be provided by designing cutoffs for less experienced riders within a system of loop trails; that an experienced rider can ride approximately 50 miles in an average day; and that some riders can cover over 100 miles in a day. The agency believes that the revised language provides useful guidance for the design and management of trails managed for motorcycle use.

*Comment.* One respondent stated that when trails are managed for multiple uses that include motorcycle use, the objective should be to decrease the speed of motorcycles. This respondent suggested striking in its entirety proposed section 2.32a, paragraph 9, regarding turns and switchback radii for motorcycle use. This respondent requested removal of guidance to use concrete blocks and cement to harden corners on multi-use trails. This respondent also proposed requiring the posting of speed limits of 10 to 15 miles per hour on multi-use trails.

*Response.* The Motorcycle Design Parameters are geared toward development and management of trails that offer an appropriate range of experience opportunities and levels of challenge for motorcyclists, while minimizing trail-related impacts on adjacent resources. The guidance in the Motorcycle Design Parameters regarding design turns (which include switchbacks, horizontal turns, and climbing turns) and in proposed section 2.32a regarding switchback radii will assist managers in meeting those objectives and has been retained.

Rather than identifying as an objective the desire for slower speeds for motorcycles, the interim final directives identify a method for slowing motorcycles, where deemed necessary or appropriate, by decreasing the turning radius. Whether motorcycle speeds need to be slowed is best judged by the local trail manager.

It is standard practice to use concrete blocks and cement to harden trails where deemed necessary to protect sensitive soils at switchbacks and climbing turns. Therefore, the agency has retained guidance regarding use of this practice in the interim final directives.

The agency does not believe it is appropriate to require posting of speed limits of 10 to 15 miles per hour on multi-use trails.

*Comment.* One respondent expressed concern that the narrative portion of proposed section 2.32a primarily focuses on the appropriateness of highly

developed trails in Trail Class 4 for motorcycles and recommended that this section be revised to reflect the appropriateness of trails in Trail Class 2 and Trail Class 3 for motorcycles.

*Response.* The Forest Service believes that the interim final directives at FSH 2309.18, section 23.21, appropriately address motorcycle use of trails in Trail Classes 2 through 4, based on their development scale.

Section 2.32a, Exhibit 01—Motorcycle Design Parameters (Recoded as Section 23.21, Exhibit 01, in the Interim Final Directives)

*Comment.* Some respondents recommended development of a set of Design Parameters for challenging motorcycle trails with sharp curves, steep grades, and other demanding characteristics.

*Response.* The Forest Service does not believe that it is necessary to develop a set of Design Parameters for challenging motorcycle trails. The agency believes that the array of Trail Classes identified for motorcycle use in the Motorcycle Design Parameters provides an appropriate range of recreation opportunities and levels of challenge on NFS trails, consistent with the objectives identified in proposed FSH 2309.18, section 2.02.

In the Motorcycle Design Parameters, Trail Class 2 provides the most challenging trail conditions for NFS trails managed for motorcycle use. Challenge is achieved by a combination of trail characteristics, including trail grade, alignment, clearing width, tread conditions, gain or loss of elevation, and other criteria outlined in the Design Parameters. The agency has revised the descriptors for Surface Obstacles and Protrusions in the Motorcycle Design Parameters to clarify consideration of these features as design elements in determining and prescribing the desired level of challenge (see Table 11 in section 4 of this preamble). Also, as stated in footnote 2 to the Motorcycle Design Parameters, the determination of the trail-specific Design Grade, Design Surface, and other Design Parameter attributes should be based upon soils, hydrological conditions, use levels, erosion potential, and other factors contributing to surface stability and overall sustainability of the trail.

The agency understands that there is increasing interest in the design of challenge courses. The agency manages NFS trails for a wide variety of uses and skill levels. In general, the Forest Service does not design challenge courses, which may raise safety concerns. The agency works with trail groups to provide an appropriate range of NFS trails managed for motorcycle use, including incorporation of natural obstacles as deemed appropriate to provide challenging trail opportunities. The Forest Service encourages trail users interested in development of motorcycle challenge courses to work with members of the private sector regarding provision of these types of recreation opportunities, which may be more appropriate on non NFS lands.

*Comment.* Two respondents recommended splitting the Motorcycle Design Parameters into different levels of difficulty. These respondents believed that providing motorcycle trails with a higher level of challenge that would be less likely to appeal to hikers and equestrians would be the best way to avoid use conflicts between hiking and horseback riding and motorcycle use.

*Response.* The agency does not believe it is necessary to create additional trail classes in the Motorcycle Design Parameters. The Trail Classes and each set of Design Parameters incorporating them reflect the development scale of NFS trails and corresponding levels of difficulty. Local managers determine the Managed Use or Uses, Designed Use, and corresponding trail-specific Design Parameters based on the applicable Trail Class and the management intent for each NFS trail. Each set of Design Parameters encompasses a wide range of recreation experiences and levels of challenge, which gives managers the flexibility to develop trail-specific prescriptions based on the Managed Uses of a trail, site-specific resource considerations, and other factors. To clarify this intent, the agency has added guidance in section 14.4, paragraph 3, of the interim final directives regarding identification of the Designed Use and Design Parameters for trails with more than one Managed Use.

Section 2.32b—All-Terrain Vehicle Design Parameters (Recoded as Section 23.22 in the Interim Final Directives)

Section 2.32b, Exhibit 01—All-Terrain Vehicle Design Parameters (Recoded as Section 23.22, Exhibit 01, in the Interim Final Directives)

*Comment.* One respondent stated that the proposed Design Tread Width in the All-Terrain Vehicle (ATV) Design Parameters contradicts federal policy to limit ATV trails to 50 inches or less in width.

*Response.* The policy referenced by the respondent applies to ATVs, not to the width of trails managed for ATV use. ATV is defined at FSM 2353.05 as a type of off-highway vehicle that travels on three or more low-pressure tires; has handle-bar steering; is less than or equal to 50 inches in width; and has a seat designed to be straddled by the operator. This definition refers to the total external width of the vehicle, including fenders, rather than to the wheelbase, which is typically narrower than the total width of the vehicle. The Design Tread Widths for single-lane trails in the ATV Design Parameters vary from a minimum of 48 inches for Trail Class 2 to 72 inches for Trail Class 4. This range of Design Tread Widths provides adequate clearance for the range of ATVs used on NFS trails.

New Section 23.23—Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width

*Comment.* Two respondents recommended adding Design Parameters and corresponding guidance for four-wheel drive motor vehicles.

*Response.* The agency agrees with this suggestion and has added Design Parameters and corresponding guidance regarding four-wheel drive vehicles greater than 50 inches in width in the interim final directives. The agency did not include the word ''motor'' in the heading for this subsection because it falls under the section heading ''Standard Terra Trails: Motorized.'' Inclusion of the word ''motor'' in the heading for this subsection would therefore be redundant and inconsistent with the two other subsection headings, ''All-Terrain Vehicle'' and ''Motorcycle,'' neither of which includes the word ''motor.''

*Comment.* Two respondents made 11 specific recommendations regarding application of the Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width. Each recommendation is listed below, followed by the agency's response.

*Recommendation 1.* State that generally four-wheel drive motor vehicle use on NFS lands can be either trail-based or road-based, depending on the availability of high-clearance NFS roads, the Road Management Objectives of those roads, the availability of trails suitable and open for four-wheel drive motor vehicles or other vehicles exceeding 50 inches in width, the TMOs of those trails, and the Managed Uses and Designed Use of those trails.

*Response.* Although different wording was used, the intent of this suggestion with respect to trail use is reflected in the interim final directives at FSH 2309.18, section 14.3. The suggestions dealing with management of motor vehicle use on roads are beyond the scope of these directives.

*Recommendation 2*. Designate suitable closed roads as NFS trails open to four-wheel drive motor vehicles.

*Response*. The agency has removed a provision regarding opening closed roads to motorcycle use and does not believe it is appropriate to add a similar provision for other uses, including four-wheel drive vehicles greater than 50 inches in width. Designation of roads, trails, and areas is made at the local level pursuant to the travel management rule and its implementing directives, rather than the TCS directives.

*Recommendation 3*. State that four-wheel drive motor vehicle trails generally should be classified as Trail Class 1 or Trail Class 2 and modified to create a greater degree of difficulty for the driver. The respondents based the latter recommendation on application of a revised Trail Class Matrix proposed by the respondents, with the least developed trails correlating to the least level of difficulty.

*Response*. Trails in Trail Class 1 are generally inappropriate for four-wheel drive vehicles greater than 50 inches in width. Trails in Trail Class 1 are the least developed and most challenging and are typically extremely rugged and often very steep, with little or no defined tread or clearing and many or continuous obstacles. Nevertheless, the Design Parameters allow for deviations based on trail-specific considerations, provided that the deviations are consistent with the general intent of the applicable Trail Class.

The agency believes that trails in Trail Class 2 are appropriate for four-wheel drive vehicles greater than 50 inches in width, as shown in their Design Parameters and the chart regarding appropriateness of the Trail Classes for the Managed Uses of NFS trails.

The agency does not believe it is appropriate to establish a direct, rather than an inverse, correlation between development scale and level of difficulty in the Trail Class Matrix. Since less developed trails in the lower Trail Classes such as Trail Class 2 are more challenging, there is no need to enhance the level of difficulty for trails in Trail Class 2 in the Design Parameters for four-wheel drive vehicles greater than 50 inches in width.

*Recommendation 4*. State that the higher the Trail Class, the higher the degree of difficulty of the trail.

*Response*. As stated above, the agency believes that the level of challenge provided by a trail inversely correlates with its development scale. The less developed trails are, the more challenging they are, and vice versa.

*Recommendation 5*. State that user needs for different distances and experiences can be accommodated by providing trunk trails offering a lower level of difficulty than secondary trails leading off trunk trails. State that the degree of difficulty of a trail affects its length: The more difficult the trail, the shorter the length necessary for a desired recreation experience; conversely, the less difficult the trail, the longer the length necessary for a desired recreation experience. State that the shorter the trail length and the smaller the area, the more difficult the trail experience should be.

*Response*. The agency believes that the length of a trail relates to its level of difficulty, in that users with less skill may need shorter trails. Accordingly, the agency has added section 23.23, paragraph 2c, to state that a variety of distances and recreation experiences may be provided by designing cutoffs for less experienced riders within a system of loop trails.

*Recommendation 6*. Encourage drainage dips, especially those that are close together, over water bars to enhance the level of challenge provided by a trail and to mitigate adverse impacts associated with sustained grades.

*Response.* The agency agrees that drainage dips on trails for four-wheel drive vehicles greater than 50 inches in width can provide more challenge and can mitigate adverse impacts on the trails. Accordingly, the agency has added guidance to the interim final directives encouraging drainage dips over water bars on trails managed for use by four-wheel drive vehicles greater than 50 inches in width. However, the agency has not provided for drainage dips to be within close proximity to one another because appropriate spacing of drainage dips is site-specific and determined at the local level.

*Recommendation 7*. Encourage the use of climbing turns and discourage the use of switchbacks whenever possible. State that implementation of rolling dips should be considered before and after climbing turns for side slopes with a grade exceeding 30 percent.

*Response*. The agency has added guidance recommending the use of climbing turns rather than switchbacks in section 23.23 of the interim final directives. Guidance regarding incorporation of dips in conjunction with switchbacks belongs in the Forest Service's Standard Specifications for Construction and Maintenance of Trails (EM 7720–103) and has not been included in the interim final directives.

*Recommendation 8*. State that turning radii should vary depending on the difficulty level of the trail. State that decreasing the turning radius can offer a greater level of challenge.

*Response.* The Design Parameters for Four Wheel Drive Vehicles Greater Than 50 Inches in Width provide guidance on turning radii that corresponds with the level of challenge in each Trail Class. The agency has provided additional guidance in section 23.23 of the interim final directives regarding the relationship of the turning radius to the level of challenge of a curve.

*Recommendation 9*. State that trail junctions should be located so that no more than two trails intersect at one point.

*Response.* The agency has included this recommendation in section 23.22 in the interim final directives for the Motorcycle Design Parameters and the ATV Design Parameters, but does not believe that it is necessary to include this recommendation for four-wheel drive vehicles greater than 50 inches in width because these vehicles generally travel at slower speeds on trails than motorcycles and ATVs.

*Recommendation 10.* State that varying degrees of horizontal and vertical alignments should be provided, with a tread surface that can accommodate an average speed of 2 to 4 miles per hour.

*Response*. The agency has included this recommendation in section 23.23, paragraph 2b, of the interim final directives.

*Recommendation 11*. State that improvements and modifications of four-wheel drive motor vehicle trails should enhance the degree of difficulty for the driver: the more developed the trail, the more difficult the trail should be.

*Response.* The Forest Service does not believe that the degree of difficulty of a trail increases with its development scale. Rather, the agency believes that the level of challenge of a trail inversely correlates to its development scale. The more developed a trails is, the less challenging it is, and vice versa.

The primary purposes of constructed features on NFS trails are to protect resources and to provide for user convenience, based on the applicable Trail Class and management intent for each trail. Design elements influencing the degree of challenge provided by an NFS trail include trail grade, alignment, clearing width, trail tread, surface obstacles and protrusions, and gain or loss of elevation. The interim final directives are not intended to provide guidance regarding development of ATV challenge courses or increasing the level of challenge through installation of constructed features.

New Section 23.23, Exhibit 01—Design Parameters for Four-Wheel Drive Vehicles Greater Than 50 Inches in Width

*Comment.* Two respondents proposed a set of Four-Wheel Drive Motor Vehicle Design Parameters.

*Response.* Trails in Trail Class 1 and Trail Class 5 are not typically designed or actively managed for four-wheel drive vehicle use. Therefore, in contrast to the respondents' proposed Design Parameters, which included a range for tread widths of 72 to 216 inches, the range for Design Tread Widths in the Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width in the interim final directives is 72 to 120 inches, with the lower numbers in the range correlated with the lower Trail Classes.

The Forest Service has incorporated the respondents' suggestion for a 16-foot Design Tread Width for Trail Class 2. It would be inconsistent with the purpose of the Design Parameters not to specify Tread Width for Trail Class 3 and Trail Class 4. Accordingly, the agency has identified a minimum Design Tread Width of 16 feet for these Trail Classes.

In addition, the agency has included guidance regarding the Design Surface Type, including the use of native or imported surface material, grading, tread roughness, and tread stability, and guidance regarding the Surface Obstacles and Protrusions for each Trail Class. The descriptor for Surface Obstacles and Protrusions includes guidance to consider these elements as design features influencing the degree of challenge provided by a trail. The agency has also included a range of grades and cross slopes similar to those proposed by the respondents for each Trail Class. Some of the Design Clearing Limits in the Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width in the interim final directives, such as those for Trail Classes 2 through 4, are similar to those suggested by the respondents.

The Design Parameters for Four-Wheel Drive Vehicles Greater Than 50 Inches in Width in the interim final directives incorporate a range of Design Turns for the Trail Classes that is similar to the range of Design Turns suggested by the respondents. For example, the respondents proposed a range of design turn radii from 10 to 25 feet, and the Design Parameters identify a range of design turn radii of 10 to 30 feet.

The agency has not included the three additional trail attributes (''Non-Defined Foot Print,'' ''Obstacles—Rock,'' and ''Obstacles—Desert'') proposed by the respondents in the Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width. These additional attributes do not appear in any other set of Design Parameters and would create unnecessary inconsistency in the Design Parameters.

New Section 23.32—Snowshoe Design Parameters

New Section 23.32, Exhibit 01—Snowshoe Design Parameters

*Comment.* Two respondents recommended developing a set of Snowshoe Design Parameters.

*Response.* The agency agrees with these respondents and has included a set of Snowshoe Design Parameters in the interim final directives.

2.33c—Snowmobile Design Parameters (Recoded as Section 23.33 in the Interim Final Directives)

2.33c, Exhibit 01—Snowmobile Design Parameters (Recoded as Section 23.33, Exhibit 01, in the Interim Final Directives)

*Comment.* One respondent expressed concern that the Snowmobile Design Parameters do not seem to take into account a trail that is used for multiple purposes, such as snowmobiles, cross-country skiing, snowshoeing, and dog sledding. This respondent expressed particular concern regarding identification of the appropriate trail grade for trails with multiple uses.

*Response.* The TCS addresses the common situation where an NFS trail is actively managed for more than one use. A trail may have multiple Managed Uses, such as snowmobiling, cross-country skiing, snowshoeing, and dog sledding, but can have only one Designed Use. The Designed Use of a trail is the design driver because it is the Managed Use that requires the most demanding design, construction, and maintenance parameters. When determining the Designed Use and corresponding Design Parameters for a trail, managers are instructed to assess any essential or limiting geometry for the Managed Uses of the trail or trail segment to determine whether any trail-specific adjustments are necessary to the applicable Design Parameters, including the Design Trail Grade.

*Comment.* One respondent stated that the Design Clearing Limits for snowmobiles are insufficient to provide adequate snowfall or visibility around turns on snowmobile trails and recommended that these Design Clearing Limits be increased.

*Response.* The Design Clearing Limits in the Snowmobile Design Parameters have been verified in the field and have been determined to be generally applicable and appropriate, including around turns. Trail-specific deviations may be established based on trail-specific conditions, topography, and other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

Response to Comments on the Regulatory Certifications in the Proposed Directives Environmental Impact

*Comment.* Several respondents stated that the agency has not considered and documented environmental impacts and impacts on trail users and pack and saddle use associated with implementation of the TCS. One respondent expressed concern that environmental analysis was not conducted on the proposed TCS. One respondent expressed concern that the proposed TCS would be adopted pursuant to a categorical exclusion from documentation in an environmental impact statement (EIS) or environmental assessment (EA) without addressing potential effects associated with trails developed and maintained for motorized use.

Several respondents disagreed with the agency's conclusion that the proposed TCS does not require preparation of an EA or EIS and requested that the agency complete an environmental analysis addressing potential economic impacts on the agency and adverse impacts on natural resources from implementation of the proposed TCS. One respondent stated that the proposed TCS represents a significant departure from previous policy and requested that a programmatic EIS be prepared for the proposed TCS. One respondent requested that the agency provide data on economic impacts associated with implementation of the TCS and stated that many equestrians in the State of Missouri travel to the western states to trail ride and to hunt and that to be denied this opportunity would be disturbing to equestrians and also damaging to the local economies of those western states.

*Response.* The management intent for a trail is reflected in the applicable land management plan, applicable travel management decisions, trail-specific decisions, and other related direction. Management direction for NFS trails is developed with public involvement and appropriate environmental documentation pursuant to NEPA and NFMA. Substantive changes in the management intent for NFS trails are subject to the direction in FSH 2309.18,

section 11, including the direction regarding compliance with NEPA.

In contrast, implementation of the TCS does not affect on-the-ground management of NFS trails. The TCS is merely a tool for classifying NFS trails for purposes of survey, design, construction, maintenance, and assessment. Local trail managers identify the applicable Trail Class, Managed Uses, Designed Use, and corresponding Design Parameters for an NFS trail based on its management intent. Therefore, implementation of the TCS falls within the Forest Service's categorical exclusion for ''rules, regulations, or policies to establish Servicewide administrative procedures, program processes, or instructions,'' and preparation of an EA or EIS is not required. *See Back Country Horsemen of America* v. *Johanns,* No. 05–0960 (D.D.C. Mar. 29, 2006), slip op. at 15–20.

Regulatory Impact

*Comment.* Two respondents stated that the proposed TCS incorporates without justification several major policy changes, including changing the basis for trail design, construction, and maintenance from transportation to recreational use and providing less stringent trail standards in wilderness areas.

Two respondents disagreed with the agency's assertion that the proposed revisions to the TCS are non-significant and therefore do not require review by the Office of Management and Budget (OMB) under Executive Order 12866.

*Response.* The agency has provided ample justification in the preambles to the proposed and interim final directives for the changes made to the TCS. Implementation of the TCS does not affect on-the-ground management of NFS trails, which continue to be surveyed, designed, constructed, maintained, and assessed in accordance with their management intent.

OMB has the responsibility in the Executive Branch to determine whether regulations and policies are significant for purposes of the criteria in Executive Order 12866. The interim final directives will establish guidelines for trail survey, design, construction, maintenance, and assessment that will apply internally to the Forest Service. Applying the criteria in Executive Order 12866, OMB has determined that these interim final directives cannot and may not reasonably be anticipated to lead to an annual effect of $100 million or more on or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; raise novel legal or policy issues; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of beneficiaries of those programs. Therefore, OMB has determined that the proposed and interim final directives are non-significant.

Unfunded Mandates

*Comment.* One respondent stated that the proposed directives were an unfunded mandate.

*Response.* The interim final directives do not constitute an unfunded mandate for purposes of 2 U.S.C. 1531–1538 because the interim final directives will not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Rather, the interim final directives will establish internal agency guidelines for survey, design, construction, maintenance, and assessment of NFS trails.

Controlling Paperwork Burdens on the Public

*Comment.* Two respondents contended that the Paperwork Reduction Act applies and that the agency's assertion to the contrary is incorrect.

*Response.* The interim final directives do not contain any public recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320. Rather, the interim final directives contain only internal agency recordkeeping and reporting requirements for purposes of inventorying and managing NFS trails. This information is currently incorporated into the agency's national trail database.

Comments Beyond the Scope of the Directives

*Comments.* One respondent expressed concern about the effects on energy use resulting from encouraging motorized trails.

*Response.* The interim final directives do not encourage any particular type of trail use. The TCS is applied based on the development scale of NFS trails and their management intent. Energy consumption by trail users is beyond the scope of these interim final directives.

*Comment.* One respondent objected to prohibiting mechanized methods for trail maintenance in wilderness areas. This respondent stated that mechanized methods for trail maintenance would cut the cost of keeping these types of trails open. One respondent requested that the Forest Service set aside a two-week period in the spring to allow trail crews to use chainsaws in the Sawtooth and Paysayten Wilderness areas.

*Response.* The propriety of the use of mechanical transport and motorized tools in wilderness areas is beyond the scope of these directives, which establish guidelines for trail survey, design, construction, maintenance, and assessment that will apply internally to the Forest Service.

*Comment.* One respondent wondered why the TCS does not include mapping guidelines by Trail Class and wondered if the different Trail Classes would be displayed on Forest Service maps that are available to the public. This respondent stated that historically trails in Trail Classes 3 through 5 have appeared on maps and assumed that trails in Trail Class 2 would also sometimes appear on Forest Service maps, depending on local factors. This respondent did not expect that trails in Class 1 would generally apear on maps and assumed that they would more likely be known only to users who come across them.

*Response.* Requirements for Forest Service visitor maps are found in FSM 7140 and FSH 7109.13a, chapter 10, which are beyond the scope of these directives.

*Comments.* Several respondents expressed concern and made requests regarding management of specific NFS trails.

*Response.* Implementation of the TCS does not result in changes in on-the-ground management of NFS trails. The TCS does not identify specific trails, their Managed Uses or Designed Use, or corresponding Design Parameters. These determinations are made by managers at the local level based on applicable land management plan direction, applicable travel management decisions, trail-specific decisions, and other related direction. Trail-specific situations should be addressed at the local level in consulation with the local trail manager.

**3. Comparison of the Pack and Saddle Trail Guides and the Pack and Saddle Design Parameters**

Tables 1 through 6 compare the Pack and Saddle Trail Guides in the current directives with the Pack and Saddle Design Parameters in the interim final directives. The correlation between the two sets of tables is approximate, rather than exact, and the trail classifications shown are not to scale due to limitations of the size of the page. Only factors common to the Trail Guides and Design

Parameters are included in these examples.

Tables 1, 2, 3, and 4 demonstrate that the technical guidelines for pack and saddle trails have never applied to the full range of NFS trails. Specifically, these tables show that the guidelines in both the Pack and Saddle Trail Guide and the Pack and Saddle Design Parameters apply to trails that fall in between the least developed and the most developed NFS trails.

*The Hiker and Barrier-Free Trail Guides Versus The Pack and Saddle Trail Guide*

Table 1: The Hiker and Barrier-Free Trail Guides

Hiker/pedestrian use encompasses the widest range of trail development scale in the NFS. Accordingly, Table 1 shows a broad range of trails ranging from the lowest level of development in the Hiker Trail Guide and the highest level of development in the Barrier-Free Trail Guide. The combined range includes extremely challenging and minimally developed trails in the Most Difficult Category in the Hiker Trail Guide, with maximum pitch grades exceeding 30 percent, tread widths of 1 foot, and clearing widths of 3 feet, to the least challenging, most highly developed, and fully accessible trails in the Easiest Category in the Barrier-Free Trail Guide, with grades of 1 to 3 percent, tread widths of 8 feet, and clearing widths free of underbrush for 1 foot on both sides of the trail.

Table 2: The Pack and Saddle Trail Guide

The basic elements of the Pack and Saddle Trail Guide are included in Table 2, which encompasses trails ranging from Most Difficult, with tread widths not indicated, maximum pitch grades exceeding 30 percent, and clearing widths of 3 to 4 feet, to Easiest, with tread widths of 24 inches, maximum pitch grades of 15 percent, and clearing widths of 8 feet. In the current directives, the Most Difficult Category in the Pack and Saddle Trail Guide is referenced by a footnote that states: ''Assume pack animals normally are not accommodated on most difficult trails, so less clearing width is needed. Same holds true for day-use horse trails.''

Table 1 Versus Table 2

Despite differences in scale, Tables 1 and 2 show that the spectrum of pack and saddle trails falls somewhere within the range of the Most Difficult trails in the Hiker Trail Guide and the Easiest trails in the Barrier-Free Trail Guide.

*The Hiker/Pedestrian Versus The Pack and Saddle Design Parameters*

Table 3: The Hiker/Pedestrian Design Parameters

The excerpt from the Hiker/Pedestrian Design Parameters shown in Table 3 includes only those factors that were also listed in the corresponding Trail Guides.

Table 3 shows that the agency created the Hiker/Pedestrian Design Parameters by combining the Hiker and Barrier-Free Trail Guides: the Hiker/Pedestrian Design Parameters encompass the full range of trail development scale included in the corresponding Hiker and Barrier-Free Trail Guides, from the Most Difficult level for hiking trails to the Easiest level for barrier-free trails.

Table 4: The Pack and Saddle Design Parameters

The excerpt from the Pack and Saddle Design Parameters shown in Table 4 includes only those factors that were also included in the Pack and Saddle Trail Guide (tread width, surface, maximum pitch grade or short pitch maximum grade, clearing height, and clearing width).

Table 4 shows that the Pack and Saddle Design Parameters encompass trails ranging from Trail Class 2, with tread widths of 12 to 18 inches in wilderness and 12 to 24 inches outside of wilderness, short pitch maximum grades of 30%, and clearing widths of 6 feet, to Trail Class 4, with tread widths of 24 in wilderness and 24 to 120 inches outside of wilderness, short pitch maximum grades of 15%, and clearing widths of 8 feet.

Table 3 Versus Table 4

Despite differences in scale, Tables 3 and 4 show that the NFS trails encompassed by the Pack and Saddle Design Parameters do not encompass the full range of NFS trails, but rather fall within the range of NFS trails encompassed by the Hiker/Pedestrian Design Parameters.

*The Pack and Saddle Trail Guide Versus The Pack and Saddle Design Parameters*

Tables 5 and 6 demonstrate that the guidelines in the Pack and Saddle Design Parameters are either identical or functionally equivalent to the guidelines in the Pack and Saddle Trail Guide or that the guidelines in the Pack and Saddle Design Parameters are more precise or even more expansive than the guidelines in the Pack and Saddle Trail Guide.

Table 5: The Pack and Saddle Trail Guide

The excerpt from the Pack and Saddle Trail Guide shown in Table 5 is the same as the one shown in Table 2.

Table 6: The Pack and Saddle Design Parameters

The excerpt from the Pack and Saddle Design Parameters shown in Table 6 is the same as the one shown in Table 4.

Table 5 Versus Table 6

Despite differences in scale, Tables 5 and 6 show that the Pack and Saddle Design Parameters incorporate the guidelines from the Pack and Saddle Trail Guide and are based on the assumption in the footnote to that trail guide, which states: ''Assume pack and saddle animals normally are not accommodated on most difficult trails, so less clearing width is needed. Same holds true for day-use trails.'' The Pack and Saddle Design Parameters thus encompass the full range of trail development scale included in the Pack and Saddle Trail Guide.

The Pack and Saddle Design Parameters cover a broad spectrum of equestrian trails, ranging from narrow, highly challenging trails in Trail Class 2 that are often very rugged and steep, with defined but narrow tread, and relatively narrow clearing limits, to wide, minimally challenging bridle trails in Trail Class 4 that typically present moderate-to-minimal levels of challenge and are wider, with well-established tread and wide clearing limits.

To enhance consistency in application, the Pack and Saddle Design Parameters more clearly identify the lower range of the development scale of NFS trails designed and managed to accommodate pack and saddle use by identifying values for the minimum Design Tread Width, Design Target Grade, and Short Pitch Maximum. Similarly, the Pack and Saddle Design Parameters more clearly identify the upper range of the spectrum of NFS trails designed and managed for equestrian use by identifying values for the Design Target Grade and identifying an expanded range of values for the Design Tread Width for single-lane and double-lane trails outside wilderness areas in Trail Class 4. In addition, the Pack and Saddle Design Parameters, like all Design Parameters, explicitly provide for local deviations based on specific trail conditions, topography, and other factors, provided that the deviations are consistent with the general intent of the applicable Trail Class.

Moreover, based on comments received on the proposed directives, the

agency has revised the Pack and Saddle Design Parameters, as shown in Tables 4 and 6. Specifically, the agency has:

- Increased the range for Design Tread Width for single-lane trails in wilderness areas in Trail Class 3 from 12 to 24 inches to 18 to 24 inches.
- Increased the Design Clearing Width for Trail Class 2 from a range of 3 to 4 feet (which matched the clearing width for Most Difficult trails in the Pack and Saddle Trail Guide) to a Design Clearing Width of 6 feet.
- Increased the range for the Design Clearing Width for Trail Class 3 from 5 to 6.5 feet to 6 to 8 feet.
- Increased the Design Clearing Width for Trail Class 4 from a range of 6 to 8 feet to 8 feet.
- Added pack clearances for Trail Class 3 and Trail Class 4, consistent with the clearances identified in the Pack and Saddle Trail Guide.

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## COMPARISON OF HIKER AND BARRIER-FREE TRAIL GUIDES WITH PACK AND SADDLE TRAIL GUIDE

### Table 1: Hiker Trail Guide and Barrier-Free Trail Guide

| Design Variable | | Hiker Trail Guide | | | Barrier-Free Trail Guide | | |
|---|---|---|---|---|---|---|---|
| | | Most Difficult | More Difficult | Easiest | Most Difficult | More Difficult | Easiest |
| Tread | Width One-Way | 12" | 12" – 18" | 18" – 24" Obstacle Free | 3' | 4' | 4' |
| | Width Two-Way | | | | 4' or 3' with turnouts[1] | 8' or 4' with 2' x 5' turnouts | 8' or 4' with 2' x 5' turnouts |
| | Surface | No graded tread except on side slopes > 50% | Not surfaced—leave roots, imbedded rocks, and some logs | Spot gravel surfacing | Hard packed sandy loam, some roots and rocks. | Asphalt, soil cement, very fine crushed rock ¾" (-) solidly packed. | Concrete or asphalt with subgrade of rock |
| Grade | Grade | (not indicated) | (not indicated) | (not indicated) | 6% - 8% | + 3% - 6% | ± 1% or 3% |
| | Max. Pitch | + 30% | 30% | 20% | Short pitches to 12% | (not indicated) | (not indicated) |
| | Length | 500' | 300' | 100' | (not indicated) | Vertical climb up to 160' | Vertical climb up to 80' |
| Clearing | Length | 8' | 8' | 8' | (not indicated) | (not indicated) | (not indicated) |
| | Width | 3' | 3' – 4' | 4' | Clear underbrush to 6" from trail | Clear underbrush to 1' from trail. | Clear underbrush to 1' from trail |

*Approximate Correlation*

### Table 2: Pack and Saddle Trail Guide

| Design Variable | | Pack and Saddle Trail Guide | | |
|---|---|---|---|---|
| | | Most Difficult [1] | More Difficult | Easiest |
| Tread | Width | (not indicated) | 18" – 24" | 24" |
| | Surface | Not graded except on slopes greater than 30% | Leave roots and imbedded rocks. | Surfacing as needed for stability. Construct extra trailbed in steep terrain. |
| Grade | Grade | (not indicated) | (not indicated) | (not indicated) |
| | Max. Pitch | + 30% | 25% | 15% |
| | Length | 500' | 300' | 200' |
| Clearing | Height | Maximum 8' | 8' | 10' |
| | Width | 3' – 4' | 6' Pack Clearance: 3' | 8' 6' between large trees. Pack Clearance: 3' |

[1] Assume pack animals normally are not accommodated on most difficult trails, so less clearing width is needed. Same holds true for day-use horse trails (emphasis added).

## COMPARISON OF HIKER/PEDESTRIAN DESIGN PARAMETERS WITH PACK AND SADDLE DESIGN PARAMETERS

### Table 3: Hiker/Pedestrian Design Parameters

| Designed Use HIKER/PEDESTRIAN | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Tread Width | Wilderness (Single Lane) | 0" – 12" | 6" – 18" | 12" – 24" | 18" – 24" | Not applicable |
| | Non-Wilderness (Single Lane) | 0" – 12" | 6" – 18" | 18" – 36" | 24" – 60" | 36" – 72" |
| | Non-Wilderness (Double Lane) | 36" | 36" | 36" – 60" | 48" – 72" | 72" – 120" |
| Design Surface[3] | Type | Native, un-graded<br>May be continuously rough | Native, limited grading<br>May be continuously rough | Native with some borrow or imported material... occasional grading<br>Intermittently rough | Native with sections of borrow or imported material, routine grading<br>Minor roughness | Likely imported material, routine grading<br>Uniform, firm, and stable |
| Design Grade | Target Grade | 5% – 25% | 5% – 18% | 3% – 12% | 2% – 10% | 2% – 5% |
| | Short Pitch Max | 40% | 35% | 25% | 15% | 5%<br>FSTAG: 5% – 12%[2] |
| | Max Pitch Density | 20% – 40% of trail | 20% – 30% of trail | 10% – 20% of trail | 5% – 20% of trail | 0% – 5% of trail |
| Design Clearing | Height | 6' | 6' – 7' | 7' – 8' | 8' – 10' | 8' – 10' |
| | Width | ≥ 2' | 2' – 4' | 3' – 5' | 4' – 6' | 5' – 6' |

*Approximate Correlation*

### Table 4: Pack and Saddle Design Parameters

| Designed Use PACK AND SADDLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Tread Width | Wilderness (Single Lane) | Typically not designed or actively managed for equestrians, although use may be allowed | 12" – 18" | 18" – 24" [~~12" – 24"~~][2] | 24" | Typically not designed or actively managed for equestrians, although use may be allowed |
| | Non-Wilderness (Single Lane) | | 12" – 24" | 18" – 48" | 24" – 96" | |
| | Non-Wilderness (Double Lane) | | 60" | 60" – 84" | 84" – 120" | |
| Design Surface | Type | | Native, limited grading<br>May be frequently rough | Native with some borrow or imported material... occasional grading<br>Intermittently rough | Native, with... sections of borrow or imported material, routine grading<br>Minor roughness | |
| Design Grade | Target Grade | | 5% – 20% | 3% – 12% | 2% – 10% | |
| | Short Pitch Max | | 30% | 20% | 15% | |
| | Max Pitch Density | | 15% – 20% of trail | 5% – 15% of trail | 5% – 10% of trail | |
| Design Clearing | Height | | 8' – 10' | 10' | 10' – 12' | |
| | Width | | 6' [~~3' – 4'~~][2] | 6' – 8' [~~5' – 6.5'~~][2]<br>[ Pack Clearance: 3' ][2] | 8' [~~6' – 8'~~][2]<br>[ Pack Clearance: 3' ][2] | |

Brackets and strikeout show changes made to the proposed directives based on public comments.

## COMPARISON OF PACK AND SADDLE TRAIL GUIDE WITH PACK AND SADDLE DESIGN PARAMETERS

### Table 5: Pack and Saddle Trail Guide

| Design Variable | | Pack and Saddle Trail Guide | | |
|---|---|---|---|---|
| | | Most Difficult [1] | More Difficult | Easiest |
| Tread | Width | (not indicated) | 18" – 24" | 24" |
| | Surface | Not graded except on slopes greater than 30% | Leave roots and imbedded rocks. | Surfacing as needed for stability. Construct extra trailbed in steep terrain. |
| Grade | Target Grade | (not indicated) | (not indicated) | (not indicated) |
| | Max. Pitch | +30% | 25% | 15% |
| | Length | 500' | 300' | 200' |
| Clearing | Height | Maximum 8' | 8' | 10' |
| | Width | 3' – 4' | 6'<br>Pack Clearance: 3' | 8'<br>6' between large trees.<br>Pack Clearance: 3' |

[1] Assume pack animals normally are not accommodated on most difficult trails, so less clearing width is needed. Same holds true for day-use horse trails (emphasis added).

*Approximate Correlation*

### Table 6: Pack and Saddle Design Parameters

| Designed Use PACK AND SADDLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Tread Width | Wilderness (Single Lane) | Typically not designed or actively managed for equestrians, although use may be allowed | 12" – 18" | 18" – 24" [ ~~12" – 24"~~ ] [2] | 24" | Typically not designed or actively managed for equestrians, although use may be allowed |
| | Non-Wilderness (Single Lane) | | 12" – 24" | 18" – 48" | 24" – 96" | |
| | Non-Wilderness (Double Lane) | | 60" | 60" – 84" | 84" – 120" | |
| Design Surface | Type | | Native, limited grading; May be frequently rough | Native with some borrow or imported material... occasional grading; Intermittently rough | Native, with... sections of borrow or imported material, routine grading; Minor roughness | |
| Design Grade | Target Grade | | 5% – 20% | 3% – 12% | 2% – 10% | |
| | Short Pitch Maximum | | 30% | 20% | 15% | |
| | Maximum Pitch Density | | 15% – 20% of trail | 5% – 15% of trail | 5% – 10% of trail | |
| Design Clearing | Height | | 8' – 10' | 10' | 10' – 12' | |
| | Width | | 6' [ ~~3' – 4'~~ ] [2] | 6' – 8' [ ~~5' – 6.5'~~ ] [2]<br>[ Pack Clearance: 3' ] [2] | 8' [ ~~6' – 8'~~ ] [2]<br>[ Pack Clearance: 3' ] [2] | |

[2] Brackets and strikeout show changes made to the proposed directives based on public comments.

**4. Summary of Revisions to the Trail Class Matrix and Design Parameters**

The following section provides a summary of the substantive changes the agency has made to the Trail Class Matrix and Design Parameters in the interim final directives. These changes will not require a change in any existing TMOs, trail-specific prescriptions, or corresponding data recorded in the Forest Service's national database.

a. Changes to the Trail Class Matrix

For clarity, in the interim final directives, the agency has changed the captions for the five Trail Classes to read:

Trail Class 1: Minimally Developed
Trail Class 2: Moderately Developed
Trail Class 3: Developed
Trail Class 4: Highly Developed
Trail Class 5: Fully Developed

The 2001 Trail Class Matrix included three sets of additional criteria specific to particular types of uses (motorized, snowmobile, and water uses), which were applied in addition to the general criteria in the five Trail Classes. In 2005, a fourth set of additional criteria was added to the Trail Class Matrix for pack and saddle use. The primary intent of the original sets of additional criteria was to address considerations specific to those uses that were not addressed by the general criteria. A secondary intent was to indicate the applicability of each Trail Class to types of Managed Uses. The agency is removing the four sets of additional criteria because they duplicate the use-specific guidance in the Design Parameters. The agency is including a new chart in the FSH that shows the potential appropriateness of each Trail Class for each of the Managed Uses of NFS trails.

In addition, attached to the 2001 Trail Class Matrix is a chart entitled, ''Trail Operation and Maintenance Considerations.'' While these considerations are a useful tool for trail managers, they are not part of the Trail Class Matrix or Design Parameters. Rather, they are provided to assist field managers in the development of trail prescriptions, program management, and trail operation and maintenance. The considerations provide a starting point and likely will be adapted locally to reflect site-specific financial limitations and applicable district, forest, and regional circumstances. To clarify this distinction, the agency is severing this chart from the Trail Class Matrix and addressing its context and purpose in FSM 2353 and FSH 2309.18.

Table 7 shows the substantive revisions and clarifications made to the Trail Class Matrix. New text is shown in italicized font, and deleted text is shown with strikeout. The following summarizes the key substantive changes.

*Tread and Traffic Flow*

The agency has added guidance regarding single and constructed passing allowances for trails in Trail Class 1 and Trail Class 2 and revised the corresponding guidance for trails in Trail Class 3 and Trail Class 4 for consistency. The agency has modified the qualifiers (for example, ''predominantly'' and ''typically'' are now used) for native and imported tread material types for trails in Trail Class 1, Trail Class 2, and Trail Class 3.

*Obstacles*

The Trail Class Matrix now provides guidance on obstacles for each Trail Class and takes into account the effect of obstacles on the level of challenge provided by a trail.

*Constructed Features and Trail Elements*

The agency has modified the discussion of this attribute for all Trail Classes to include guidance regarding the use of native or imported materials for trail structures, to provide clearer guidance regarding drainage for trails in Trail Class 1, to provide clearer guidance for trails in Trail Classes 1 through 4, and to provide or revise guidance regarding bridges for all Trail Classes.

*Signs*

The agency has revised the discussion of this attribute to provide improved clarity and consistency in guidance regarding signs and markers for trails in all Trail Classes.

## TABLE 7 – CHANGES TO THE TRAIL CLASS MATRIX

| Trail Attributes | Trail Class 1<br>Minimally Developed | Trail Class 2<br>Moderately Developed | Trail Class 3<br>Developed | Trail Class 4<br>Highly Developed | Trail Class 5<br>Fully Developed |
|---|---|---|---|---|---|
| **Tread & Traffic Flow** | • Tread intermittent and often indistinct<br>• May require route finding<br>• *Single lane, with no allowances constructed for passing*<br>• *Predominantly* native materials ~~only~~ | • Tread *continuous and* discernible, ~~and continuous,~~ but narrow and rough<br>• *Single lane, with minor* ~~Few or no~~ allowances constructed for passing<br>• *Typically* native materials | • Tread *continuous and* obvious ~~and continuous~~<br>• *Single lane, with allowances constructed for passing where required by traffic volume in places where there is no reasonable opportunity to pass* ~~Width accommodates unhindered one-lane travel with occasional constructed passing sections~~<br>• ~~Typically~~ Native *or imported* materials | • Tread wide and relatively smooth with few irregularities<br>• *Single lane, with allowances constructed for passing where required by traffic volume in places where there is no reasonable opportunity to pass* ~~Width may consistently accommodate two-lane travel~~<br>• *Double lane where traffic volume is high and passing is frequent*<br>• Native or imported materials<br>• May be hardened | • *Tread wide, firm, stable, and generally uniform*<br>• *Single lane, with frequent turnouts where traffic volume is low to moderate* ~~Width generally accommodates two-lane and two-directional travel, or provides frequent passin turnouts~~<br>• *Double lane where traffic volume is moderate to high*<br>• Commonly hardened with asphalt or other imported material |
| **Obstacles** | • Obstacles common, *naturally ocurring, often substantial, and intended to provide increased challenge*<br>• Narrow passages; brush, steep grades, rocks and logs present | • Obstacles ~~occasionally present~~ *may be common, substantial, and intended to provide increased challenge*<br>• Blockages cleared to define route and protect resources<br>• Vegetation may encroach into trailway | • Obstacles ~~infrequent~~ *may be common, but not substantial or intended to provide challenge*<br>• Vegetation cleared outside of trailway | • *Obstacles infrequent and insubstantial* ~~Few or no obstacles exist~~<br>• ~~Grades typically < 12%~~<br>• Vegetation cleared outside of trailway | • *Obstacles not present*<br>~~• No obstacles present~~<br>• Grades typically < 8% |

| Trail Attributes | Trail Class 1<br>Minimally Developed | Trail Class 2<br>Moderately Developed | Trail Class 3<br>Developed | Trail Class 4<br>Highly Developed | Trail Class 5<br>Fully Developed |
|---|---|---|---|---|---|
| **Constructed Features & Trail Elements** | • *Structures* minimal to non-existent<br>• Drainage ~~is functional~~ *typically accomplished without structures*<br>• *Natural fords*<br>• *Typically no bridges* ~~No constructed bridges or foot crossings~~ | • Structures of limited size, scale, and ~~number~~ *quantity; typically constructed of native materials*<br>• ~~Drainage is functional~~<br>• Structures adequate to protect trail infrastructure and resources<br>• *Natural fords* ~~Primitive foot crossings and fords~~<br>• *Bridges as needed for resource protection and appropriate access* | • Structures ~~(walls, steps, drainage, raised trail)~~ may be common and substantial; *constructed of imported or native materials*<br>• *Natural or constructed fords*<br>• Bridges as needed for resource protection and appropriate access<br>• ~~Generally native materials used in Wilderness~~ | • Structures frequent and substantial; *typically constructed of imported materials*<br>• *Contructed or natural fords*<br>• *Bridges as needed for resource protection and user convenience* ~~Substantial bridges are appropriate at water crossings~~<br>• Trailside amenities may be present | • Structures frequent or continuous *and typically constructed of imported materials*<br>• May include bridges, boardwalks, curbs, handrails, trailside amenities, *and similar features*<br>• ~~Drainage structures frequent; may include culverts and road-like drainages~~ |
| **Signs[2]** | • ~~Minimum required~~<br>• *Route identification signing limited to junctions*<br>• *Route markers present when trail location is not evident*<br>• *Regulatory and resource protection signing infrequent* ~~Generally limited to regulation and resource protection~~<br>• *Desination signing, unless required, generally not present* ~~No destination signs present~~<br>• *Information and interpretive signing generally not present* | • ~~Minimum required for basic direction~~<br>• *Route identification signing limited to junctions*<br>• *Route markers present when trail location is not evident*<br>• *Regulatory and resource protection signing infrequent* ~~Generally limited to regulation and resource protection~~<br>• *Destination signing typically infrequent outside wilderness areas; generally not present in wilderness areas* ~~Typically very few or no destination signs present~~<br>• *Information and interpretive signing uncommon* | • ~~Regulation, resource protection, user reassurance~~<br>• *Route identification signing at junctions and as needed for user reassurance*<br>• *Route markers as needed for user reassurance* ~~Directional signs at junctions, or when confusion is likely~~<br>• *Regulatory and resource protection signing may be common*<br>• *Destination signing likely outside wilderness areasa; generally not present in wilderness* ~~Destination signs typically present~~<br>• Information and interpretive signs may be present outside of wilderness | • ~~Wide variety of signs likely present~~<br>• *Route identification signing at junctions and as needed for user reassurance*<br>• *Route markers as needed for user reassurance*<br>• *Regulatory and resource protection signing common*<br>• *Destination signing common outside of wilderness areas; generally not present in wilderness areas*<br>• *Information and interpretive signs may be common outside wilderness areas* ~~Informational signs likely (outside of Wilderness).~~<br>• ~~Interpretive signs possible (outside of Wilderness)~~<br>• ~~Trail Universal Access~~ *Accessibility* information likely displayed at trailhead | • ~~Wide variety of signage is present~~<br>• *Route identification signing at junctions and for user reassurance*<br>• *Route markers as needed for user reassurance*<br>• *Regulatory and resource protection signing common*<br>• *Destination signing common*<br>• Information and interpretive signs *common* ~~likely~~<br>• ~~Trail Universal Access~~ *Accessibility* information likely displayed at trailhead |

| Trail Attributes | Trail Class 1<br>Minimally Developed | Trail Class 2<br>Moderately Developed | Trail Class 3<br>Developed | Trail Class 4<br>Highly Developed | Trail Class 5<br>Fully Developed |
|---|---|---|---|---|---|
| **Typical Recreation Environs & Experience**[3] | • Natural, unmodified<br>• ROS: *Typically Primitive to Roaded Natural* ~~Often Primitive setting, but may occur in other ROS settings~~<br>• WROS: *Typically Primitive to Semi-Primitive* ~~Primitive~~ | • Natural, essentially unmodified<br>• ROS: Typically *Primitive to Roaded Natural* ~~Primitive to Semi-Primitive setting~~<br>• WROS: *Typically* Primitive to Semi-Primitive | • Natural, primarily unmodified<br>• ROS: Typically *Primitive to Roaded Natural* ~~Semi-Primitive to Roaded Natural setting~~<br>• WROS: *Typically* Semi-Primitive to Transition | • May be modified<br>• ROS: Typically ~~Roaded Natural~~ *Semi-Primitive* to Rural<br>• WROS: *Typically Portal or Transition* ~~Transition (rarely present in Wilderness)~~ | • ~~Can~~ *May* be highly modified<br>• Commonly associated with visitor centers or high-use recreation sites<br>• ROS: Typically *Roaded Natural to Urban* ~~Rural Roaded Natural to Urban~~<br>• *Generally* not present in Wilderness |

[1] For *the National Quality Standards for Trails, Potential Appropriateness of Trail Classes for Managed Uses*~~Trail Class and Managed Use Application Guide, Design Parameters~~, and other related guidance, refer to FSM 2353, FSH 2309.18, and other applicable agency references. ~~The National Quality Standards are posted under the Trails link at www.fs.fed.us/r3/measures.~~

[2] *For standards and guidelines for the use of signs and posters on trails, refer to the Sign and Poster Guidelines for the Forest Service (EM-7100-15).*

[3] *These Trail Class and ROS/WROS setting combinations represent commonly occurring combinations, although trails in all Trail Classes may and do occur in all settings. For guidance on the application of the Recreation Opportunity Spectrum and Wilderness Recreation Opportunity Spectrum, refer to FSM 2310 and 2353 and FSH 2309.18.*

b. Changes to the Design Parameters

The Forest Service is replacing the trail guides in the FSH with the Design Parameters. These interim final directives include Design Parameters for Hiker/Pedestrian, Pack and Saddle, Bicycle, ATV, Motorcycle, Cross-Country Ski, and Snowmobile. The Barrier-Free Trail Guide has additionally been made obsolete by adoption of the FTAG. To enhance consistency, the agency has defined the factors in the Design Parameters, including Design Tread Width, Design Surface, Design Grade, Design Cross Slope, Design Clearing Width and Height, and Design Turns (FSH 2309.18, sec. 05).

The Forest Service has made several revisions to the Design Parameters in the interim final directives, as shown in Tables 8 through 14. Tables 8 through 14 do not include the Design Parameters for Four-Wheel Drive Vehicle Greater Than 50 Inches in Width or the Design Parameters for Snowshoe, which are both new sets of Design Parameters and are included in the interim final directives under FSH 2309.18, sections 23.23, exhibit 01, and 23.32, exhibit 01. The following summarizes the key substantive changes common to each set of Design Parameters. New text in Tables 8 through 14 is shown in italicized font, and deleted text is shown with strikeout.

*Design Tread Width*

To provide improved guidance for trails where it is determined that a double-lane tread width is needed, the agency has validated, revised, or identified double-lane tread widths for each set of Design Parameters. These double-lane tread widths reflect the desired level of challenge and recreation experience for each Trail Class. In addition, the double-lane tread widths provide for unhindered passage for the Designed Use without special maneuvering when passing or traveling side by side.

The agency has added a subcategory for Design Tread Width called, ''Structures (Minimum Width),'' to each set of Design Parameters to provide better guidance regarding the minimum usable tread width on trail structures such as bridges, puncheon, and turnpike.

*Design Surface*

The agency has revised the discussion of Design Surface Type to provide guidance for all Trail Classes regarding when to construct the design surface of native or imported material and regarding the roughness of the trail surface.

Under Design Surface, the row previously labeled ''Obstacles'' included guidance on surface obstacles and protrusions. In the interim final directives, the agency has split this row into two rows labeled, ''Protrusions'' and ''Obstacles (Maximum Height),'' to provide increased design flexibility and enhance clarity and consistency in application of the guidelines regarding protrusions and obstacles. The guidance regarding protrusions includes a ''less than or equal to'' value for the height of surface protrusions and indicates whether they are common or continuous. The guidance regarding obstacles identifies a maximum height for surface obstacles.

*Design Grade*

The agency has revised the values for Design Target Grade to present them as a range of values for all Trail Classes (rather than a range of values in some Design Parameters and a ''less than or equal to'' value in others). In addition, the agency has revised the values for Design Target Grade in most Trail Classes to identify a minimum percentage for the lower limit of the range, since trails with a 0 percent grade typically do not provide adequate drainage. For trails in Trail Classes 4 and 5, the minimum value is 2 percent and 0 percent, respectively, because these Trail Classes typically have harder, more durable surfaces that can more readily provide adequate drainage on flatter grades than trails with a native surface, which is more typically encountered on trails in Trail Classes 1 through 3. The lower value in the range varies somewhat among uses because some are more likely to trigger erosion than others.

In addition, the agency has increased the tolerances for Maximum Pitch Density to reflect more accurately the desired levels of challenge for each Trail Class and the actual maximum grade tolerances of many NFS trails. The upper limit for Maximum Pitch Density depends upon the applicable trail grade and factors concerning sustainability of the trail, as discussed in one of the footnotes to each set of Design Parameters.

*Design Clearing*

The agency has revised the values for Design Clearing Width for each Trail Class to reflect the entire clearing width (that is, the tread width, plus the distance from the edge of the trail tread needed to accommodate the Designed Use), rather than the entire clearing width for some Trail Classes and merely the distance from the edge of the trail tread for others, as in the proposed directives. This standard approach to Design Clearing Width is consistent with the revised definition for that term and improves clarity and consistency in application of the Design Parameters. In addition, the agency has verified the Design Clearing Limits across each set of Design Parameters against a hypothetical doorway to ensure that the minimum clearing widths provide adequate clearance for the Designed Use in each Trail Class.

The agency has added a new category called ''Shoulder Clearance,'' defined as ''the minimum horizontal and vertical clearance of obstructions (for example, removal of bicycle pedal or motorcycle peg bumpers) immediately adjacent to the trail tread that is determined to be appropriate for accommodating the Manages Uses of the trail'' (FSH 2309.18, sec. 05). This attribute will provide useful guidance and latitude in situations where a manager determines it is appropriate or necessary to leave logs or other obstacles on the ground within the design clearing limits for the trail (e.g., to keep users on the trail tread or to keep other users off the trail).

*Design Turn*

In the interim final directives, the agency has defined ''Design Turn Radius'' as ''the minimum horizontal radius required for a Managed Use to negotiate a curve (e.g., a switchback, climbing turn, or horizontal turn) in a single maneuver'' (FSH 2309.18, sec. 05).

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## TABLE 8 – CHANGES TO THE HIKER/PEDESTRIAN DESIGN PARAMETERS

| Designed Use HIKER/PEDESTRIAN | | Trail Class 1 | Trail Class 2 | Trail Class 3[1 2] | Trail Class 4[1 2] | Trail Class 5[1 2] |
|---|---|---|---|---|---|---|
| **Design Tread Width** | **Wilderness** *(Single Lane)* | 0" – 12" | 6" – 18" | 12" – 24" Exception: May be 36" – 48" at ~~switchbacks, turnpikes, fords and~~ steep side slopes | *18" – 24"* ~~24"~~ Exception: May be 36" – 48" at ~~switchbacks, turnpikes, fords and~~ steep side slopes | Not applicable |
| | **Non-Wilderness** *(Single Lane)* | 0" – 12" | 6" – 18" | *18" – 36"* ~~18" – 48"~~ | *24" – 60"* ~~32" – 96"~~ | *36" – 72"* ~~36" – 120"~~ |
| | ***Non-Wilderness*** *(Double Lane)* | *36"* | *36"* | *36" – 60"* | *48" – 72"* | *72" – 120"* |
| | ***Structures*** *(Minimum Width)* | *18"* | *18"* | *18"* | *36"* | *36"* |
| **Design Surface[3]** | **Type** | Native, un-graded *May be continuously rough* ~~Intermittent, rough~~ | Native, limited grading *May be continuously rough* ~~Continuous, rough~~ | Native with some onsite borrow or imported material *where needed for stabilization and occasional grading* *Intermittently rough* | *Native, with improved sections of borrow or imported material and routine grading* *Minor roughness* ~~Imported materials or hardening is common~~ | *Imported material likely and routine grading* Uniform, firm, and stable |
| | ***Protrusions*** | *≤ 24" Likely common and continuous* | *≤ 6" May be common and continuous* | *≤ 3" May be common, but not continuous* | *≤ 3" Uncommon and not continuous* | *No protrusions* |
| | **Obstacles** *(Maximum Height)* | *24"* ~~Roots, rocks, logs, steps to 24"~~ | *14"* ~~Roots, rocks, and log protrusions to 6"; steps to 14"~~ | *10"* ~~Generally clear; Protrusions to 3"; steps to 10"~~ | *8"* ~~Smooth, few obstacles; Protrusions 2" – 3"; steps to 8"~~ | *No obstacles* ~~Smooth, no obstacles; Protrusions <2"~~ |
| **Design Grade[2 3]** | **Target Grade[3,]** ~~(>90% of Trail)~~ | *5% – 25%* ~~</=25%~~ | *5% – 18%* ~~</= 18%~~ | *3% – 12%* ~~</= 12%~~ | *2% – 10%* ~~</= 10%~~ | *2% – 5%* ~~</= 5%~~ |
| | **Short Pitch Maximum[4,]** (Up to 200' lengths) | 40% | 35% | 25% | 15% | *5%* ~~</= 10%~~ *FSTAG: 5% – 12%* |
| | **Maximum Pitch Density[5,]** | *20% – 40% of trail* ~~< 10% of trail~~ | *20% – 30% of trail* ~~< 5% of trail~~ | *10% – 20% of trail* ~~< 5% of trail~~ | *5% – 20% of trail* ~~< 3% of trail~~ | *0% – 5% of trail* ~~< 3% of trail~~ |

## TABLE 8 – CHANGES TO THE HIKER/PEDESTRIAN DESIGN PARAMETERS (CONTINUED)

| Designed Use HIKER/PEDESTRIAN | | Trail Class 1 | Trail Class 2 | Trail Class 3[1,2] | Trail Class 4[1,2] | Trail Class 5[1,2] |
|---|---|---|---|---|---|---|
| Design Cross Slope | Target ~~Range~~ *Cross Slope* | *Natural side slope* ~~Not applicable~~ | 5% – 20% | 5% – 10% | 3% – 7% | 2% – 3% (or crowned) |
| | Maximum *Cross Slope* | ~~Up to~~ Natural side-slope | *25%* ~~Up to natural side-slope~~ | 15% | 10% | 3% |
| Design Clearing | Height | 6' | 6' – 7' | *7' – 8'* ~~8'~~ | *8' – 10'* ~~8'~~ | *8' – 10'* ~~>/= 8'~~ |
| | Width | ≥ *24"* *Some vegetation may encroach into clearing area* ~~Sufficient to define trail corridor~~ | *24" – 48"* *Some light vegetation may encroach into clearing area* ~~24" – 36", with some encroachment into clearing area~~ | *36" – 60"* ~~12" – 18" outside of tread edge~~ | *48" – 72"* ~~12" – 18" outside of tread edge~~ | *60" – 72"* ~~12" – 24" outside of tread edge~~ |
| | *Shoulder Clearance* | *3" – 6"* | *6" – 12"* | *12" – 18"* | *12" – 18"* | *12" – 24"* |
| Design Turn | Radius | No minimum | 2' – 3' | 3' – 6' | 4' – 8' | *6' – 8'* ~~6' – 12'~~ |

In addition to the footnotes common to all set of Design Parameters (listed above), the following footnote appears on the Hiker/Pedestrian Design Parameters:

**Footnote referencing Trail Classes 3, 4 and 5:** "Trail Classes 3, ~~Trail Class~~ 4, and ~~Trail Class~~ 5, in particular, have the potential to be accessible. If assessing or designing trails for accessibility, refer to the Forest Service Trail Accessibility Guidelines (FSTAG) for more specific technical provisions and tolerances *(FSM 2350).*"

## TABLE 9 – CHANGES TO THE PACK AND SADDLE DESIGN PARAMETERS

| Designed Use PACK AND SADDLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Tread Width** | **Wilderness** *(Single Lane)* | Typically not designed or actively managed for equestrians, although use may be allowed | 12" – 18"<br>*May be up to 48" along steep side slopes*<br>*48" – 60" or greater along precipices*<br>~~Exception: May be to 48" at switchbacks, turnpikes, fords and steep side slopes~~ | *18" – 24"*<br>~~12" – 24"~~<br>*May be up to 48" along steep side slopes*<br>*48" – 60" or greater along precipices*<br>~~Exception: May be to 48" at switchbacks, turnpikes, fords and steep side slopes; up to 60" along precipices~~ | 24"<br>*May be up to 48" along steep side slopes*<br>*48" – 60" or greater along precipices*<br>~~Exception: May be to 48" at switchbacks, turnpikes, fords and steep side slopes; up to 60" along precipices~~ | Typically not designed or actively managed for equestrians, although use may be allowed |
| | **Non-Wilderness** *(Single Lane)* | | 12" – 24"<br>*May be up to 48" along steep side slopes*<br>*48" – 60" or greater along precipices*<br>~~(with above exceptions)~~ | 18" – 48"<br>*48" – 60" or greater along precipices*<br>~~(with above exceptions)~~ | *24" – 96"*<br>~~36" – 96"~~<br>*48" – 60" or greater along precipices* | |
| | ***Non-Wilderness*** *(Double Lane)* | | *60"* | *60" – 84"* | *84" – 120"* | |
| | ***Structures*** *(Minimum Width)* | | *Other than bridges: 36"*<br>*Bridges without Handrails: 60"*<br>*Bridges with Handrails: 84" clear width* | *Other than bridges: 36"*<br>*Bridges without Handrails: 60"*<br>*Bridges with Handrails: 84" clear width* | *Other than bridges: 36"*<br>*Bridges without Handrails: 60"*<br>*Bridges with Handrails: 84" clear width* | |
| **Design Surface[2]** | **Type** | | Native, limited grading<br>*May be frequently rough* | Native with some onsite borrow or imported material *where needed for stabilization and occasional grading*<br>*Intermittently rough* | *Native, with improved sections of borrow or imported material and routine grading*<br>*Minor roughness*<br>~~Native with some imported materials or stabilization~~ | |
| | ***Protrusions*** | | *< = 6"*<br>*May be common and continuous* | *< = 3"*<br>*May be common, but not continuous* | *< = 3"*<br>*Uncommon and not continuous* | |
| | **Obstacles** *(Maximum Height)* | | *12"*<br>~~Roots, rocks, logs to 12"~~ | *6"*<br>~~Generally clear; Occasional protrusions to 6"~~ | *3"*<br>~~Smooth, few obstacles; Occasional protrusions 2" – 3"~~ | |

## TABLE 9 – CHANGES TO THE PACK AND SADDLE DESIGN PARAMETERS (CONTINUED)

| Designed Use PACK AND SADDLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Grade[1,2] | Target Grade[2] ~~(>90% of Trail)~~ | | *5% – 20%* ~~*</= 20%*~~ | *3% – 12%* ~~*</= 12%*~~ | *2% – 10%* ~~*</= 10%*~~ | |
| | Short Pitch Maximum[3] (Up to 200' lengths) | | 30% | 20% | 15% | |
| | Maximum Pitch Density[4] | | *15% – 20% of trail* ~~*< 5% of trail*~~ | *5% – 15% of trail* ~~*< 5% of trail*~~ | *5% – 10% of trail* ~~*< 3% of trail*~~ | |
| Design Cross Slope | Target ~~Range~~ *Cross Slope* | | 5% – 10% | *3% – 5%* ~~*5%*~~ | *0% – 5%* ~~*5%*~~ | |
| | Maximum *Cross Slope* | | *10%* ~~Natural side slope~~ | *8%* ~~*10%*~~ | *5%* ~~*10%*~~ | |
| Design Clearing | Height | | 8' – 10' | 10' | 10' - 12' | |
| | Width | | *72"* ~~*36" – 48"*~~ *Some light vegetation may encroach into clearing area* | *72" – 96"* ~~*60" – 78"*~~ | *96"* ~~*72" – 96"*~~ | |
| | *Shoulder Clearance* | | *6" – 12"* *Pack Clearance: 36" x 36"* | *12" – 18"* *Pack Clearance: 36" x 36"* | *12" – 18"* *Pack Clearance: 36" x 36"* | |
| Design Turn | Radius | | 4' – 5' | *5' – 8'* ~~*5' – 6'*~~ | 6' – 10' | |

## TABLE 10 – CHANGES TO THE BICYCLE DESIGN PARAMETERS

| Designed Use BICYCLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Tread Width | *Single Lane* ~~One Lane~~ | 6" – 12" | 12" – 24" | *18" – 36"* ~~18" – 30"~~ | 24" – 48" | 36" – 60" |
| | *Double Lane* ~~Two Lane~~ | *36" – 48"* ~~Not applicable~~ | *36" – 48"* ~~Not applicable~~ | *36" – 48"* ~~48" – 60"~~ ~~Accommodate two-lane travel with passing lanes~~ | *48" – 84"* ~~60" – 84"~~ | 72" – 120" |
| | *Structures* (Minimum Width) | *18"* | *18"* | *36"* | *48"* | *60"* |
| Design Surface[2] | Type | Native *and ungraded*<br>*May be continuously rough*<br>*Sections of soft or unstable tread on grades < 5% may be common and continuous*<br>~~Rough, unstable or soft tread~~ | Native, limited grading<br>*May be continuously rough*<br>*Sections of soft or unstable tread on grades < 5% may be common*<br>~~Unstable or soft sections likely~~ | Native with some onsite borrow or imported material *where needed for stabilization and occasional grading*<br>*Intermittently rough*<br>*Sections of soft or unstable tread on grades < 5% may be present, but not common*<br>~~Some soft areas~~ | *Native, with improved sections of borrow or imported materials and routine grading*<br>*Stable with minor roughness*<br>~~Likely imported or stabilized tread;~~<br>~~Few, if any, loose or soft surfaces~~ | *Imported material likely, with routine grading*<br>*Uniform, firm, and stable*<br>~~Firm, hardened surface~~ |
| | *Protrusions* | *< = 24"*<br>*Likely common and continuous* | *< = 6"*<br>*May be common and continuous* | *< = 3"*<br>*May be common, not continuous* | *< = 3"*<br>*Uncommon, not continuous* | *No protrusions* |
| | Obstacles (Maximum Height) | *24"*<br>~~Rocks, logs and roots up to 6 – 12" common;~~<br>~~Forced portages likely~~ | *12"*<br>~~Embedded rock, protrusions to 6";~~<br>~~Some portages may be needed~~ | *10"*<br>~~Generally smooth with few protrusions exceeding 3"~~ | *8"*<br>~~Smooth, few obstacles;~~<br>~~1 – 2" protrusions~~ | No obstacles ~~to wheeled transport~~ |
| Design Grade[1, 2] | Target Grade[2,] (~~>~~90% of Trail) | *5% – 20%*<br>~~15% – 18%~~ | *5% – 12%*<br>~~</= 12%~~ | *3% – 10%*<br>~~</= 10%~~ | *2% – 8%*<br>~~</= 8%~~ | *2% – 5%*<br>~~</= 5%~~ |
| | Short Pitch Maximum[3,] (Up to 200' lengths) | 30%<br>50% on downhill-only travel | 25%<br>35% on downhill-only travel | 15% | 10% | 8% |
| | Maximum Pitch Density[4,] | *20% – 30% of trail*<br>~~< 10% of trail~~ | *10% – 30% of trail*<br>~~< 5% of trail~~ | *10% – 20% of trail*<br>~~< 5% of trail~~ | *5% – 10% of trail*<br>~~< 3% of trail~~ | *0% – 5% of trail*<br>~~< 3% of trail~~ |

## TABLE 10 – CHANGES TO THE BICYCLE DESIGN PARAMETERS (CONTINUED)

| Designed Use BICYCLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Cross Slope | Target ~~Range~~ *Cross Slope* | 5% – 10% | *5% – 8%* ~~5% – 10%~~ | *3% – 8%* ~~5%~~ | 3% – 5% | *2% – 3%* ~~3% – 5%~~ |
| | Maximum *Cross Slope* | *10%* | *10%* | *8%* | *5%* | *5%* |
| Design Clearing | Height | *6'* ~~6' – 7'~~ | *6' – 8'* ~~7' – 8'~~ | 8' | 8' - 9' | 8' - 9' |
| | Width | 24" – 36" Some vegetation may encroach into clearing area | 36" – 48" Some light vegetation may encroach into clearing area | *60" – 72"* ~~12" – 18" outside of tread edge~~ | *72" – 96"* ~~12" – 18" outside of tread edge~~ | *72" – 96"* ~~18" – 24"" outside of tread edge~~ |
| | Shoulder Clearance | *0' – 12"* | *6" – 12"* | *6" – 12"* | *6" – 18"* | *12" – 18"* |
| Design Turn | Radius | *2' – 3'* ~~3' – 4'~~ | *3' – 6'* ~~4' – 6'~~ | *4' – 8'* ~~6' – 8'~~ | 8' – 10' | 8' - 12' |

## TABLE 11 – CHANGES TO THE MOTORCYCLE DESIGN PARAMETERS

| Designed Use MOTORCYCLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Tread Width** ~~(If side-slope >50%, increase widths by 6"—18")~~ | *Single Lane* ~~One Lane~~ | Typically not designed or actively managed for motorcycles, although use may be allowed | 8" – 24" ~~At switchbacks, 36"—48"~~ | 18" – 36" ~~At switchbacks, >/= 48"~~ | *24" – 48"* ~~30"—48"~~ ~~At switchbacks, >/= 48"~~ | Typically not designed or actively managed for motorcycles, although use may be allowed |
| | *Double Lane* ~~Two Lane~~ | | *48"* ~~Typically not designed for two-lane travel;~~ ~~Passing areas (uncommon) up to 60"~~ | 48 " – 60" ~~Occasional passing lanes to 72"~~ | 60" – 72" | |
| | *Structures* (Minimum Width) | | *36"* | *48"* | *48"* | |
| **Design Surface**[2] | Type | | *Native, with limited grading* *May be continuously rough* *Sections of soft or unstable tread on grades < 5% may be common and continuous* ~~Native, with limited or no grading;~~ ~~Commonly unstable and soft~~ | *Native, with some on-site borrow or imported material where needed for stabilization and occasional grading* *Intermittently rough* *Sections of soft or unstable tread on grades < 5% may be present* ~~Native with some on-site borrow, pavers, or imported materials;~~ ~~Some loose or soft areas~~ | *Native, with imported materials for tread stabilization common and routine grading* *Minor roughness* *Sections of soft tread not common* ~~Gravel, pavers or other imported materials possible;~~ ~~Relatively firm, stable surface~~ | |
| | *Protrusions* | | *< = 6"* *May be common and continuous* | *< = 3"* *May be common, not continuous* | *< = 3"* *Uncommon, not continuous* | |
| | **Obstacles** (Maximum Height) | | *18"* *May be common or placed for increased challenge* ~~Soft sand and embedded rock, steps and protrusions up to 12"~~ | *12"* *Common and left for increased challenge* ~~Generally smooth with few protrusions exceeding 6"~~ | *3"* *Uncommon* ~~Smooth, few obstacles;~~ ~~Few 2"—4" protrusions~~ | |

## TABLE 11 – CHANGES TO THE MOTORCYCLE DESIGN PARAMETERS (CONTINUED)

| Designed Use MOTORCYCLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Grade [2] | Target Grade [2] ~~(>90% of Trail)~~ | | *10% – 25%* ~~</= 25%~~ | *5% – 20%* ~~</= 15%~~ | *3% – 10%* ~~</= 10%~~ | |
| | Short Pitch Maximum [3] (Up to 200' lengths) | | 40% ~~Rarely to 50% on downhill-only travel~~ | 25% | 15% | |
| | Maximum Pitch Density [4] | | *20% – 40% of trail* ~~< 10% of trail~~ | *15% – 30% of trail* ~~< 10% of trail~~ | *10% – 20% of trail* ~~< 5% of trail~~ | |
| Design Cross Slope | Target ~~Range~~ *Cross Slope* | | 5% – 10% | *5% – 8%* ~~5%~~ | 3% – 5% | |
| | Maximum *Cross Slope* | | 15% | 10% | 10% | |
| Design Clearing | Height | | *6' – 7'* ~~7' – 8'~~ | *6' - 8'* ~~8'~~ | *8' - 10'* ~~8' – 9'~~ | |
| | Width (On steep side-hills, increase clearing on uphill side by 6" – 12") | | 36" – 48" Some light vegetation may encroach into clearing area | *48" – 60"* ~~12" – 18" outside of tread edge~~ | *60" - 72"* ~~> 18" outside of tread edge~~ | |
| | *Shoulder Clearance* | | *6" – 12"* | *12" – 18"* | *12" – 24"* | |
| Design Turn | Radius | | *3' – 4'* ~~4' – 5'~~ | *4' – 6'* ~~5' – 6'~~ | *5' – 8'* ~~6' – 8'~~ | |

## TABLE 12 – CHANGES TO THE ATV DESIGN PARAMETERS

| Designed Use ALL-TERRAIN VEHICLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Tread Width** ~~[If sideslopes are >50%, increase widths by 6"—18"]~~ | ***Single Lane*** ~~**One Lane**~~ | Typically not designed or actively managed for ATVs, although use may be allowed | *48" – 60"* ~~30"—48"~~ ~~At switchbacks, > = 48"~~ | *60"* ~~42"—60"~~ ~~At switchbacks, > = 60"~~ | *60" – 72"* ~~54"—72"~~ ~~At switchbacks, > = 60"~~ | Typically not designed or actively managed for ATVs, although use may be allowed |
| | ***Double Lane*** ~~**Two Lane**~~ | | *96"* ~~Typically not designed for two-lane travel;~~ ~~Passing areas (uncommon)—60"~~ | *96" – 108"* ~~60" and/or accommodate with passing areas 60"—78"~~ | *96" – 120"* ~~72"—96"~~ | |
| | ***Structures*** *(Minimum Width)* | | *60"* | *60"* | *60"* | |
| **Design Surface**[2] | **Type** | | *Native, with limited grading* *May be continuously rough* *Sections of soft or unstable tread on grades < 5% may be common and continuous* ~~Native with limited or no grading; commonly soft and unstable~~ | Native with some onsite borrow or imported material *where needed for stabilization and occasional grading* *Intermittently rough* *Sections of soft or unstable tread on grades < 5% may be present* ~~some loose or soft sections~~ | *Native, with imported materials for tread stabilization common and routine grading* *Minor roughness* *Sections of soft tread not common* ~~Relatively firm and stable; gravel, pavers or other imported materials possible~~ | |
| | ***Protrusions*** | | *≤ 6"* *May be common and continuous* | *≤3"* *May be common, but not continuous* | *≤ 3"* *Uncommon and not continuous* | |
| | **Obstacles** *(Maximum Height)* | | *12"* *May be common or placed for increased challenge* ~~Embedded rock, steps, waterbars, holes and protrusions to 6"~~ | *6"* *May be common and left for increased challenge* ~~Generally smooth, with few protrusions exceeding 4"; drain dips and low waterbars~~ | *3"* *Uncommon* ~~Smooth, few obstacles; 1"—3" protrusion; drain dips or waterbars with low-angle approach~~ | |

## TABLE 12 – CHANGES TO THE ATV DESIGN PARAMETERS (CONTINUED)

| Designed Use ALL-TERRAIN VEHICLE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| Design Grade[1,2] | Target Grade[2,] ~~(>90% of Trail)~~ | | *10% – 25%* ~~*</=25%*~~ | *5% – 15%* ~~*</=15%*~~ | *3% – 10%* ~~*</=10%*~~ | |
| | Short Pitch Maximum[3,] (Up to 200' lengths) | | 35% | 25% | 15% | |
| | Maximum Pitch Density[4,] | | *20% – 40% of trail* ~~*< 10% of trail*~~ | *15% – 30% of trail* ~~*< 5% of trail*~~ | *10% – 20% of trail* ~~*< 5% of trail*~~ | |
| Design Cross Slope | Target ~~Range~~ *Cross Slope* | | 5% – 10% | *3% – 8%* ~~*3% – 5%*~~ | 3% – 5% | |
| | Maximum *Cross Slope* | | 15% | 10% | 8% | |
| Design Clearing | Height | | *6' – 7'* ~~*5' – 6'*~~ | *6' – 8'* ~~*6' – 7'*~~ | *8' – 10'* ~~*8'*~~ | |
| | Width (On steep side hills, increase clearing on uphill side by 6" – 12") | | *60"* ~~*36" – 48"*~~ Some *light* vegetation may encroach into clearing area | *60" – 72"* ~~*8" – 12" outside of tread edge*~~ | *72" - 96"* ~~*>/=12" outside of tread edge*~~ | |
| | *Shoulder Clearance* | | *0" – 6"* | *6" – 12"* | *12" – 18"* | |
| Design Turn | Radius (Use climbing turns versus switchbacks for ATVs whenever possible) | | 6' – 8' | 8' – 10' | *8' – 12'* ~~*>/=10'*~~ | |

## TABLE 13 – CHANGES TO THE CROSS-COUNTRY SKI DESIGN PARAMETERS

| Designed Use CROSS-COUNTRY SKI | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Groomed Width** | ***Single Lane*** ~~***One Lane***~~ | Typically not designed or actively managed for cross-country skiing, although use may be allowed | *2' – 4'* ~~*3' – 4'*~~ *Typically not groomed* ~~*If groomed, width of grooming equipment*~~ | 6' – 8' (or ~~minimum~~ width of grooming equipment) | 8'– 10" *(or width of grooming equipment)* ~~(but typically managed to accommodate two-way passage)~~ | Typically not designed or actively managed for cross-country skiing, although use may be allowed |
| | ***Double Lane*** ~~***Two Lane***~~ | | *6' – 8'* ~~*Typically not designed for two-lane travel, except in steep sections accommodate passing areas*~~ | *8' – 12'* ~~*>/=8' (or min width of grooming equipment) and/or accommodate with passing areas 8' – 12' wide*~~ | *12' – 16'* ~~*12' – 14'*~~ | |
| | ***Structures*** *(Minimum Width)* | | *36"* | *36"* | *36"* | |
| **Design Grooming and Surface**[2] | **Type** | | *Generally no machine grooming* ~~*Coarse compaction;*~~ ~~*Occasional or no grooming (may be ski-packed); over-snow vehicle packing sufficient*~~ ~~*Tracklayer optional*~~ | *May receive occasional machine grooming for snow compaction and track setting* ~~*Groomed or compacted using implements or tracklayer when packed surface is snow-covered, drifted, melted or skied out*~~ | *Regular machine grooming for snow compaction and track setting* ~~*Well-groomed with tiller or other implements;*~~ ~~*Groomed frequently, and when groomed surface becomes degraded or buried*~~ | |
| | ***Protrusions*** | | *No protrusions* | *No protrusions* | *No protrusions* | |
| | **Obstacles** *(Maximum Height)* | | *12"* *Uncommon* ~~*Dips, bumps, or ruts to 12" common and may be tightly spaced;*~~ ~~*Surface obstacles may occasionally require off-trail bypass*~~ | *8"* *Uncommon (no obstacles if machine groomed)* ~~*Generally smooth;*~~ ~~*Dips, bumps, or ruts to 8" uncommon and widely spaced;*~~ ~~*Surface obstructions not present*~~ | *No obstacles* ~~*Consistently smooth;*~~ ~~*Small, rolling bumps, dips and rises;*~~ ~~*Surface obstructions not present*~~ | |

## TABLE 13 – CHANGES TO THE CROSS-COUNTRY SKI DESIGN PARAMETERS (CONTINUED)

| Designed Use CROSS-COUNTRY SKI | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Grade**[1,2] | **Target Grade**[2] ~~(>90% of Trail)~~ | | *5% – 15%* ~~<=15%~~ | *2% – 10%* ~~<=10%~~ | *0% – 8%* ~~<=8%~~ | |
| | **Short Pitch**[3] **Maximum** (Up to 200' lengths) | | 25% | 20% | 12% | |
| | **Maximum Pitch Density**[4] | | *10% – 20% of trail* ~~<10% of trail~~ | *5% – 15% of trail* ~~<5% of trail~~ | *0% – 10% of trail* ~~<5% of trail~~ | |
| **Design Cross Slope** | **Target ~~Range~~ *Cross Slope*** | | *0% – 10%* ~~<=10%~~ | *0% – 5%* ~~<=5%~~ | *0% – 5%* ~~<=5%~~ | |
| | **Maximum *Cross Slope*** (For up to 50') | | 20% | 15% | 10% | |
| **Design Clearing** | **Height** (Above normal maximum snow level) | | *6' – 8'* ~~>= 6' – 8'~~ ~~(or height of grooming machinery if used)~~ | *8'* ~~>=8'~~ (or height of grooming machinery) | *8' – 10'* ~~10'~~ | |
| | **Width** | | *24" – 60"* ~~4' – 6' (or minimum width of grooming equipment, if larger);~~ Light vegetation may encroach into clearing area | *72" – 120"'* ~~>=1' outside of groomed edge;~~ Light vegetation may encroach ~~slightly~~ into clearing area | *96"' – 168"* ~~>=2' outside of tread edge;~~ Widen clearing at turns or if increased sight distance needed | |
| | ***Shoulder Clearance*** | | *0" – 6"* | *0" - 12"* | *0" – 24"* | |
| **Design Turn** | **Radius** | | 8' – 10' ~~if not snowcat-groomed~~ ~~(provide sufficient radius for grooming equipment if used)~~ | 15' – 20' (~~provide sufficient radius for~~ *or width of* grooming equipment) | > = 25' | |

## TABLE 14 – CHANGES TO THE SNOWMOBILE DESIGN PARAMETERS

| Designed Use SNOWMOBILE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Tread Width** | ***Single Lane*** ~~***One Lane***~~ | Typically not designed or actively managed for snowmobiles, although use may be allowed | *4' – 6'* Typically not groomed ~~but commonly signed. If groomed, 4' – 6' (or minimum width of grooming equipment)~~ | 6' – 8' (or ~~minimum~~ width of grooming equipment). On tight-radius turns, increase groomed width to > = 10' | 8' – 10' *(or width of grooming equipment)* On tight-radius turns, increase groomed width to > = 12' | Typically not designed or actively managed for snowmobiles, although use may be allowed |
| | ***Double Lane*** ~~***Two Lane***~~ | | *10'* Typically not groomed ~~but commonly signed If groomed, >/=8' groomed width~~ | *10' – 12'* ~~>/=11' and/or accommodate with passing areas 12' – 14' wide~~ | *12' – 20'* ~~12' – 16' On tight-radius turns, increase groomed width to >/=14'~~ | |
| | ***Structures*** *(Minimum Width)* | | *6'* | *12'* | *18'* | |
| **Design Surface**[2] | **Type** | | *Generally no machine grooming* *Commonly rough and bumpy* ~~Occasional or no grooming or user-packed. Coarse compaction with cat or snowmobile; Use of implements optional~~ | *May receive occasional machine grooming for snow compaction and conditioning* *Frequently rough and bumpy* ~~Groomed or compacted after significant snow accumulations or when moguled/rutted; Use of implements likely~~ | *Regular machine grooming for snow compaction and conditioning* *Commonly smooth* ~~Well-groomed with tiller or other implements; Groomed frequently, soon after significant snow accumulations and before surface is degraded~~ | |
| | ***Protrusions*** | | *No protrusions* | *No protrusions* | *No protrusions* | |
| | **Obstacles** (Maximum Height) | | *12"* *Uncommon* ~~Dips/bumps/ruts to 24" common and may be tightly spaced; Obstacles may occasionally require off-trail bypass~~ | *6"* *Uncommon (no obstacles if machine groomed)* ~~Generally smooth; Dips, bumps, ruts to 12" infrequent and widely spaced. Surface obstacles not present~~ | *No obstacles* ~~Consistently smooth. Small, rolling bumps, dips and rises. Surface obstacles not present~~ | |

## TABLE 14 – CHANGES TO THE SNOWMOBILE DESIGN PARAMETERS (CONTINUED)

| Designed Use SNOWMOBILE | | Trail Class 1 | Trail Class 2 | Trail Class 3 | Trail Class 4 | Trail Class 5 |
|---|---|---|---|---|---|---|
| **Design Grade** [2] | **Target Grade** [2] ~~(>90% of Trail)~~ | | *0% – 12%* ~~</=20%~~ | *0% – 10%* ~~</=15%~~ | *0% – 8%* ~~</=10%~~ | |
| | **Short Pitch Maximum** [3] (Up to 200' lengths) | | 35% | 25% | 20% | |
| | **Maximum Pitch Density** [4] | | *15% – 30% of trail* ~~<10% of trail~~ | *10% – 20% of trail* ~~<5% of trail~~ | *5% – 10% of trail* ~~<5% of trail~~ | |
| **Design Cross Slope** | **Target ~~Range~~ *Cross Slope*** | | *0% – 10%* ~~</= 15%~~ | *0% – 5%* ~~</=10%~~ | *0%* ~~</=5%~~ | |
| | **Maximum *Cross Slope*** | | *15%* ~~25%~~ | *10%* ~~15%~~ | *5%* ~~10%~~ | |
| **Design Clearing** | **Height** (Above normal maximum snow level) | | *6'* ~~>/=6'~~ ~~(provide sufficient clearance for grooming equipment if used)~~ | *6' – 8'* ~~>/=7'~~ (provide sufficient clearance for grooming equipment) | *8' - 12'* ~~10'~~ (provide sufficient clearance for grooming equipment) | |
| | **Width** | | *6' – 12'* ~~4' – 6' (or minimum width of grooming equipment if used);~~ Some *light* vegetation may encroach into clearing area | *8' – 14'* ~~>/=1' outside of groomed trail edge;~~ Light vegetation may encroach into clearing area | *10' - 22'* ~~>/=2' outside of groomed trail edge~~ Widen clearing at turns or if increased sight distance needed | |
| | ***Shoulder Clearance*** | | *6" – 12"* | *12" – 18"* | *12" – 24"* | |
| **Design Turn** | **Radius** | | 8' – 10' ~~if not groomed. (provide sufficient radius for grooming equipment if used , typically 15' – 20')~~ | 15' – 20' (~~provide~~ *or* sufficient radius for grooming equipment) | *25' – 50'* ~~>/= 25'~~ | |

**5. Regulatory Certifications**

*Environmental Impact*

Section 31.12, paragraph 2, of FSH 1909.15 (67 FR 54622, August 23, 2002) excludes from documentation in an environmental assessment or environmental impact statement ''rules, regulations, or policies to establish Servicewide administrative procedures, program processes, or instructions.'' The agency has concluded that the interim final directives fall within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement (*see Back Country Horsemen of America* v. *Johanns*, No. 05–0960 (ESH) (D.D.C. Mar. 29, 2006), slip op. at 15–20).

*Regulatory Impact*

These interim final directives have been reviewed under USDA procedures and Executive Order 12866, as amended by Executive Order 13422, on regulatory planning and review. The Office of Management and Budget has determined that these are not significant directives. These interim final directives cannot and may not reasonably be anticipated to lead to an annual effect of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; raise novel legal or policy issues; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of beneficiaries of those programs. Accordingly, these interim final directives are not subject to OMB review under Executive Order 12866, as amended by Executive Order 13422.

These final interim directives have been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). The agency has determined that these interim final directives will not have a significant economic impact on a substantial number of small entities as defined by the act because the interim final directives will not impose recordkeeping requirements on them; will not affect their competitive position in relation to large entities; and will not affect their cash flow, liquidity, or ability to remain in the market. The interim final directives will establish guidelines for trail survey, design, construction, maintenance, and assessment that will apply internally to the Forest Service and that will have no direct effect on small businesses.

*No Taking Implications*

The interim final directives have been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that these directives will not pose the risk of a taking of private property.

*Civil Justice Reform*

The interim final directives have been reviewed under Executive Order 12988 on civil justice reform. After adoption of the interim final directives, (1) all State and local laws and regulations that conflict with the interim final directives or that impede their full implementation will be preempted; (2) no retroactive effect will be given to the interim final directives; and (3) administrative proceedings will not be required before parties can file suit in court challenging their provisions.

*Unfunded Mandates*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of the interim final directives on State, local, and Tribal governments and the private sector. The interim final directives will not compel the expenditure of $100 million or more by any State, local, or Tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

*Federalism and Consultation and Coordination With Indian Tribal Governments*

The agency has considered the interim final directives under the requirements of Executive Order 13132 on federalism and has determined that these directives conform with the federalism principles set out in this Executive Order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the agency has determined that no further assessment of federalism implications is necessary.

Moreover, the interim final directives will not have Tribal implications as defined by Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and therefore advance consultation with Tribes is not required.

*Energy Effects*

The interim final directives have been reviewed under Executive Order 13211 of May 18, 2001, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.'' The agency has determined that the interim final directives will not constitute a significant energy action as defined in the Executive order.

*Controlling Paperwork Burdens on the Public*

The interim final directives do not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

**6. Access to the Interim Final Directives**

The Forest Service organizes its directive system by alphanumeric codes and subject headings. The intended audience for this direction is Forest Service employees charged with trail management and construction of NFS trails. The full text of FSM 2350 and FSH 2309.18 is available electronically on the World Wide Web at *http://www.fs.fed.us/im/directives/*. The interim final directives (that is, excerpts from FSM 2350 and FSH 2309.18) and this **Federal Register** notice are available electronically on the World Wide Web at *http://www.fs.fed.us/recreation/*.

Dated: October 7, 2008.

**Sally D. Collins,**

*Associate Chief.*

[FR Doc. E8–24193 Filed 10–7–08; 4:15 pm]

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**Forest Service**

Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho; published 10-16-08

**AGRICULTURE DEPARTMENT**

The Dairy Import Licensing Program; published 9-16-08

**COMMERCE DEPARTMENT**

**National Oceanic and Atmospheric Administration**

Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting; published 9-16-08

Taking of Marine Mammals Incidental to Commercial Fishing Operations:

- Atlantic Large Whale Take Reduction Plan; published 10-14-08

**ENVIRONMENTAL PROTECTION AGENCY**

Approval and Promulgation of Air Quality Implementation Plans:

- Michigan; PSD Regulations; published 9-16-08

**HOMELAND SECURITY DEPARTMENT**

**U.S. Citizenship and Immigration Services**

TN Nonimmigrants; Period of Admission and Extension of Stay for Canadian and Mexican Citizens Engaged in Professional Business Activities; published 10-16-08

**SMALL BUSINESS ADMINISTRATION**

Women-Owned Small Business Federal Contract Assistance Procedures; Correction; published 10-16-08

**TRANSPORTATION DEPARTMENT**

**Federal Aviation Administration**

Airworthiness Directives:

- Bell Helicopter Textron Canada Model 222, 222B, 222U, 230, and 430 Helicopters; published 9-11-08
- Boeing Model 737-300, -400, and -500 Series Airplanes; published 10-1-08

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments; published 10-16-08

## COMMENTS DUE NEXT WEEK

**AGRICULTURE DEPARTMENT**

**Animal and Plant Health Inspection Service**

South American Cactus Moth; Availability of an Environmental Assessment and Reopening of Comment Period; comments due by 10-20-08; published 9-18-08 [FR E8-21816]

**AGRICULTURE DEPARTMENT**

**Forest Service**

Special Areas:

- Roadless Area Conservation; Applicability to the National Forests in Colorado, Regulatory Risk Assessment; comments due by 10-23-08; published 9-18-08 [FR E8-21899]

Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado; comments due by 10-23-08; published 7-25-08 [FR E8-17109]

**AGRICULTURE DEPARTMENT**

**Rural Business-Cooperative Service**

Intermediary Relending Program; comments due by 10-20-08; published 9-19-08 [FR E8-22003]

**AGRICULTURE DEPARTMENT**

**Rural Housing Service**

Direct Single Family Housing Loans and Grants; comments due by 10-21-08; published 8-22-08 [FR E8-19350]

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**National Oceanic and Atmospheric Administration**

Fisheries in the Western Pacific:

- Bottomfish and Seamount Groundfish Fisheries; Management Measures for the Northern Mariana Islands; comments due by 10-20-08; published 8-20-08 [FR E8-19337]

Fisheries in the Western Pacific; Bottomfish and Seamount Groundfish Fisheries:

- Management Measures for the Northern Mariana Islands; comments due by 10-23-08; published 9-8-08 [FR E8-20774]

Pacific Halibut Fisheries, Bering Sea and Aleutian Islands King and Tanner Crab Fisheries, et al.; Recordkeeping and Reporting; Permits; comments due by 10-24-08; published 9-24-08 [FR E8-21722]

**CONSUMER PRODUCT SAFETY COMMISSION**

Labeling Requirement for Toy and Game Advertisements; comments due by 10-20-08; published 10-6-08 [FR E8-23543]

**ENERGY DEPARTMENT**

Coordination of Federal Authorizations for Electric Transmission Facilities

- Coordination of Federal Authorizations for Electric Transmission Facilities; comments due by 10-20-08; published 9-19-08 [FR E8-21866]

Energy Conservation Program for Commercial and Industrial Equipment:

- Energy Conservation Standards for Commercial Ice-Cream Freezers, et al.; comments due by 10-24-08; published 8-25-08 [FR E8-19063]

Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers:

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**ENERGY DEPARTMENT**

**Federal Energy Regulatory Commission**

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- Coastal Nonpoint Pollution Control Programs; States and Territories—
  - Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

Exemption From the Requirement of a Tolerance:

- Residues of Quaternary Ammonium Compounds, N-Alkyl (C-12-18) Dimethyl Benzyl Ammonium Chloride on Food Contact Surfaces; comments due by 10-20-08; published 8-20-08 [FR E8-19070]

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**HEALTH AND HUMAN SERVICES DEPARTMENT**

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- Modifications to the Health Insurance Portability and Accountability Act Electronic Transaction Standards; comments due by 10-21-08; published 8-22-08 [FR E8-19296]

**HOMELAND SECURITY DEPARTMENT**

**U.S. Customs and Border Protection**

Entry Requirements for Certain Softwood Lumber Products Exported from any Country into the United States; comments due by 10-24-08; published 8-25-08 [FR E8-19641]

First Sale Declaration Requirement; comments due by 10-24-08; published 8-25-08 [FR E8-19640]

Uniform Rules Of Origin for Imported Merchandise; comments due by 10-23-08; published 9-8-08 [FR E8-20662]

**HOMELAND SECURITY DEPARTMENT**

**Coast Guard**

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- Special Anchorage Area "A", Boston Harbor, MA;

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**Federal Emergency Management Agency**

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Changes to the Public Housing Assessment System and Determining and Remedying Substantial Default; comments due by 10-20-08; published 8-21-08 [FR E8-18753]

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**NUCLEAR REGULATORY COMMISSION**

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**SMALL BUSINESS ADMINISTRATION**

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**TRANSPORTATION DEPARTMENT**

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**TRANSPORTATION DEPARTMENT**

**Federal Aviation Administration**

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Boeing Model 767 200, 300, and 400ER Series Airplanes; comments due by 10-20-08; published 9-23-08 [FR E8-22220]

Bombardier Model CL 600 2C10 (Regional Jet Series 700, 701 & 702) Airplanes et al.; comments due by 10-23-08; published 9-23-08 [FR E8-22218]

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Maule Aerospace Technology, Inc. Models M-4, M-5, M-6, M-7, and M-8 Series Airplanes; comments due by 10-20-08; published 8-19-08 [FR E8-19168]

Turbomeca S.A. Arrius 2B1, 2B1A, 2B2, and 2K1 Turboshaft Engines; comments due by 10-23-08; published 9-23-08 [FR E8-21834]

**TRANSPORTATION DEPARTMENT**

**Pipeline and Hazardous Materials Safety Administration**

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**Internal Revenue Service**

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**TREASURY DEPARTMENT**

Entry Requirements for Certain Softwood Lumber Products Exported from any Country into the United States; comments due by 10-24-08; published 8-25-08 [FR E8-19641]

First Sale Declaration Requirement; comments due by 10-24-08; published 8-25-08 [FR E8-19640]

Uniform Rules Of Origin for Imported Merchandise; comments due by 10-23-08; published 9-8-08 [FR E8-20662]

**TREASURY DEPARTMENT**

**Alcohol and Tobacco Tax and Trade Bureau**

Russian River Valley and Northern Sonoma Viticultural Areas, CA; Proposed Expansions; comments due by 10-20-08; published 8-20-08 [FR E8-19327]

**VETERANS AFFAIRS DEPARTMENT**

VA Acquisition Regulation:

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## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.R. 1532/P.L. 110–392**

Comprehensive Tuberculosis Elimination Act of 2008 (Oct. 13, 2008; 122 Stat. 4195)

**H.R. 5350/P.L. 110–393**

To authorize the Secretary of Commerce to sell or exchange certain National Oceanic and Atmospheric Administration property located in Norfolk, Virginia, and for other purposes. (Oct. 13, 2008; 122 Stat. 4203)

**H.R. 5618/P.L. 110–394**

National Sea Grant College Program Amendments Act of 2008 (Oct. 13, 2008; 122 Stat. 4205)

**H.R. 6199/P.L. 110–395**

To designate the facility of the United States Postal Service located at 245 North Main Street in New City, New York, as the ''Kenneth Peter Zebrowski Post Office Building''. (Oct. 13, 2008; 122 Stat. 4210)

**H.R. 6229/P.L. 110–396**

To designate the facility of the United States Postal Service located at 2523 7th Avenue East in North Saint Paul, Minnesota, as the ''Mayor William 'Bill' Sandberg Post Office Building''. (Oct. 13, 2008; 122 Stat. 4211)

**H.R. 6338/P.L. 110–397**

To designate the facility of the United States Postal Service located at 4233 West Hillsboro Boulevard in Coconut Creek, Florida, as the ''Army SPC Daniel Agami Post Office Building''. (Oct. 13, 2008; 122 Stat. 4212)

**H.R. 6849/P.L. 110–398**

To amend the commodity provisions of the Food, Conservation, and Energy Act of 2008 to permit producers to aggregate base acres and reconstitute farms to avoid the prohibition on receiving direct payments, counter-cyclical payments, or average crop revenue election payments when the sum of the base acres of a farm is 10 acres or less, and for other purposes. (Oct. 13, 2008; 122 Stat. 4213)

**H.R. 6874/P.L. 110–399**

To designate the facility of the United States Postal Service located at 156 Taunton Avenue in Seekonk, Massachusetts, as the ''Lance Corporal Eric Paul Valdepenas Post Office Building''. (Oct. 13, 2008; 122 Stat. 4223)

**S. 431/P.L. 110–400**

Keeping the Internet Devoid of Sexual Predators Act of 2008 (Oct. 13, 2008; 122 Stat. 4224)

**S. 1738/P.L. 110–401**

Providing Resources, Officers, and Technology To Eradicate

Cyber Threats to Our Children Act of 2008 (Oct. 13, 2008; 122 Stat. 4229)

**S. 3296/P.L. 110–**
To extend the authority of the United States Supreme Court Police to protect court officials off the Supreme Court Grounds and change the title of the Administrative Assistant to the Chief Justice. (Oct. 13, 2008; 122 Stat. 4254)

**S. 3325/P.L. 110–403**
Prioritizing Resources and Organization for Intellectual Property Act of 2008 (Oct. 13, 2008; 122 Stat. 4256)

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